

NOTE

THE CASE FOR CITY REPARATIONS

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Once a political boogeyman, calls for Black reparations as a means to advance racial justice in the United States have become increasingly earnest, particularly in the wake of George Floyd’s murder. But among those who view reparations as morally imperative, there is much disagreement about where they should occur. Proponents of reparations have called on federal, state, and local government to implement reparatory justice. But so far, only one institution has meaningfully responded: cities. For the first time in American history, cities across the country are beginning to implement reparations. In this Note, I argue that cities both can and should adopt reparatory policies, as city government—not state or federal—is best positioned to craft effective and constitutional reparations. After surveying current municipal reparations policies, I contend that cities are the correct level at which to pioneer reparations for three reasons: normative, pragmatic, and constitutional. Normative, because city government is proximate, responsive, and capable of unique policy innovation. Pragmatic, because cities enjoy supportive political coalitions that become improbable at the state and federal levels. And constitutional, because race-based programs like reparations must identify and connect a historic harm “with particularity” to the remedy to pass legal muster, which cities are uniquely well-suited to do. After making the case for cities as the proper venue, I suggest ways in which cities can both find reparatory power and avoid unwanted interference by their home states.

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INTRODUCTION

American reparations are nearly as old as the country itself. From pre-Civil War abolitionist attempts¹ to General Sherman’s Field Order No. 15,² many Americans have long sought to advance racial justice through reparatory programs. And while these early attempts foundered on the shoals of virulent bigotry and political impossibility, today’s renewed calls for reparations are no longer falling on deaf ears.³

In the wake of George Floyd’s murder, public support for reparations grew tremendously, particularly among white Americans.⁴ As then-California Assemblywoman Shirley Weber put it at the time, “Folks [are]

¹ Gary B. Nash, Warner Mifflin: Unflinching Quaker Abolitionist 101–02 (Daniel K. Richter, Kathleen M. Brown, Max Cavitch & David Waldstreicher eds., 2017).

² William A. Darity Jr. & A. Kirsten Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* 9 (2d ed. 2020).

³ Many credit Ta-Nehisi Coates’s groundbreaking 2014 article *The Case for Reparations* with popularizing the idea of modern American reparations. See Jonathan Capehart, *How Ta-Nehisi Coates Turned Reparations from a Punchline into a Policy Objective*, Wash. Post (Mar. 20, 2019, 3:25 PM), <https://www.washingtonpost.com/opinions/2019/03/20/how-ta-nehisi-coates-turned-reparations-punchline-into-policy-objective/> [https://perma.cc/D2AL-BURY]; Ta-Nehisi Coates, *The Case for Reparations*, *The Atlantic* (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [https://perma.cc/5XHN-8WW8].

⁴ See Ashley V. Reichelmann & Matthew O. Hunt, *How We Repair It: White Americans’ Attitudes Toward Reparations*, Brookings Inst. (Dec. 8, 2021), <https://www.brookings.edu/articles/how-we-repair-it-white-americans-attitudes-toward-reparations/> [https://perma.cc/5KB9-XSXX] (noting that white American support for cash reparations grew from 6% in 2014 to 28% in 2021, an increase of over 300%).

now begin[ning] to realize just how extensively, how deeply, issues of race are embedded in our society and how that can produce what we saw happen to George Floyd in Minneapolis.”⁵ When Americans began to call for reparations, policymakers in city, state, and federal government all made commitments to consider reparatory justice.⁶ But while leaders in state and national governments later hedged on those commitments,⁷ city officials capitalized on the movement’s momentum and became the first governments in the country to seriously attempt reparations. Today, a handful of American cities are already administering reparatory programs;⁸ many others have established task forces to lay the groundwork for their own programs.⁹

In this Note, I argue that cities both *can* and *should* adopt reparatory policies. City government—not state or federal—is the best venue for achieving both effective and constitutional reparations. In Part I, I review the various definitions of reparations, survey the landscape of current city reparations programs, and consider evidence of those programs’ success. In Part II, I argue that cities are the best venues for reparations for three principal reasons. First, these reasons are *normative*, because city government is proximate, responsive, and capable of unique policy

⁵ Lauren Gambino, *Calls for Reparations Are Growing Louder. How Is the US Responding?*, *The Guardian* (June 20, 2020, 5:00 AM), <https://www.theguardian.com/world/2020/jun/20/joe-biden-reparations-slavery-george-floyd-protests> [<https://perma.cc/FE3T-GYRA>].

⁶ See, e.g., Eugene Daniels, *Biden Privately Tells Lawmakers Not to Expect Much on Reparations Legislation*, *Politico* (June 2, 2021, 1:46 PM), <https://www.politico.com/news/2021/06/02/biden-reparations-tulsa-491607> [<https://perma.cc/4B27-WBXU>] (“As a candidate, Biden said he supported a commission on reparations.”); Madeline Holcombe, *California Passes a First-of-Its-Kind Law to Consider Reparations for Slavery*, *CNN* (Oct. 1, 2020, 8:27 AM), <https://www.cnn.com/2020/10/01/us/california-bill-slavery-reparations-trnd/index.html> [<https://perma.cc/5BP9-FW6D>] (describing California Governor Gavin Newsom’s support for a statewide reparations committee); 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/> [<https://perma.cc/G92D-68RM>].

⁷ See, e.g., Daniels, *supra* note 6; Jeremy B. White, *Cash for Slavery Reparations in California Draws Cool Response from Newsom*, *Politico* (May 10, 2023, 1:23 PM), <https://www.politico.com/news/2023/05/10/slavery-reparations-california-newsom-00096211> [<https://perma.cc/MM9Y-ME85>].

⁸ See, e.g., *Evanston Local Reparations*, *City of Evanston*, <https://www.cityofevanston.org/government/city-council/reparations> [<https://perma.cc/U8RA-8V44>] (last visited Aug. 30, 2024).

⁹ See, e.g., *Community Reparations Commission*, *City of Asheville*, <https://www.ashevillenc.gov/departments/city-clerk/boards-and-commissions/reparations-commission/> [<https://perma.cc/BD4Z-L5NM>] (last updated Aug. 15, 2024).

innovation. Next, they are *pragmatic*, because cities enjoy supportive political coalitions that become improbable at the state and federal levels. And finally, these reasons are *constitutional*, because race-based programs like reparations must connect to a historic harm “with particularity” to pass legal muster, which cities are uniquely well-suited to do. In Part III, I suggest several practical considerations for cities seeking to craft their own reparations policies—principal among them, financing their program and avoiding interference by the state in which they sit.

It is prudent to acknowledge that this Note is grounded in one fundamental principle: reparations are morally appropriate. I do not waive this debate lightly.¹⁰ My argument, however, is responsive to the question of *where* reparations should occur, not *why* they should—though I hope that place-based arguments will speak indirectly to the normative value of reparations themselves. In short, my argument is rooted in a belief that the moral propriety of reparations cannot, and indeed *must* not, be divorced from how they are achieved and where they occur—but because there has been much written on the former, I turn my attention instead to the latter.

I. THE MODERN AMERICAN REPARATIONS MOVEMENT

A. What Are Reparations?

Despite growing national support for reparations, no one definition of the term exists. Though the conventional American understanding involves a nationwide program issuing direct payments to the descendants

¹⁰ Much has been said already about the need for reparations, but the debate continues. For arguments in favor of reparations, see Coates, *supra* note 3. See generally Susan S. Kuo & Benjamin Means, A Corporate Law Rationale for Reparations, 62 B.C. L. Rev. 799 (2021) (arguing that the corporate law model can bolster the argument for reparations and responding to the objection that individuals are not personally responsible for slavery and Jim Crow laws); Joyce Hope Scott, Reparations, Restitution, and Transitional Justice: American Chattel Slavery & Its Aftermath, A Moral Debate Whose Time Has Come, 39 Wis. Int'l L.J. 269 (2022) (arguing for slavery reparations to acknowledge and redress the civil and human rights violations of slavery and beyond). For arguments against the moral and legal propriety of reparations, see Richard A. Epstein, The Case Against Black Reparations, 84 B.U. L. Rev. 1177 (2004) (contending that reparations will not work as a legal matter); Gregory Kane, Comment, Why the Reparations Movement Should Fail, 3 U. Md. L.J. Race, Religion, Gender & Class 189 (2003) (arguing that reparations are not the proper vehicle for repairing historic harms to Black Americans).

of enslaved people,¹¹ the dictionary definition of the word is much broader. Per *Merriam-Webster*, reparations are “the act of making amends, offering expiation, or giving satisfaction for a wrong or injury.”¹² Theoretically, this definition encompasses *any* sort of benefit, given to *any* group of victims, to compensate for *any* sort of harm. As such, Professor Roy L. Brooks calls reparations “[r]esponses [from a government] that seek atonement for the commission of an injustice.”¹³

In the United States, reparations typically focus on compensating non-white groups for generations of racist violence, exclusion, and injustice.¹⁴ Particularly in the wake of George Floyd’s murder, these discussions have centered on making restitution to Black Americans. The purposes of these programs are to acknowledge and apologize for historic wrongs,¹⁵ to

¹¹ Many academics also conceive of American reparations in this way. See Darity & Mullen, *supra* note 2, at 256–58; Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 *Colum. L. Rev.* 689, 691 (2003).

¹² *Reparations*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/reparation> [<https://perma.cc/EB5H-L6PL>] (last visited Aug. 30, 2024).

¹³ Roy L. Brooks, *The Age of Apology*, in *When Sorry Isn’t Enough: The Controversy Over Apologies and Reparations for Human Injustice* 3, 8 (Roy L. Brooks ed., 1999).

¹⁴ But the American model is not the only one. Post-genocide Rwanda channeled reparations through a community-oriented judicial system called the *gacaca* courts, where perpetrators appeared before their victims and communities to apologize for the harms they had caused. Bert Ingelaere, *Reparation in Rwanda’s Gacaca Courts*, 129 *Testimony Between Hist. & Memory* 84, 84–91 (Oct. 2019), <https://journals.openedition.org/temoigner/8633?lang=en> [<https://perma.cc/S5G9-D6M2>].

¹⁵ *Reparations*, Int’l Ctr. for Transitional Just., <https://www.ictj.org/reparations> [<https://perma.cc/Z2Z7-JGJE>] (last visited Aug. 30, 2024).

correct massive disparities in outcomes,¹⁶ and to engage in “the act of rejecting race-based domination” itself through policy.¹⁷

As to the content of reparations, the United Nations has outlined five principles as guideposts: restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.¹⁸ *Restitution* is a return to the situation as it was before the harm occurred.¹⁹ If full restitution is not possible, then *compensation*—payment (in many forms) for damage done—is appropriate.²⁰ *Satisfaction* includes an accurate account of the harm done, commemorations for the victims, and public apologies.²¹ *Rehabilitation* includes medical aid, psychological care, and social services for victims.²² And *guarantees of non-repetition* are both public assurances and policy changes that ensure the mistreatment of the victimized group will not happen again.²³

Though these general principles give cities a rough framework for their own reparations programs, there is still a panoply of choices they must make. Principal among them are decisions about (1) the scope of the beneficiary class, (2) the type of compensation offered, and (3) where the

¹⁶ Black Americans have long lagged behind their white counterparts in all categories of wealth. See Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, Examining the Black-White Wealth Gap, Brookings Inst. (Feb. 27, 2020), <https://www.brookings.edu/article/s/examining-the-black-white-wealth-gap/> [https://perma.cc/T7JR-PPDP]. For instance, while 73% of white Americans own homes, only 44% of Black Americans do. See U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Third Quarter 2023 (Oct. 31, 2023, 10:00 AM), <https://www.census.gov/housing/hvs/files/qtr323/Q323press.pdf> [https://perma.cc/MK6C-JWTG]. The median income of a white family is nearly double that of a Black family. See U.S. Census Bureau, Real Median Household Income by Race and Hispanic Origin: 1967 to 2017, <https://www.census.gov/content/dam/Census/library/visualizations/2018/demo/p60-263/figure1.pdf> [https://perma.cc/CKG5-J6UB] (last visited Oct. 4, 2024). In retirement, white families have up to eleven times more savings than Black families. See Jonnelle Marte, The Racial Wealth Gap We Hardly Talk About: What Happens in Retirement, Wash. Post (Feb. 18, 2015, 7:23 AM), <https://www.washingtonpost.com/news/get-there/wp/2015/02/18/the-racial-wealth-gap-we-hardly-talk-about-what-happens-in-retirement/> [https://perma.cc/GTP4-LPYB].

¹⁷ Eric J. Miller, Republican, Rebellious Reparations, 63 How. L.J. 363, 365 (2020).

¹⁸ G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 7–8 (Dec. 16, 2005), <https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf> [https://perma.cc/TFS3-VVN3].

¹⁹ *Id.* at 7.

²⁰ *Id.* at 7–8.

²¹ *Id.* at 8.

²² *Id.*

²³ *Id.* at 8–9.

funds will come from.²⁴ Generally, cities have three options to choose from when considering the scope of their beneficiary class: direct victims of the harm, descendants of those direct victims, or a broader group, often based on the race of its members.²⁵ Cities have a comparatively larger menu of options when considering the forms of compensation;²⁶ compensation should always, though, include a formal apology.²⁷ On the final question—*Who pays?*—cities can finance programs through a mix of taxpayer revenue, sales tax, and private fundraising.²⁸

More than twenty cities have become a part of the municipal reparations movement, either by piloting their own programs or establishing committees to study the prospect of reparations.²⁹ The different shapes of these programs illuminate the many policy choices that cities must make.

²⁴ For a longer discussion on the forms these choices can take, see Brooke Simone, *Municipal Reparations: Considerations and Constitutionality*, 120 Mich. L. Rev. 345, 353–72 (2021).

²⁵ *Id.* at 353.

²⁶ For example, cities have crafted programs designed to serve the beneficiary’s pecuniary interests (direct cash payments, tax credits); interests in homeownership (mortgage payments, first choice for affordable housing units, community land trusts); community revitalization (funds to civic institutions and cultural districts); job creation (grants); education (school-to-prison pipeline reform); and law enforcement (banning cash bail). See, e.g., S.F. Hum. Rts. Comm’n, *African American Reparations Advisory Committee Final Report* (July 7, 2023), <https://www.sf.gov/sites/default/files/2023-07/AARAC%20Reparations%20Final%20Report%20July%207%2C%202023.pdf> [<https://perma.cc/RTW3-JRPP>].

²⁷ See, e.g., Posner & Vermeule, *supra* note 11, at 698 (“Apologies can be thought of as a form of in-kind reparations that often precedes, follows, or accompanies cash payments, but sometimes stands alone.”); Roy L. Brooks, *Getting Reparations for Slavery Right—A Response to Posner and Vermeule*, 80 Notre Dame L. Rev. 251, 283 (2004) (describing non-monetary commemorations, such as museums).

²⁸ See *infra* Section III.A for more on this.

²⁹ I will discuss programs in Evanston, Illinois; San Francisco, California; Santa Monica, California; Asheville, North Carolina; Amherst, Massachusetts; and Providence, Rhode Island. Many other cities have begun to study their own reparations, including but not limited to St. Louis, Missouri; St. Paul, Minnesota; Boston, Massachusetts; Tullahassee, Oklahoma; and Berkeley, California. See Patrick Hain & Rosanna Mulcahy, *Cities Are Addressing the Past and Building Futures Through Reparations*, Nat’l League of Cities (Feb. 10, 2023), <https://www.nlc.org/article/2023/02/10/cities-are-addressing-the-past-and-building-futures-through-reparations/> [<https://perma.cc/5JHV-7EYD>]. Some of the largest cities in the country are now also considering reparations. See, e.g., *New York City Lawmakers Approve Bill to Study Slavery and Reparations*, Associated Press (Sept. 12, 2024, 7:25 PM), <https://apnews.com/article/new-york-reparations-study-slavery-5a9a707552b782c25df1ab2375bc6be8> [<https://perma.cc/VPX5-NAKM>].

B. City Reparations in Practice

In November 2019, Evanston, Illinois, made history as the first American city to adopt a reparations policy;³⁰ it began making payments in 2022.³¹ The so-named Restorative Housing Program distributes grants of up to \$25,000 to Black residents who lived in Evanston between 1919 and 1969—the period when the city was found to have engaged in intentional housing discrimination—or to those residents’ direct descendants.³² Other residents who can prove that they were affected by discriminatory housing policies *after* 1969 are also eligible for payment.³³ At the outset of the program, the beneficiaries were authorized to use their \$25,000 grants to pay their mortgages, renovate their homes, or make a down payment on a new home; as of 2023, the city now makes direct cash payments to beneficiaries, which they can use as they please.³⁴

The way Evanston’s reparations program took shape is illustrative of the choices cities must make when crafting similar programs. First, Evanston addressed the “*Who pays?*” question in Resolution 126-R-19, establishing a reparations fund financed by sales taxes levied on the newly legalized cannabis industry.³⁵ Thereafter, the first ten million dollars of Evanston’s 3% cannabis sales tax—as well as any private donations—went directly to capitalizing the city’s reparations fund.³⁶ Next, the city identified the scope of the beneficiary class: Black residents who lived in

³⁰ 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> [<https://perma.cc/KH5A-75DH>].

³¹ Adrienne Broaddus, *Evanston City Council Votes in Favor of Expanding Its Reparations Program to Repair Housing Discrimination*, CNN, <https://www.cnn.com/2023/03/27/us/evanston-illinois-reparations-housing-discrimination-expand/index.html> [<https://perma.cc/4QU9-62ZQ>] (last updated Mar. 28, 2023).

³² See *Evanston Local Reparations*, *supra* note 8; Adams, *supra* note 30.

³³ City of Evanston, *Local Reparations: Restorative Housing Program Official Program Guidelines*, <https://www.cityofevanston.org/home/showpublisheddocument/66184/637677439011570000> [<https://perma.cc/FYW7-LP5H>] (last visited Aug. 30, 2024).

³⁴ Broaddus, *supra* note 31.

³⁵ Evanston, Ill., *Municipal Resolution 126-R-19 (2019)* (codified at Evanston, Ill., *Municipal Code 2-17-1 to -6, 3-2-20-3*).

³⁶ Memorandum from Kimberly Richardson, Interim Assistant City Manager, to Hon. Mayor and Members of the City Council, *Adoption of Resolution 37-R-27, Authorizing the Implementation of the Evanston Local Reparations Restorative Housing Program and Program Budget* (Mar. 22, 2021), <https://cityofevanston.civicweb.net/document/50624/Adoption%20of%20Resolution%2037-R-27,%20Authorizing%20the.pdf?handle=E11C7B73E1B6470DA42362AB80A50C46> [<https://perma.cc/3WDJ-8NAC>].

the city between 1919 and 1969 and their direct descendants. This group was intentional. As the city writes, “Reparations . . . must connect between the harm imposed and the City,” and in Evanston, “[t]he strongest case for reparations . . . is in the area of housing, where there is sufficient evidence showing the City’s part in housing discrimination as a result of early City zoning ordinances in place between 1919 and 1969.”³⁷ Indeed, the city published multiple studies demonstrating the connection between Evanston’s discriminatory housing policies and the harm to the Black community during this period.³⁸ The Restorative Housing Program is one example of how the historic wrongs of the city will often define the scope of the beneficiary class and the remedy proposed.³⁹ Finally, Evanston decided on the form of compensation—housing stipends—both because the stipends connect to the historic harm of housing discrimination, and because Black residents made clear in public comment that they desired more affordable housing.⁴⁰ At the behest of the community, the city later authorized direct cash payments to beneficiaries.⁴¹

There is a vast array of other shapes reparatory programs might take. In San Francisco, the city’s African American Reparations Advisory Committee (“the Committee”) took a broader tact. The Committee recommended that the beneficiary class include anyone who (1) is the descendant of an enslaved person, (2) is the descendant of a free Black person prior to the end of the nineteenth century, or (3) has identified as Black on public documents for at least 10 years, so long as they have lived in San Francisco for 10 years and can demonstrate some type of harm perpetuated by the city.⁴² This racial-group approach to a beneficiary class

³⁷ Evanston Local Reparations, *supra* note 8.

³⁸ See Morris (Dino) Robinson, Jr. & Jenny Thompson, City of Evanston, *Evanston Policies and Practices Directly Affecting the African American Community*, https://rsaevanston.org/wp-content/uploads/2023/08/Evanston-Policies-Affecting-the-AA-Comm_Shorefront.pdf [<https://perma.cc/3AKX-6ZW9>] (last updated Nov. 2021); African American Redress Network, *Segregation in Evanston, an Impact Study* (July 2021), <https://redressnetwork.org/wp-content/uploads/2022/02/Evanston-Impact-Study.pdf> [<https://perma.cc/YBJ4-EW66>].

³⁹ Posner & Vermeule, *supra* note 11, at 698.

⁴⁰ Rachel Treisman, *In Likely First, Chicago Suburb of Evanston Approves Reparations for Black Residents*, NPR (Mar. 23, 2021, 2:36 PM), <https://www.npr.org/2021/03/23/980277688/in-likely-first-chicago-suburb-of-evanston-approves-reparations-for-black-reside> [<https://perma.cc/9ZTX-BKTN>].

⁴¹ Broaddus, *supra* note 31.

⁴² Types of harm include descending from someone who has been convicted of a drug crime, being displaced by urban renewal efforts and their progeny, or being a part of the child welfare system. See San Francisco Human Rights Commission, *supra* note 26, at 32.

has the advantage of offering benefits to more people, but, as discussed *infra*, is much more vulnerable to legal challenge.⁴³ The Committee also devised over 150 different forms of compensation that the city's reparations could take, such as making direct cash payments, offering tax credits, creating community land trusts, funding civic institutions and cultural districts, establishing Afrocentric K-12 schools, and banning cash bail.⁴⁴ The mayor and other city leaders are now debating these proposals.⁴⁵

Some reparatory programs are more modest in scope. In 2022, Santa Monica, California, began its Below Market Housing for Historically Displaced Households program, allowing city residents who were displaced by the racist urban renewal policies⁴⁶ of the 1950s and '60s (or their descendants) to apply for priority access to the city's scarce affordable housing units.⁴⁷ This program merely reallocates existing city resources to those who experienced historic harms, avoiding the issues attendant to finding or raising new funds.

Asheville, North Carolina, also plans to predicate its proposed reparations program on the harms of urban renewal. During the heyday of urban renewal, Asheville razed a historically Black community to acquire a large plot of land.⁴⁸ In 2020, after Asheville sold that land, it decided to

⁴³ Alec Regimbal, *Why San Francisco's and California's Reparations Plans Are Likely Doomed*, SFGATE (Apr. 13, 2023), <https://www.sfgate.com/politics/article/california-san-francisco-reparations-plans-doomed-17891876.php> [<https://perma.cc/3534-RA5P>].

⁴⁴ San Francisco Human Rights Commission, *supra* note 26, at 9–31.

⁴⁵ Madison Alvarado & Zhe Wu, *With Reparations Office in Limbo, Advocates Urge Action to Help Black Residents*, S.F. Pub. Press (Sept. 21, 2023), <https://www.sfpublicpress.org/with-reparations-office-in-limbo-advocates-urge-action-to-help-black-residents/> [<https://perma.cc/XV6M-WZM9>].

⁴⁶ Urban renewal was a post-World War II effort by city and state government—funded and encouraged by the federal government—to remove and revitalize so-called “blighted” neighborhoods in cities. What it meant in practice was the wholesale destruction of communities of color, which were the neighborhoods overwhelmingly deemed “blighted.” See Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: Advancing Racial Equity Through Highway Reconstruction, 73 *Vand. L. Rev.* 1259, 1276 (2020).

⁴⁷ Santa Monica City Council Prioritizes Housing for Historically Displaced Households Through New Pilot, City of Santa Monica (July 14, 2021, 9:21 AM), <https://www.santamonica.gov/press/2021/07/14/santa-monica-city-council-prioritizes-housing-for-historically-displaced-households-through-new-pilot> [<https://perma.cc/PN2Q-9N4L>].

⁴⁸ Derek Lacey, *Asheville Recognizes Juneteenth, Commits \$2.1M for Reparations*, Asheville Citizen-Times (June 9, 2021, 8:48 AM), <https://www.citizen-times.com/story/news/2021/06/09/asheville-recognizes-juneteenth-commits-2-1-m-reparations/7606295002/> [<https://perma.cc/7X2A-U7J9>].

divert \$2.1 million from the sale into its reparations fund.⁴⁹ But the reparations committee has not yet decided on the form of compensation, nor on the group of beneficiaries.

Despite the fiscal constraints of many cities, it is often these two inquiries—the form of reparations and the class of beneficiaries—that generate the most controversy. For example, Amherst, Massachusetts, has already capitalized its reparations fund, but members of the African Heritage Reparations Assembly disagree over whether reparations should extend to all Black residents, or only to those who can trace their ancestry back to enslaved Africans who lived in the United States.⁵⁰ Providence, Rhode Island, committed \$10 million to its own reparations fund using re-appropriated federal COVID-19 money but is facing controversy over its decision to include as beneficiaries anyone earning less than 50% of the Area Median Income—a definition that will include some white residents.⁵¹ In the many cities that have begun discussing reparations, fault lines often emerge over who gets to benefit.

Given that many of these programs are still in the exploratory stage, it is difficult to gauge their efficacy. However, Evanston—the first city to pioneer reparations—has seen some early evidence of success. As of May 2024, over \$4.8 million in cash benefits has been paid out to 193 city recipients.⁵² The city has committed to meeting individually with each beneficiary to provide them with an overview of the program and give

⁴⁹ *Id.*

⁵⁰ Saraya Wintersmith, *Who Should Be Eligible for Reparations? That's the Big Question in Amherst*, WGBH (Aug. 7, 2023), <https://www.wgbh.org/news/local/2023-05-30/who-should-be-eligible-for-reparations-thats-the-big-question-in-amherst> [https://perma.cc/AE95-6QMS].

⁵¹ Low-income folks are eligible so long as they were born in the city, are not college students, and have lived in the city for three years. See Providence Mun. Reparations Comm'n, *Report of the Providence Municipal Reparations Commission 14* (Aug. 2022), https://www.providenceri.gov/wp-content/uploads/2022/08/ReparationsRecommendationsReport_FINAL.pdf [https://perma.cc/QPD4-M7KV]; see also Gabriella Abdul-Hakim, Lulit Tadesse, Morgan Norwood & Allie Weintraub, *Providence Establishes Reparations Program to Praise and Criticism*, ABC News (Jan. 31, 2023, 12:33 PM), <https://abcnews.go.com/US/providence-establishes-reparations-program-praise-criticism/story?id=96662287> [https://perma.cc/4W4H-H22P] (noting that some white residents are included in Providence's reparations plan).

⁵² Jonathan Bullington, Alex Hulvalchick & Kate Armanini, 'A Movement, Not Just a Moment': Inside the Arduous Work of Illinois' Reparations Efforts, *Chi. Trib.* (Aug. 10, 2024, 8:12 AM), <https://www.chicagotribune.com/2024/08/10/a-movement-not-just-a-moment-inside-the-arduous-work-of-illinois-reparations-efforts/> [https://perma.cc/UC6Q-UVWG].

them time to consider the form in which they would like to receive their \$25,000.⁵³

The program has also seen success on another axis: popularizing reparatory justice. A recent study polling Evanston residents found that a record 70% of white respondents thought the city's reparations were "good public policy"⁵⁴—on national polls, white support of reparations has consistently remained a minority view.⁵⁵ Further, across ethnic groups and geographic lines, the program has led to double-digit increases in residents' trust in Evanston's government.⁵⁶ But the program has also faced pushback from some Evanstonians, who claim it is not responsive enough to the needs of Black residents.⁵⁷ And because Evanston must evaluate each individual application, the program got off to a slow start; indeed, at least six eligible residents died while the city sorted through applications.⁵⁸ The program's chances of long-term success remain unclear. While studies of reparatory programs in other countries suggest that recipients of lump-sum payments often see large gains in health, educational outcomes, and asset-building,⁵⁹ whether Evanston's program

⁵³ *Id.*

⁵⁴ Stephanie Kulke, *Overwhelming Support for Evanston Reparations Program*, Survey Finds, *Nw. Now* (Oct. 24, 2023), <https://news.northwestern.edu/stories/2023/10/reparations-survey-conducted-by-northwestern-center-reveals-overwhelming-community-support-for-evanston-program-across-every-ethnic-and-racial-demographic-group/> [https://perma.cc/8N76-M74P].

⁵⁵ *Id.*; see also Reichelmann & Hunt, *supra* note 4; Carrie Blazina & Kiana Cox, *Black and White Americans Are Far Apart in Their Views of Reparations for Slavery*, *Pew Rsch. Ctr.* (Nov. 28, 2022), <https://www.pewresearch.org/short-reads/2022/11/28/black-and-white-americans-are-far-apart-in-their-views-of-reparations-for-slavery/> [https://perma.cc/3S8G-7CCJ] (finding that just 18% of white Americans supported reparations in 2022); Philip M. Alberti, Daria C. Grayer, Carla S. Alvarado & Ebonie Megibow, *Racial Justice and Health Equity: Public Perspectives on Reparations in America*, *Assoc. of Am. Med. Colls.: Ctr. for Health Just.* (Apr. 16, 2024), <https://www.aamchealthjustice.org/resources/policy/reparations> [https://perma.cc/U6EA-3ZGY] (finding that 34% of white Americans supported reparations in January 2024). Evanston is a consistently liberal city, so it is likely true that support for reparations in Evanston was higher than the national average prior to the program, but it is still remarkable that 3 of every 4 white residents now publicly support reparations. Indeed, the researchers who conducted this study were "stunned" by its results. Kulke, *supra* note 54.

⁵⁶ Kulke, *supra* note 54.

⁵⁷ Jason Beeferman, *Community Group Seeks to Delay Vote on Reparations They Call "Racist"*, *Daily Nw.* (Mar. 3, 2021), <https://dailynorthwestern.com/2021/03/03/city/community-group-seeks-to-delay-vote-on-reparations-they-call-racist/> [https://perma.cc/ZV7V-6ZAB].

⁵⁸ Broaddus, *supra* note 31.

⁵⁹ See Kaday Kamara, *The Wealth and Health Gap Between Black and White Americans: Reparation Payments May Narrow Racial Disparities*, *Univ. of Pa. Inst. of Health Econ.* (Jan.

promotes growth in Black residents' wealth and overall well-being remains to be seen.

II. WHY CITIES?

A. The Normative Case

Local governments have an advantage over other potential reparatory venues for three normative reasons: community engagement, experimentation, and responsiveness.

First, community engagement. Local governments are, by definition, closer to their constituents than other layers of government, and can offer the type of community listening sessions that are so important to the work of reparations.⁶⁰ Cities with reparations committees have, among other things, held listening sessions, collected oral histories from community members, and administered surveys⁶¹—all tasks more easily accomplished at the local level. While federal power is “impersonal, uniform, and abstract,” local power is “personalistic, relational, affectionate, irregular and based on a shared history of reciprocity and trust.”⁶² For this reason, local governments will find it easier to identify and study their own racist, historic policies and practices, given their much smaller geographic (and potentially temporal) range, and to meet

11, 2023), <https://ldi.upenn.edu/our-work/research-updates/the-wealth-and-health-gap-between-black-and-white-americans> [<https://perma.cc/Y6Z8-YRQA>]; see also Arlen Guarin, Juliana Londoño-Vélez & Christian Posso, Joint Data Ctr. on Forced Displacement, *Reparations as Development? Evidence from Victims of the Colombian Armed Conflict 16–27* (Dec. 17, 2021), https://www.jointdatacenter.org/wp-content/uploads/2022/01/Reparations_Gurian_Dec17.pdf [<https://perma.cc/WC5S-KZPE>] (finding that lump-sum payments to victims of human rights abuses in Colombia bettered their health conditions, educational outcomes, and wealth-building).

⁶⁰ Maria Suchkova, Univ. of Essex, *The Importance of a Participatory Reparations Process and Its Relationship to the Principles of Reparation 2* (2011) (“For this right to be truly meaningful, victims need to take part in the design and implementation of reparations.”).

⁶¹ Michael A. Stoll et al., UCLA Ralph J. Bunche Ctr., *Harm & Repair: Community Engagement Project Report on Reparations in California 9* (May 6, 2023), <https://oag.ca.gov/system/files/media/ab3121-agenda13-ch32-harm-repair-05062023.pdf> [<https://perma.cc/PKQ9-KXCK>].

⁶² David Brooks, *The Localist Revolution*, N.Y. Times (July 19, 2018), <https://www.nytimes.com/2018/07/19/opinion/national-politics-localism-populism.html> [<https://perma.cc/93KR-NL4G>].

the needs of their communities.⁶³ Identifying historic harms is crucial to crafting constitutional reparations⁶⁴ and to making meaningful apologies.

Second, experimentation. Given the varied input city leaders will receive from their diverse constituencies, cities will inevitably propose different types of reparations programs. That allows the entire country to learn through experimentation.⁶⁵ The ability to compare different strategies is particularly useful in a novel policy area like reparations. As Professor Joshua Douglas points out, “[i]f states are laboratories of democracy, then municipalities are, in essence, ‘test tubes of democracy,’ experimenting with democratic processes on an even smaller scale” and “enact[ing] local laws to ‘try novel social and economic experiments.’”⁶⁶ Indeed, the Supreme Court itself has recognized that “[t]he federal structure allows local policies ‘more sensitive to the diverse needs of a heterogeneous society,’ *permits* ‘innovation and experimentation,’ enables greater citizen ‘involvement in democratic processes,’ and makes government ‘more responsive.’”⁶⁷ Not only are there beneficial “trickle up” effects to local experimentation, but also “trickle across” effects: as more cities commit to the work of reparations and find success, others will follow. Professor Paul Diller writes that “one or two innovative cities [can] spur[] other cities and some states to take action.”⁶⁸ And all this

⁶³ Alfred L. Brophy, *Realistic Reparations*, 1 *Freedom Cent. J.* 1, 16 (2008) (“In order to understand the connections between past and present, we must begin at the local level.”).

⁶⁴ See *infra* Section II.C.

⁶⁵ Though the classic Brandeisian expression “laboratories of democracy” refers to the fifty states as the laboratories, there are exponentially greater possibilities for policy experimentation in the thousands of city “laboratories” across the United States. This type of city experimentation is already happening in other policy areas. See, e.g., Dilini Lankachandra, *Enacting Local Workplace Regulations in an Era of Preemption*, 122 *W. Va. L. Rev.* 941, 943 (2020) (“Across the country, cities are increasingly taking the lead when it comes to passing and enforcing labor laws, acting as true Brande[i]sian laboratories of democracy by developing and testing novel worker protections.”).

⁶⁶ Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 *Geo. Wash. L. Rev.* 1039, 1073 (2017) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). This, in turn, promotes important values of federalism—values often discussed with respect to the relationship between states and the federal government, but that ought to include the relationship between cities and higher levels of government as well. See Richard Schragger, *Cities, Not States* (Va. Pub. L. & Legal Theory, Rsch. Paper No. 2023-29, 2023) (making the case for city-based federalism); Richard Briffault, “What About the ‘Ism’?” Normative and Formal Concerns in Contemporary Federalism, 47 *Vand. L. Rev.* 1303, 1313 (1994).

⁶⁷ *Bond v. United States*, 564 U.S. 211, 221 (2011) (emphasis added) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

⁶⁸ Paul A. Diller, *Intrastate Preemption*, 87 *B.U. L. Rev.* 1113, 1118–19 (2007).

novel, community-centric work can be done by the institution Americans trust the most: their local government.⁶⁹ Indeed, Americans are more likely to trust their local government than their state government, the national government, or the federal judiciary.⁷⁰ That trust in localities is also more durable over time, as opposed to the swings in national trust that occur after elections.⁷¹ This ensures that a local reparations program is more likely to have staying power.

Third, responsiveness. Given the closeness to their constituents, researchers have found that local government tends to be more responsive to the desires of their electorate than higher levels of government.⁷² The same cannot be said for our other electoral institutions.⁷³ Gridlock in Congress is currently at all-time highs⁷⁴ (perhaps unsurprisingly, given our extremely gerrymandered political maps).⁷⁵ And many state governments use winner-take-all electoral designs, leading to minority control in statehouses—indeed, between 1968 and 2016, thirty-eight states experienced minoritarian rule at least once.⁷⁶ As Professor Miriam Seifter puts it, state “[I]nstitutions with such artificial cushions may be less

⁶⁹ Jeffrey M. Jones, *Americans Trust Local Government Most, Congress Least*, Gallup (Oct. 13, 2023), <https://news.gallup.com/poll/512651/americans-trust-local-government-congress-east.aspx> [<https://perma.cc/Z9MJ-LYKH>].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Alka Sapat, Ryan J. Lofaro & Benjamin Trautman, *Policy Responsiveness and Institutions in a Federal System: Analyzing Variations in State-Level Data Transparency and Equity Issues During the COVID-19 Pandemic*, 77 *Int'l. J. Disaster Risk Reduction*, July 2022, at 7 (“[P]rior research has shown that states and local governments are likely to be more responsive to problems in their jurisdictions as they understand local problems more clearly.”); Michael M. O’Hear, *Federalism and Drug Control*, 57 *Vand. L. Rev.* 783, 860 (2004) (“Individual citizen voice grows as the size of the electorate shrinks . . .”). See generally Christine Kelleher Palus, *Responsiveness in American Local Governments*, 42 *State & Local Gov’t Rev.* 133 (2010) (surveying 26 municipalities and determining that they generally spent funds in line with their constituents’ desires and ideologies); Katherine Levine Einstein & Vladimir Kogan, *Pushing the City Limits: Policy Responsiveness in Municipal Government*, 52 *Urb. Affs. Rev.* 3 (2016) (surveying 2,000 midsize cities and voter preferences in those cities and determining that they are responsive to voters’ desires).

⁷³ See Schragger, *supra* note 66, at 3 (“The rigidity of state jurisdictional lines and the rural bias in the states and the U.S. Congress exacerbates the problem of political conflict instead of ameliorating it.”).

⁷⁴ Fred Dewes, *3 Charts That Capture the Rise in Congressional Gridlock*, Brookings Inst. (May 30, 2014), <https://www.brookings.edu/articles/3-charts-that-capture-the-rise-in-congressional-gridlock/> [<https://perma.cc/MJ2W-LD8C>].

⁷⁵ *What Redistricting Looks Like in Every State*, FiveThirtyEight (July 19, 2022, 3:50 PM), <https://projects.fivethirtyeight.com/redistricting-2022-maps/> [<https://perma.cc/B9SP-94RV>].

⁷⁶ Miriam Seifter, *Counter-majoritarian Legislatures*, 121 *Colum. L. Rev.* 1733, 1764 (2021).

responsive to the concerns of both the median voter and partisan minorities.”⁷⁷ Cities suffer less from this democratic ailment.

B. The Pragmatic Case

Of course, the normative benefits of cities as a venue only matter if their citizens are interested in reparatory legislation at all. But this again cuts in favor of cities leading the way.⁷⁸ It is well-documented that cities skew more left than their rural counterparts,⁷⁹ and reparations are considerably more popular with Democrats than with Republicans—nearly half of all Democrats support reparations, as opposed to only 8% of Republicans.⁸⁰ Therefore, while state and national governments will need to painstakingly build coalitions to pass any sort of redistributive legislation, many cities can get by with a simpler consensus from their communities—as did, for example, Evanston.⁸¹ As Yale Law School Dean Heather Gerken writes, “[R]acial minorities . . . can wield more electoral power at the local level than they do at the national.”⁸² Of course, it is true that some cities will choose not to attempt reparations. But on political feasibility, it is telling that more than twenty cities already have made such an attempt, while states and the national government have faced debilitating political obstacles.⁸³

Indeed, city reparations represent one part of a larger trend: cities leading the way on progressive policy. Today’s cities have demonstrated an increasingly large appetite for passing novel redistributive policies—for example, to provide living wages and higher labor standards,⁸⁴ combat

⁷⁷ *Id.* at 1762.

⁷⁸ See Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 *Seattle U. L. Rev.* 1327, 1371 (2016).

⁷⁹ See Kim Parker et al., *Urban, Suburban and Rural Residents’ Views on Key Social and Political Issues*, Pew Rsch. Ctr. (May 22, 2018), <https://www.pewresearch.org/social-trends/2018/05/22/urban-suburban-and-rural-residents-views-on-key-social-and-political-issues/> [<https://perma.cc/UFG8-SL3L>].

⁸⁰ Blazina & Cox, *supra* note 55.

⁸¹ See Kulke, *supra* note 54.

⁸² Heather K. Gerken, *A New Progressive Federalism*, 24 *Democracy*, Spring 2012, <https://democracyjournal.org/magazine/24/a-new-progressive-federalism/> [<https://perma.cc/A4AE-5VUU>].

⁸³ See *infra* Section II.D.

⁸⁴ Sixty-three localities nationwide have adopted minimum wage laws that are higher than the state minimum wage. See *Minimum Wage Tracker*, Econ. Pol’y Inst., https://www.epi.org/minimum-wage-tracker/#/min_wage/Illinois [<https://perma.cc/9GEZ-RBFL>] (values as of July 1, 2024); *Inventory of US City and County Minimum Wage Ordinances*, UC Berkeley

climate change,⁸⁵ and protect LGBTQ rights.⁸⁶ It is clear that today's cities—driven by their progressive constituents—are keen to engage in social welfare policymaking, and reparations programs can take advantage of this momentum.⁸⁷

C. The Constitutional Case

In the wake of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,⁸⁸ race-based programs like reparations face an uphill battle before a Supreme Court deeply skeptical of race used in any context.⁸⁹ After winning the *Students for Fair Admissions* case, conservative legal groups quickly moved on to one of their next targets: diversity fellowships at law firms.⁹⁰ Reparations are not immune from these constitutional challenges. Already, conservative activist group Judicial Watch has challenged Evanston's reparations program as

Lab. Ctr. (Mar. 7, 2024), <https://laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/> [<https://perma.cc/A94D-ZEXA>].

⁸⁵ See, e.g., American Cities Climate Challenge, Bloomberg Philanthropies, <https://www.bloomberg.org/environment/supporting-sustainable-cities/american-cities-climate-challenge/> [<https://perma.cc/5QD9-GWKC>] (last visited Aug. 30, 2024); Climate Mobilization Act, N.Y.C. Council, <https://council.nyc.gov/data/green/> [<https://perma.cc/QXD4-C98P>] (last visited Aug. 30, 2024); Reducing Emissions, City of Bos. (June 29, 2022), <https://www.boston.gov/environment-and-energy/reducing-emissions> [<https://perma.cc/2HUR-4CDW>].

⁸⁶ Municipal Equality Index 2022, Hum. Rts. Campaign Found. (Nov. 2022), https://reports.hrc.org/municipal-equality-index-2022?_ga=2.209111442.1422390905.1699628441-1618288024.1699628441 [<https://perma.cc/GUM6-KXD9>]. Cities were also early proponents of same-sex marriage. See generally Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 *J.L. & Pol.* 147 (2005) (highlighting how municipalities pioneered national legalization of same-sex marriage).

⁸⁷ Schragger, *supra* note 66, at 3 (“[I]n the U.S., we are witnessing an inversion of this assumption. Cities (and local governments generally) are eager to raise revenue, engage in social welfare spending, and adopt environmental and other forms of protective regulations . . .”).

⁸⁸ 143 S. Ct. 2141 (2023).

⁸⁹ Belan Yeshigeta, *The Demise of Affirmative Action: The Consequences of an Anti-Precedent Supreme Court*, *Colum. Undergraduate L. Rev.* (Sept. 13, 2023), <https://www.culawreview.org/journal/the-demise-of-affirmative-action-the-consequences-of-an-anti-precedent-supreme-court> [<https://perma.cc/4H2N-CM7P>].

⁹⁰ Nate Raymond, *U.S. Law Firm Alters Diversity Fellowship Criteria After Lawsuit*, *Reuters* (Sept. 6, 2023, 8:07 PM), <https://www.reuters.com/sustainability/society-equity/us-law-firm-alters-diversity-fellowship-criteria-after-lawsuit-2023-09-06/> [<https://perma.cc/6USA-Y94C>].

unconstitutional under the Fourteenth Amendment.⁹¹ The group brought a class action suit against Evanston on behalf of white plaintiffs who they say would have been eligible for the city's reparations payments but for their race.⁹² They seek to enjoin Evanston from continuing to use race as an eligibility requirement and \$25,000 in damages each—the amount they would have received had they qualified.⁹³ Evanston has since sought dismissal of the challenge on two procedural grounds: lack of plaintiff standing and untimeliness.⁹⁴

Judicial Watch's challenge is grounded in an anti-classification understanding of the Fourteenth Amendment's Equal Protection Clause, a conception adopted by the current Supreme Court.⁹⁵ The argument goes like this: race-based classifications *themselves*—and not their underlying purposes—are the constitutional injury. Thus, in the eyes of the Court, benign classification programs meant to *aid* historically minoritized populations (such as affirmative action⁹⁶) and their malign counterparts meant to *demean* those same groups (such as interracial marriage bans⁹⁷) both suffer from the same constitutional ailment: using race

⁹¹ Class Action Complaint at 1, *Flinn v. City of Evanston*, No. 24-cv-04269 (N.D. Ill. May 23, 2024), ECF No. 1 [hereinafter *Complaint*]. The plaintiffs sued under 42 U.S.C. § 1983, alleging that the Equal Protection Clause provides the underlying constitutional violation.

⁹² *Id.* at 1, 5.

⁹³ *Id.* at 1.

⁹⁴ Defendant City of Evanston's Motion to Dismiss at 3, 8, *Flinn v. City of Evanston*, No. 24-cv-04269 (N.D. Ill. July 22, 2024), ECF No. 13 [hereinafter *Motion to Dismiss*] (seeking dismissal pursuant to Rule 12(b)(1) for lack of standing or Rule 12(b)(6) for untimeliness). The plaintiffs resist that conclusion. See generally Plaintiffs' Opposition to Defendant's Motion to Dismiss, *Flinn v. City of Evanston*, No. 24-cv-04269 (N.D. Ill. Sept. 18, 2024), ECF No. 20 (arguing that plaintiffs have standing). In reply, the City of Evanston claims that the plaintiffs' opposition to the motion to dismiss failed to adequately address the jurisdictional defects. See generally Defendant's Reply in Support of Motion to Dismiss, *Flinn v. City of Evanston*, No. 24-cv-04269 (N.D. Ill. Oct. 2, 2024), ECF No. 22.

⁹⁵ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141, 2161 (2023) (noting that “the ‘core purpose’ of the Equal Protection Clause [is] ‘do[ing] away with all governmentally imposed discrimination based on race’” (second alteration in original) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984))); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). This is often called the “colorblind Constitution,” wherein there exists no “benign” form of race-based discrimination. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring); Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 *Yale L.J.* 1600, 1602 (2020).

⁹⁶ See *Students for Fair Admissions*, 143 S. Ct. at 2192.

⁹⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

classifications at all.⁹⁸ The Supreme Court, and particularly Justice Thomas, fears that race-based classifications will lead to stigmatization of the group receiving benefits, thereby “promot[ing] notions of racial inferiority.”⁹⁹

If the U.S. District Court for the Northern District of Illinois—where Judicial Watch filed its complaint—decides that Evanston’s program is making a race-based classification, the program will receive strict scrutiny review, the most stringent type of constitutional scrutiny.¹⁰⁰ This level of review requires Evanston to demonstrate that its program both (1) furthers a compelling governmental interest and (2) is narrowly tailored to achieve that interest.¹⁰¹ The Supreme Court’s precedent allows the compelling interest of “remedy[ing] . . . discrimination,” but only “if [the city] identifies that discrimination *with the particularity required* by the Fourteenth Amendment.”¹⁰²

This discrimination-remedying compelling interest gives cities a constitutional advantage over other legislative actors. Cities, with their smaller geographic areas and populations, can more effectively (1) find a historic harm, preferably a more recent historic harm and (2) connect their proposed class of beneficiaries to that harm “with . . . particularity,” making the type of showing that the Court demanded in *City of Richmond v. J.A. Croson Co.*¹⁰³

⁹⁸ Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. Rev. 1195, 1234 (2002).

⁹⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); see also *Students for Fair Admissions*, 143 S. Ct. at 2198 (Thomas, J., concurring) (“I have long believed that large racial preferences in college admissions ‘stamp [blacks and Hispanics] with a badge of inferiority.’” (alteration in original) (citation omitted)).

¹⁰⁰ *Students for Fair Admissions*, 143 S. Ct. at 2161–62.

¹⁰¹ *Id.* at 2161.

¹⁰² *Croson*, 488 U.S. at 492 (emphasis added); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (“[I]n order to remedy the effects of prior discrimination, it may be necessary to take race into account.”); *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion) (“The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor.”). However, “promoting diversity” as a rationale is no longer sufficient to withstand strict scrutiny review after *Students for Fair Admissions*, 143 S. Ct. at 2192. Indeed, cities facing equal protection challenges to their reparatory programs should clarify that their compelling interests arise from the *Croson* line of race jurisprudence (interests in remedying past harm), not from the *Students for Fair Admissions* line of jurisprudence (interests in promoting diversity). See Deborah Hellman, *Diversity by Facially Neutral Means*, 110 Va. L. Rev. (forthcoming Dec. 2024).

¹⁰³ 488 U.S. at 492.

In its compelling interest analysis, the Court lays out the distinction between general “societal discrimination,” which can never be enough to justify race-based reparations, and “identified discrimination that can support and *define* the scope of race-based relief.”¹⁰⁴ That latter part is important: the Court has allowed for only the entities that *engaged* in the discriminatory conduct to then recompense for it.¹⁰⁵ The Court also demands that, to adopt race-based reparations, the entity must have previously discriminated with some sort of *intent*—discriminatory effects alone are not enough.¹⁰⁶ Taking these constraints together, it is clear that cities have the best chance of creating constitutional reparations. Because many harmful policies were funded and encouraged by the federal government but implemented at the local level—think exclusionary zoning¹⁰⁷ and urban renewal¹⁰⁸—cities have the benefit of proof: they can tie their program to an intentional constitutional harm that they themselves carried out, then use that harm to scope a beneficiary class.¹⁰⁹ For example, Evanston’s studies demonstrated the city’s intentional discrimination against Black residents in its housing policy between 1919 and 1969; therefore, the program’s beneficiaries are Black residents who lived in Evanston during that time period and their direct descendants, and the benefits began as housing grants.¹¹⁰ The harm and the remedy are closely linked, as they must be to survive strict scrutiny. This is the substantive defense Evanston is likely to marshal in favor of its program.¹¹¹

¹⁰⁴ Id. at 497 (emphasis added) (referencing the Court’s analysis in *Wygant*, 476 U.S. 267).

¹⁰⁵ Id. at 491–92.

¹⁰⁶ See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

¹⁰⁷ Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 *Fordham Urb. L.J.* 1667, 1669–70 (2013).

¹⁰⁸ See *supra* note 46.

¹⁰⁹ The Court in *Crosby* suggested that a constitutional way to implement race-based programs would involve each “subdivision” pioneering its own program based on the historical harms done in that particular area. 488 U.S. at 504 (“While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.”).

¹¹⁰ *Robinson, Jr. & Thompson*, *supra* note 38; see also *Broaddus*, *supra* note 31 (highlighting instances of Evanston’s historic housing discrimination and detailing the initial housing grants as relief).

¹¹¹ In its initial motion to dismiss, Evanston reserved its right to defend its reparations program on the constitutional merits, hinting at many of the arguments laid out above. *Motion to Dismiss*, *supra* note 94, at 10.

Cities also have the benefit of crafting the most “narrowly tailored” version of reparations. To assess the tailoring of a race-conscious program, the Court looks to several factors: the necessity of the relief, the availability of alternative (race-neutral) remedies, the duration of the program, the numerical proportionality, the burden on third parties, and the general over- or underinclusiveness of the relief.¹¹² Judicial Watch focuses on two of these factors in its complaint against Evanston: whether the program is overinclusive, and whether the city considered race-neutral options.¹¹³ Judicial Watch first argues that Evanston’s program is overinclusive because it uses race as a proxy for experiencing discrimination between 1919 and 1969, rather than requiring each individual applicant to prove that they experienced discrimination.¹¹⁴ But because Evanston’s historical studies demonstrate that Black residents during that time faced *systemic* housing discrimination—at the hands of *de jure* racist city policy—it is easier to argue that *all* Black residents faced this discrimination and that the class is thus narrowly tailored.¹¹⁵ The only logical gap the court must then fill is that all Black residents at one point during that time sought housing, participated in the housing market, or were affected by the city’s housing policy—an assumption that seems almost self-evident. Next, Judicial Watch argues that Evanston failed to consider race-neutral remedial options before implementing reparations.¹¹⁶ In response, Evanston may argue that it has tried *many* race-neutral remedies—from affordable housing grants to inclusionary zoning¹¹⁷—but none worked to narrow the city’s massive wealth and homeownership gaps.¹¹⁸ Evanston can avoid other narrow-tailoring

¹¹² *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); see also *Croson*, 488 U.S. at 506–08 (applying and expounding on the *Paradise* factors).

¹¹³ Complaint, *supra* note 91, at 8–9.

¹¹⁴ *Id.* at 8.

¹¹⁵ In *Croson*, the Court took issue with the fact that Richmond did not base its race-conscious relief on specific instances of discrimination like Evanston does. 488 U.S. at 507 (“[I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.”).

¹¹⁶ Complaint, *supra* note 91, at 8–9.

¹¹⁷ Ella Jeffries, *A History of Initiatives and Attempts to Increase Affordable Housing in Evanston*, Daily Nw. (Oct. 12, 2022), <https://dailynorthwestern.com/2022/10/12/city/a-history-of-initiatives-and-attempts-to-increase-affordable-housing-in-evanston/> [<https://perma.cc/2Z2K-FXKC>].

¹¹⁸ Clara Gustafson, Hazel Hayes, Frank Herman & Naomi Alemayehu, *Lasting Impact: Housing Practices, Policies Crafted a Century Ago Still Shape the Experiences of Black Evanstonians*, *The Evanstonian* (May 21, 2024), <https://www.evanstonian.net/reparations/2024/05/21/lasting-impact/> [<https://perma.cc/7D52-QFC9>] (explaining that, in 2021, the wealth

complaints, such as inflexibility and burden on third parties, by highlighting that its program allows non-Black residents to receive payments too if they can prove the city discriminated against them after 1969.¹¹⁹

However, the city's largest strength as an entity crafting legal reparations lies in its ability to choose more recent discriminatory harms on which to base its program. The national government, former slave states, and some cities *could* use chattel slavery as their historic harm. But choosing a more recent discriminatory harm has two advantages: rebuffing constitutional claims and avoiding massive problems of proof. *First*, the constitutional benefits: as Professors Eric Posner and Adrian Vermeule write, a program compensating for slavery is "uniquely vulnerable" to legal challenge because it is "based on general facts about large-scale historical practices and structures . . . rather than small-scale facts about specific discriminatory acts."¹²⁰ Facing such a program, today's Court would almost certainly be skeptical about the hundreds of years and many mitigating events that have occurred since the end of slavery, weakening the link between slavery and the present hardships that African Americans face.¹²¹ Choosing a more recent discriminatory event eliminates this one common critique of slave reparations: that it discounts all intervening civil rights advances that have occurred since 1865.¹²²

Second, the problem of proof. When cities choose discrete and modern racist policies upon which to base their reparations, they avoid the massive problems of proof that attach to slavery reparations.¹²³ Even

gap between Black and white families in Evanston was more than double the national average).

¹¹⁹ See Carlton Waterhouse, *Follow the Yellow Brick Road: Perusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination*, 62 Rutgers L. Rev. 163, 206–08 (2009) (proposing ways cash-based reparations programs could be narrowly tailored).

¹²⁰ Posner & Vermeule, *supra* note 11, at 717.

¹²¹ Waterhouse, *supra* note 119, at 200 (noting that basing reparations on government harms "in the twenty-first century" is most likely to satisfy strict scrutiny); see also Ted Barrett, *McConnell Opposes Paying Reparations: 'None of Us Currently Living Are Responsible' for Slavery*, CNN, <https://www.cnn.com/2019/06/18/politics/mitch-mcconnell-opposes-reparations-slavery/index.html> [<https://perma.cc/DV5F-R6SS>] (last updated June 19, 2019) (noting that Senator Mitch McConnell called slave reparations a bad idea because slavery happened "150 years ago" and "none of us currently living are responsible").

¹²² See Regimbal, *supra* note 43.

¹²³ Mary Franklin Harvin, *Proving Lineage for Reparations? Concerns Loom Over Feasibility, Emotional Toll for Black Californians*, KQED (Mar. 29, 2023), <https://www.kqed>

Evanston has struggled somewhat to verify documentation from local applicants who lived in the city less than one hundred years ago¹²⁴—imagine the difficulties proving that any given individual is truly the descendant of an enslaved person. DNA evidence can help only insofar as it can be collected from a gravesite,¹²⁵ and because enslaved individuals were rarely able to create their own records, research will require first identifying *enslavers* who may have mentioned their names.¹²⁶ Some of these problems of proof could hobble a program entirely, both constitutionally and practically. Cities will be most immune from these serious issues when they select more recent discriminatory policies.

Given all of the above, cities are the most promising legal venues for crafting race-*conscious* reparatory programs. However, cities do have fewer constitutionally suspect options as well. Rather than structuring a race-conscious beneficiary class—i.e., Black descendants of a victim class—cities can structure their program based solely on ancestry.¹²⁷ Take, for example, a program that grants benefits to “victims of redlining and their descendants.” This program is technically race-neutral, though of course the harms of redlining are inherently racialized. The legal benefit to structuring a program like this is that the Court applies less stringent rational basis review when considering most race-neutral programs.¹²⁸ There is still a risk that the Court would identify ancestry in

d.org/news/11944986/proving-lineage-for-reparations-concerns-loom-over-feasibility-emotional-toll-for-black-californians [https://perma.cc/KB2-2VLK].

¹²⁴ Memorandum from Damilola Olabanji, Reparations Intern, to Members of the Reparations Comm., Developing a Selection Process for Direct Descendants (Oct. 5, 2023), <https://cityofevanston.civicweb.net/document/218617/> [https://perma.cc/5F3L-YVN6] (noting the city’s troubles with identifying around 10% of the direct descendant applications).

¹²⁵ See, e.g., Stephanie Dutchen, Historical DNA Study Connects Living People to Enslaved and Free African Americans at Early Ironworks, Harvard Med. Sch. (Aug. 3, 2023), <https://hms.harvard.edu/news/historical-dna-study-connects-living-people-enslaved> [https://perma.cc/6KZ5-G5MC].

¹²⁶ Claire Kluskens, Nat’l Archives & Recs. Admin., Federal Records That Help Identify Former Enslaved People and Slave Holders (Dec. 2021), <https://www.archives.gov/files/calendar/genealogy-fair/2018/2-kluskens-handout.pdf> [https://perma.cc/HD6R-KNAA].

¹²⁷ Simone, *supra* note 24, at 380 (“Race-neutral municipal reparations are likely viable under existing Fourteenth Amendment doctrine.”).

¹²⁸ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141, 2220 (2023) (Gorsuch, J., concurring, joined by Thomas, J.) (“[C]ourts apply strict scrutiny for classifications based on race, color, and national origin; intermediate scrutiny for classifications based on sex; and rational-basis review for classifications based on more prosaic grounds.”); see also *Waterhouse*, *supra* note 119, at 204 (noting that a harms-based reparations program would “avoid[] the Supreme Court’s strict scrutiny analysis”).

this case as a proxy for race and apply strict scrutiny regardless,¹²⁹ but for cities in this predicament, Justice Alito makes a helpful argument. In *Dobbs v. Jackson Women’s Health Organization*, he writes that a policy that incidentally affects only women—in that case, abortion regulation—does not necessarily make that regulation sex-based for the purposes of heightened scrutiny under the Fourteenth Amendment.¹³⁰ Cities can marshal this same argument for their reparations programs, arguing that even if Black residents (a class otherwise subject to strict scrutiny) were the only ones subjected to a particular policy in the past (redlining), that does not automatically make the city’s current reparations program race-based. If cities choose this path, they could maximize the benefits to the descendant class by choosing a more modern discrete harm—i.e., redlining or urban renewal—and scope their beneficiary classes as the victims of those harms and their descendants. Of course, using a race-neutral beneficiary class would somewhat contravene the symbolic purpose of reparations.¹³¹

Whether formally race-neutral or not, creating a constitutional reparations program is an uphill battle.¹³² But cities, armed with more historically recent evidence of discrimination that they themselves perpetuated and a smaller population to which they can tailor the benefits, are the best fit for the challenge.

D. The Weaknesses of Alternative Venues

The fact that cities have led the modern American reparations movement is not preordained. Indeed, there are at least four other venues from which reparations could originate: state legislatures, Congress, the judiciary, or private institutions. Each venue has its benefits, but ultimately, each fails compared to the viability of city reparations.

The most obvious substitute for the city is the state. What can’t be fiscally accomplished in cities, the argument goes, can be done by

¹²⁹ See *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (“Ancestry can be a proxy for race.”).

¹³⁰ 142 S. Ct. 2228, 2245–46 (“The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny . . .”).

¹³¹ Simone, *supra* note 24, at 381 (“Rectifying these types of harms in a race-neutral fashion would belie the symbolic meaning of reparations.”).

¹³² But not one that is completely lost. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”).

states—states can marshal more resources, both for the payment of benefits and to commission reparations research. But reparations at the state level are unlikely and perhaps undesirable.

Only three state legislatures have begun the process of exploring reparations: California, Illinois, and New York.¹³³ In June 2023, California’s reparations task force issued its report to the California State Legislature, suggesting a system of state-wide reparations, including maximum payments of \$1.2 million per Black resident to compensate for health, housing, and policing harms.¹³⁴ As eligible class members, it suggested (1) residents descended from enslaved Africans or (2) residents descended from free African Americans who lived in the United States prior to 1900.¹³⁵ Committee members left legislators to debate funding sources, but suggested that California could capitalize its reparations programs by levying a sales tax on marijuana, much like Evanston, or by diverting 0.5% of the state’s budget annually into a separate reparations fund.¹³⁶ Illinois later joined California by becoming the second state to create a reparations committee, followed by New York.¹³⁷

¹³³ States have, in the past, created more modest systems of reparations that are somewhat dissimilar from the programs this Note is discussing. For example, North Carolina passed a bill compensating the living victims of eugenics programs, but that harm was disconnected from race and involved recompensing only living victims. See Press Release, Thom Tillis, U.S. Sen., Senate Passes Bipartisan Bill to Assist Eugenics Victims Receiving Compensation Payments (Dec. 1, 2015), <https://www.tillis.senate.gov/2015/12/senate-passes-bipartisan-bill-to-assist-eugenics-victims-receiving-compensation-payments> [https://perma.cc/P3GC-AJQQ]. The Florida legislature approved compensation to the victims of the racially motivated Rosewood Massacre, but the class included only nine beneficiaries. See 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/> [https://perma.cc/FW3H-XU8P].

¹³⁴ A Black California resident would be eligible for: \$13,600 per year they have lived in California for health harms, \$3,400 per year for housing discrimination harms, and \$2,400 per year for over-policing harms. The program includes “caps” on the number of years of eligibility, bringing the maximum possible payout to \$1.2 million. See Task Force to Study and Dev. Reparation Proposals for Afr. Ams., Calif. Dep’t of Just., Executive Summary: “The California Reparations Report,” at 41–42, 45, <https://oag.ca.gov/system/files/media/exec-summary-ca-reparations.pdf> [https://perma.cc/84C3-6SBL] (last visited Aug. 30, 2024).

¹³⁵ *Id.* at 41.

¹³⁶ Wendy Fry, Erica Yee & Rya Jetha, California Is the First State to Tackle Reparations for Black Residents. What That Really Means, *CalMatters* (Sept. 13, 2024), <https://calmatters.org/explainers/reparations-california/> [https://perma.cc/B9SV-9C37].

¹³⁷ 20 Ill. Comp. Stat. 405/405-540 (2021); 2023 N.Y. Sess. Laws Ch. 729 (A. 7691) (McKinney).

Proponents of California's reparations recommendations say that the state can and should take responsibility for its historic harms.¹³⁸ But at the state legislature's doors, the committee's recommendations have been met with hedging,¹³⁹ disbelief,¹⁴⁰ and even outright repudiation.¹⁴¹ California State Senator Steven Bradford, himself a member of the reparations committee, warned residents not to bank on receiving the types of payments his committee recommended: "That's just not happening," he said.¹⁴² With that, Senator Bradford identifies one prominent criticism of a state-centric reparations model: it is just not feasible. In California, a consistently liberal state, only 28% of residents support reparations in the form of cash payments.¹⁴³ Black lawmakers are fighting an uphill battle as they push for reparations in the state legislature,¹⁴⁴ not least of all because the state currently faces a large financial downturn.¹⁴⁵ Given the barriers to state legislation and the major consensus required, it is unlikely that California's reparations proposal

¹³⁸ Press Release, Steven Bradford, Cal. State Sen., Senator Bradford Introduces Historic Reparations Legislation to Address California's Role in Slavery and Systemic Discrimination (Aug. 22, 2023), <https://sd35.senate.ca.gov/news/2023-08-22-senator-bradford-introduces-his-toric-reparations-legislation-address-california%E2%80%99s> [<https://perma.cc/MSQ6-ABQH>].

¹³⁹ Dan Walters, Gov. Gavin Newsom May Regret Pledges to Black Californians, CalMatters (Sept. 12, 2023), <https://calmatters.org/commentary/2023/09/gov-gavin-newsom-may-regret-pledges-to-black-californians/> [<https://perma.cc/GW5Q-WNU2>].

¹⁴⁰ Sophie Austin, California Lawmakers on Reparations Panel Challenge Assumptions About Payments to Black Residents, Associated Press (May 11, 2023, 8:53 PM), <https://apnews.com/article/california-reparations-payments-black-african-american-1d8225ab2c0af0cbe8e96d78813ad43b> [<https://perma.cc/ASH2-JAX5>].

¹⁴¹ Sonya Singh, California Faces Backlash as It Weighs Historic Reparations for Black Residents, The Guardian (July 11, 2023, 7:00 AM), <https://www.theguardian.com/us-news/2023/jul/11/california-historic-reparations-black-residents> [<https://perma.cc/B7LY-XB33>].

¹⁴² Austin, *supra* note 140.

¹⁴³ Mark DiCamillo, U.C. Inst. of Governmental Stud., Majority of Voters Believe Black Californians Continue to Be Affected by the Legacy of Slavery, Yet Cash Reparations Face Headwinds 5 (Sept. 10, 2023), <https://escholarship.org/uc/item/5ks5g9f6#main> [<https://perma.cc/4A7S-QWZT>].

¹⁴⁴ Curtis Bunn, Black Lawmakers in California Push to Overcome Resistance on Reparations, NBC News (Sept. 13, 2023, 6:21 PM), <https://www.nbcnews.com/news/nbcblk/black-lawmakers-california-push-overcome-resistance-reparations-rcna104420> [<https://perma.cc/5TS6-J59R>].

¹⁴⁵ Taryn Luna, Is California Giving Reparations for Slavery? Here's What You Need to Know, L.A. Times (May 6, 2023, 7:37 PM), <https://www.latimes.com/california/story/2023-05-06/californias-reparations-task-force-recommendations-heres-what-you-need-to-know> [<https://perma.cc/A2YE-VXZE>].

will become law.¹⁴⁶ Political feasibility is one major reason why city reparations programs are preferable to states—when political units get smaller, consensus becomes easier to achieve. As University of Massachusetts political scientist Professor Tatishe Nteta puts it, “in a state as progressive as California, if you can’t pass reparations, the likelihood of passing this at the national level is very low, and in other states is also very low.”¹⁴⁷

Another concerning aspect of state-led reparations is the dubious history of centralization as a tool for justice. While conventional wisdom often characterizes city government as ineffective or even as an engine of inequality itself,¹⁴⁸ it was state government that defended slavery,¹⁴⁹ maintained Jim Crow,¹⁵⁰ and continues to craft racially gerrymandered voting maps.¹⁵¹ More recently, Professor Jacob Grumbach made the case that, often, “threats of norm violations in the federal government are preceded by state governments having already violated the norm,” making “state governments . . . [the] leaders in democratic backsliding in the United States in recent years.”¹⁵² State legislatures are often viewed as a corrective salve applied to cleanse parochial cities, in part because state government is perceived as more representative than its local

¹⁴⁶ Trip Gabriel, Maya King, Kurtis Lee & Shawn Hubler, *Reparations Are a Financial Quandary. For Democrats, They’re a Political One, Too*, N.Y. Times (May 27, 2023), <https://www.nytimes.com/2023/05/27/us/politics/reparations-democrats-black-americans.html> [<https://perma.cc/C6ZE-S673>].

¹⁴⁷ Adrian Florido, *Most California Voters Oppose Cash Reparations for Slavery, Poll Finds*, NPR, <https://www.npr.org/2023/09/11/1198805444/most-california-voters-oppose-cash-reparations-for-slavery-poll-finds> [<https://perma.cc/6F7N-CJYW>] (last updated Sept. 11, 2023, 10:22 PM).

¹⁴⁸ See Richard C. Schragger, *The Attack on American Cities*, 96 *Tex. L. Rev.* 1163, 1195 (2018).

¹⁴⁹ *Slavery as a Cause of the Civil War*, Nat’l Park Serv., <https://www.nps.gov/liho/learn/historyculture/slavery-cause-civil-war.htm> [<https://perma.cc/TEE3-XX6W>] (last visited Aug. 30, 2024).

¹⁵⁰ *The Southern Manifesto and “Massive Resistance” to Brown*, Legal Def. Fund, <https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/> [<https://perma.cc/E2PQ-C9AW>] (last visited Aug. 30, 2024).

¹⁵¹ Michael Li, *Alabama’s Congressional Map Struck Down as Discriminatory—Again*, Brennan Ctr. for Just. (Sept. 26, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/alabamas-congressional-map-struck-down-discriminatory-again> [<https://perma.cc/9GF9-NYMJ>].

¹⁵² Jacob M. Grumbach, *Laboratories Against Democracy: How National Parties Transformed State Politics* 152 (2022).

counterpart.¹⁵³ But that is not necessarily true. Instead, as some scholars have found, state legislatures are often “outright countermajoritarian institutions” voted in by extremely gerrymandered districts.¹⁵⁴ Maybe it is actually intuitive to trust cities with the important work of reparations; perhaps we should be wary of entrusting it to state government.

The idea of a federal reparations program suffers from some of the same ailments; however, many argue that federal reparations are the best path forward. Professor William A. Darity, Jr. urges Black Americans to “[t]ake nothing if you’re not going to get what you deserve”¹⁵⁵ and writes that municipal reparatory efforts actually damage progress toward the real goal: a comprehensive system of federal reparations.¹⁵⁶ One major problem with his argument, of course, is that there *has* been no real progress in the fight for federal reparations. While it is true that the federal government has previously administered some smaller reparatory programs—to Japanese Americans interned during World War II¹⁵⁷ and some Native American tribes,¹⁵⁸ for example—reparations for African Americans have long been a congressional non-starter.¹⁵⁹ Former U.S. Representative John Conyers, Jr. introduced a bill to study the effects of slavery on African Americans in every session of Congress from 1989 until he resigned in 2017, but the bill never saw a floor vote.¹⁶⁰ Recently, several Democrats have introduced legislation to study federal reparations¹⁶¹—but, similarly, none of the bills have made it out of the

¹⁵³ Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. Pa. L. Rev. 125, 154–55 (2021).

¹⁵⁴ Seifter, *supra* note 76, at 1735; see also Grumbach, *supra* note 152, at 153 (arguing that state governments are prominent examples of democratic backsliding).

¹⁵⁵ John Murawski, *Georgetown University’s Road to Slavery Reparations Was Paved with Good Intentions, Leading to a Can of Worms*, Nat’l Afr. Am. Reparations Comm’n (July 13, 2022), <https://reparationscomm.org/reparations-news/georgetown-universitys-road-to-slavery-reparations-was-paved-with-good-intentions/> [<https://perma.cc/2AME-TSE7>].

¹⁵⁶ Brentin Mock, *The Case Against Local Reparations, Bloomberg* (July 12, 2023, 10:26 AM), <https://www.bloomberg.com/news/articles/2023-07-12/the-case-against-reparations-in-evanston-asheville-and-california> [<https://perma.cc/L8ZL-7GVE>].

¹⁵⁷ Civil Liberties Act of 1988, 50 U.S.C. §§ 4211–20 (2018).

¹⁵⁸ Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70–70w (1976).

¹⁵⁹ Kaimipono David Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution*, 25 J.C.R. & Econ. Dev. 697, 698 (2011).

¹⁶⁰ Melissa Nann Burke, *House Panel Advances Reparations Bill That Conyers Championed*, *Detroit News* (Apr. 14, 2021, 11:18 PM), <https://www.detroitnews.com/story/news/politics/2021/04/14/us-house-reparations-black-americans-bill-john-conyers/7219385002/> [<https://perma.cc/JH86-C7HA>].

¹⁶¹ See Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 118th Cong. (2023).

House (nor are they likely to, given the nation's low level of support for reparations).¹⁶² A dozen advocacy groups have urged President Biden to sign an executive order authorizing the federal government to study reparations, to no avail.¹⁶³

If liberal state legislatures like California struggle to pass reparations programs, one imagines the difficulties such a program would face in the deeply polarized Congress.¹⁶⁴ And even assuming the federal government were to study *and* implement reparations—two major assumptions—they would almost certainly be found unconstitutional by today's Supreme Court.¹⁶⁵

Another problem with Professor Darity's argument against city reparations is how much he is willing to bet on the federal government getting reparations right the first time around. There is inherent value in allowing cities to experiment with reparations programs of their own, learning from their successes and mistakes. And much like state legislatures, we may worry about placing trust in the federal government—an institution that has so often been a catalyst of injustice—to craft and administer reparations correctly on their very first try.

We could, however, take claims for reparations to the judiciary, a tactic that some scholars have argued is key to forcing reparations in areas less inclined to take up the fight themselves.¹⁶⁶ But one major problem with

¹⁶² Blazina & Cox, *supra* note 55.

¹⁶³ Beatrice Peterson, *Advocates Call on Biden to Act on Reparations Study by Juneteenth*, ABC News (June 17, 2022, 5:07 AM), <https://abcnews.go.com/Politics/advocates-call-biden-act-reparations-study-juneteenth/story?id=85418510> [<https://perma.cc/AN7T-BQMJ>].

¹⁶⁴ See Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, Pew Rsch. Ctr. (Mar. 10, 2022), <https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> [<https://perma.cc/3NA4-JFXS>]; see also Darity & Mullen, *supra* note 2, at 27 (“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.”).

¹⁶⁵ See Charles Lane, *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 [<https://perma.cc/733W-W5N9>]; see also *supra* Section II.C.

¹⁶⁶ Allison Roy Kawachi, *Municipal Fair Housing Act Litigation and Reparations*, 69 UCLA L. Rev. 1322, 1337–38 (2023); see also Eric K. Yamamoto & Susan K. Serrano, *Reparations Theory and Practice Then and Now: Mau Mau Redress Litigation and the British High Court*, 18 UCLA Asian Pac. Am. L.J. 71, 81–82 (2013) (explaining that some scholars have advocated for Black Americans to seek reparations through legal claims sounding in both tort and contract).

court-ordered reparations is, again, feasibility.¹⁶⁷ Courts have again and again dismissed lawsuits for reparations without reaching their merits.¹⁶⁸ The most recent attempt to claim reparations—involving survivors of the 1921 Tulsa Race Massacre suing the state of Oklahoma—was recently dismissed by the state’s highest court.¹⁶⁹ However, even if that lawsuit *had* found success, only two known survivors of the Tulsa Race Massacre are still alive.¹⁷⁰ Suing for reparations often fails because those who have standing are not around to bring suit.¹⁷¹ What is more, scholars disagree about whether court-ordered reparations could even qualify as reparations.¹⁷²

Finally, some private institutions have begun exploring, and even paying, reparations. Universities have largely led this charge. For example, Harvard University recently set aside \$100 million to fund programs meant to close the educational and economic gaps caused by systemic racism.¹⁷³ Other private institutions have also shown interest in

¹⁶⁷ Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. Ann. Surv. Am. L. 497, 502 (2003) (“[T]hese will be hard claims to put into a legal framework.”); Epstein, *supra* note 10, at 1187 (“[T]he decision in *African American Slave Descendants* offers a full range of reasons for denying claims for reparations.”); see also Kaiman, *supra* note 78, at 1370 (“As is clear from the history of slavery reparations and other reparations through the court system, it is much more difficult to fit claims for reparations whether based on environmental law or contract and tort law.”).

¹⁶⁸ See *Johnson v. McAdoo*, 45 App. D.C. 440, 441 (D.C. Cir. 1916), *aff’d*, 244 U.S. 643 (1917) (dismissing on sovereign immunity grounds); *Cato v. United States*, 70 F.3d 1103, 1105–06 (9th Cir. 1995) (dismissing on sovereign immunity grounds); *In re Afr.-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721, 780–81 (N.D. Ill. 2005), *aff’d in part as modified, rev’d in part*, 471 F.3d 754 (7th Cir. 2006) (dismissed on lack of standing and statute of limitations grounds); *Alexander v. Oklahoma*, 382 F.3d 1206, 1211 (10th Cir. 2004) (dismissed on statute of limitations grounds).

¹⁶⁹ *Randle v. City of Tulsa*, 556 P.3d 612, 623 (Okla. 2024) (dismissing for failure to state a claim under Oklahoma law).

¹⁷⁰ See Sam Cabral, *Oklahoma Court Rejects Tulsa Massacre Survivors Suit*, BBC News (June 12, 2024), <https://www.bbc.com/news/articles/cjmm8dnxz00o> [<https://perma.cc/VZ39-3UR5>].

¹⁷¹ See Alexander & Murphy, *supra* note 169.

¹⁷² Compare Posner & Vermeule, *supra* note 11, at 692 (arguing that judicially ordered reparations should be excluded from reparatory schemes), with Kaiman, *supra* note 78, at 1350–51 (proposing tort litigation to remedy historical environmental harms, but noting that such a remedy would be inaccessible to low-income communities).

¹⁷³ Michela Moscufo, *Harvard Sets up \$100 Million Endowment Fund for Slavery Reparations*, Reuters (Apr. 26, 2022, 1:33 PM), <https://www.reuters.com/world/us/harvard-sets-up-100-million-endowment-fund-slavery-reparations-2022-04-26/> [<https://perma.cc/T5R-F-85N5>]; cf. Murawski, *supra* note 155 (“Georgetown has committed to raise \$400,000 a year from donations to support projects benefiting descendant communities and offered preferential

reparatory justice. In 2005, Chase Bank committed \$5 million to fund a scholarship program in Louisiana, where it had previously profited from chattel slavery.¹⁷⁴ But there are numerous objections to private institutions engaging in reparations. For one, there is little oversight and community representation inside a private institution. Compensatory options are also quite limited at the private level.¹⁷⁵ Private institutions cannot pay mortgages, create cultural districts, or grant tax credits—all things cities *can* do. And of course, in the wake of *Students for Fair Admissions*,¹⁷⁶ the options for universities to legally provide recompense to Black students have become ever more limited.

III. PRACTICAL APPROACHES TO CITY REPARATIONS

For cities interested in piloting a reparations program, there are two primary roadblocks to consider: financial feasibility and state preemption. But because the challenges both of these issues pose will vary greatly depending on the source and scope of a city's power, I will first briefly discuss the three general types of city power: Dillon's Rule, *imperio* home rule, and legislative home rule.

Until 1875, all municipalities had only the powers laid out in the common law Dillon's Rule: "(1) [T]hose granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the accomplishment of the declared objects and purposes of the corporation."¹⁷⁷ In short, Dillon's Rule cities can exercise only the power the state has explicitly granted to them. If a local

admissions to descendants of the Jesuit-owned slaves. To date, 16 descendants have been admitted under the special preference.").

¹⁷⁴ JP Morgan Chase Creates "Smart Start Louisiana," *How. Univ. News Serv.*, <https://hunews.service.com/news/jp-morgan-chase-creates-smart-start-louisiana/> [<https://perma.cc/GN25-SJYX>] (last visited Aug. 30, 2024).

¹⁷⁵ For example, Georgetown University offers preferential admissions to descendants of enslaved individuals owned by Georgetown. Though it has identified thousands of descendants, between 2016 and 2023, only sixteen have been admitted via special preference. During that same time, about 1,500 legacy students were admitted. Kirk Carapezza, *If the Supreme Court Restricts Race in College Admissions, Should Schools Adopt Slave Descent as a Factor Instead?*, *WGBH*, <https://www.wgbh.org/news/education-news/2022-02-17/if-the-supreme-court-restricts-race-in-college-admissions-should-schools-adopt-slave-descent-as-a-factor-instead> [<https://perma.cc/68Z5-LE47>] (last updated Oct. 19, 2023).

¹⁷⁶ 143 S. Ct. 2141 (2023).

¹⁷⁷ Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 *Colum. J.L. & Soc. Probs.* 93, 102 (2005) (emphases omitted).

regulation is challenged on lack-of-power grounds, courts will presume that the locality lacks said power (barring an express statute to the contrary).¹⁷⁸ Any ambiguity is resolved against the city.¹⁷⁹ As such, cities in a Dillon’s Rule regime have little power and authority.¹⁸⁰

However, the vast majority of states have done away with Dillon’s Rule and instead adopt some measure of “home rule.”¹⁸¹ From its inception, the purpose of home rule was to grant cities and municipalities the power to act on issues of local concern.¹⁸² An early model of home rule—called the *imperio in imperium* (“government within a government”) model—envisioned state government expressly granting municipalities the right to regulate on matters of *local* concern, leaving matters of *state* concern to themselves.¹⁸³ While the *imperio* model of home rule granted more control to local government, it left the definitions of “local issue” and “state issue” undefined, allowing courts to interpret the boundary lines for themselves and leaving cities unsure of the scope of their own authority.¹⁸⁴

Therefore, most home-rule states now employ some version of the “legislative model” instead.¹⁸⁵ Devised by the American Municipal Association in 1953, the legislative model grants a broad range of powers to municipalities: generally, all the powers not expressly *denied* to it by law.¹⁸⁶ These grants of authority leave open the possibility of states exercising their preemptive authority to strike down city laws,¹⁸⁷ though

¹⁷⁸ *Id.* at 102–03.

¹⁷⁹ Amanda Lineberry, Essay, *Payne v. City of Charlottesville* and the Dillon’s Rule Rationale for Removal, 104 Va. L. Rev. Online 45, 48 (2018).

¹⁸⁰ See Felipe Ford Cole, Unshackling Cities, 90 U. Chi. L. Rev. 1365, 1415 (2023) (“Dillon’s Rule is stifling the ability of cities to address, repair, and mitigate . . . problems.”).

¹⁸¹ Home Rule, Cmty. Env’t Legal Def. Fund, <https://celdf.org/home-rule/> [<https://perma.cc/PQH3-FZK6>] (last visited Aug. 30, 2024) (“Forty-three states in the U.S. either constitutionally or statutorily allow for Municipal Home Rule.”).

¹⁸² Nat’l League of Cities, Principles of Home Rule for the 21st Century 11 (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/3GFA-3USR>].

¹⁸³ *Id.*; see Dalmat, *supra* note 177, at 104; Kerry A. Burchill, Madison’s Minimum-Wage Ordinance, Section 104.001, and the Future of Home Rule in Wisconsin, 2007 Wis. L. Rev. 151, 160.

¹⁸⁴ Dalmat, *supra* note 177, at 105.

¹⁸⁵ “Some version” is the operative phrase here. States vary dramatically on what “home rule” looks like, with many incorporating some elements of *imperio* into their doctrines as well. See Paul A. Diller, Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism, 77 La. L. Rev. 1045, 1066 (2017).

¹⁸⁶ National League of Cities, *supra* note 182, at 12; Dalmat, *supra* note 177, at 106.

¹⁸⁷ See Dalmat, *supra* note 177, at 107.

fifteen states recognize some degree of home rule “immunity” insulating local policies from challenge.¹⁸⁸

In sum, cities located in Dillon’s Rule states have the least amount of autonomy to pass and defend their own legislation, followed by *imperio* home-rule states, while legislative home-rule states enjoy the most.¹⁸⁹ This general rule is implicated in both the discussions of financial feasibility and state preemption, as cities in home-rule states are more likely to find success in both areas.

A. Finding Sources of Reparatory Power

Though local budgets are often tight, cities are not bereft of resources to engage in redistributive justice. Cities in the United States generally get their local revenue from the following sources: about 61% from property taxes, followed by 16% from sales taxes, 7% from income taxes, and the remaining 16% from other taxes (e.g., entertainment and business licensing).¹⁹⁰ But these percentages are deceptively simple. The revenues and budget structures of cities vary wildly, often based on the restrictions imposed upon them by their states.¹⁹¹

Many local governments get the bulk of their funding from property taxes, but this is not the wisest source of revenue for a reparations program. For one, many states exercise tight control over cities’ abilities to modify property taxation.¹⁹² Some states limit the percentage that assessed city property tax values can grow each year, some limit the tax rate itself, and still others limit the percentage growth in *revenue* collected

¹⁸⁸ See Diller, *supra* note 185, at 1066–67 (noting that, of the fifteen states with some type of home-rule immunity, most relate to cities’ personnel and structural decisions, though a few grant immunity with respect to regulation of local matters).

¹⁸⁹ Municipalities with home-rule charters tend to spend more than those with less autonomy. See Chrissie Long, *How Local Power and Home Rule Affect Spending and Budgets*, *Journalist’s Res.* (July 17, 2014), <https://journalistsresource.org/economics/local-power-home-rule-spending/> [<https://perma.cc/SG4H-EMSG>].

¹⁹⁰ Jeff Chapman, *How Local Governments Raise Their Tax Dollars*, *Pew Charitable Trs.* (July 27, 2021), <https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2021/how-local-governments-raise-their-tax-dollars> [<https://perma.cc/KLC4-VFEP>].

¹⁹¹ Jeff Chapman, *Local Tax Limitations Can Hamper Fiscal Stability of Cities and Counties*, *Pew Charitable Trs.* (July 8, 2021), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/07/local-tax-limitations-can-hamper-fiscal-stability-of-cities-and-counties> [<https://perma.cc/6NTV-LHSF>].

¹⁹² John Patrick Hunt, *Constitutionalized Consent: Preemption of State Tax Limits in Municipal Bankruptcy*, 34 *Yale J. on Reg.* 391, 394 (2017).

by the city each year.¹⁹³ Today, 44 states impose at least one of those limits, and many impose a mixture, leaving cities with little wiggle room to capitalize reparations with property taxes.¹⁹⁴ Another issue with sourcing revenue this way is that, invariably, some of those taxed will be the people harmed by the past discriminatory policy itself.¹⁹⁵ Cities could try to narrow the property tax base for the purposes of reparatory fundraising, but this is almost certainly unconstitutional.¹⁹⁶

Sales taxes and other activity-specific taxes, like alcohol licensing taxes, present a more promising route for capitalizing a reparatory fund.¹⁹⁷ For cities that are interested in using these tools, the first question is one of power: Are local governments in this state empowered to collect a sales tax, and if so, what type? The answer to this question varies state-by-state, including whether the state grants home-rule powers.¹⁹⁸ Some states give cities broad power to impose their own sales tax—Illinois’s state constitution, for example, grants cities sales tax authority and expressly restricts the state from monopolizing the tax authority.¹⁹⁹ Other states allow cities to adopt sales taxes only if voters approve them.²⁰⁰ Some allow localities to collect sales taxes but impose limits on what that

¹⁹³ Iris J. Lav & Michael Leachman, Ctr. on Budget & Pol’y Priorities, *State Limits on Property Taxes Hamstring Local Services and Should Be Relaxed or Repealed* 3 (July 18, 2018), <https://www.cbpp.org/research/state-budget-and-tax/state-limits-on-property-taxes-hamstringing-local-services-and-should-be> [<https://perma.cc/S5R6-UV8X>].

¹⁹⁴ *Id.*

¹⁹⁵ Posner & Vermeule, *supra* note 11, at 720. The property tax system also has a long history of disadvantaging Black homeowners. See Jordan M. Fields, Andre M. Perry & Manann Donoghoe, *How the Property Tax System Harms Black Homeowners and Widens the Racial Wealth Gap*, Brookings Inst. (Aug. 22, 2023), <https://www.brookings.edu/articles/how-the-property-tax-system-harms-black-homeowners-and-widens-the-racial-wealth-gap/> [<https://perma.cc/6KHD-AKLQ>].

¹⁹⁶ Posner & Vermeule, *supra* note 11, at 720; see also Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. Rev. 1319, 1340 (2004) (explaining that proof of injury in reparations lawsuits is difficult because of the indirect harm faced by descendants of enslaved individuals).

¹⁹⁷ I will not discuss the use of income taxation here, as “only a fraction of cities” have the authority to collect it. Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. Rev. 292, 303 (2016).

¹⁹⁸ See Long, *supra* note 189.

¹⁹⁹ Ill. Const. art. VII, § 6(h); see, e.g., Alaska Stat. §§ 29.45.650, 29.45.700 (2023); Colo. Rev. Stat. § 29-2-105(1)(d) (2023).

²⁰⁰ See, e.g., Tex. Tax Code Ann. § 321.101(a) (West 2015) (“A municipality may adopt . . . a sales and use tax . . . at an election in which a majority of the qualified voters of the municipality approve the adoption . . .”).

revenue can be used for.²⁰¹ A few do not allow municipalities to collect sales taxes at all.²⁰² However, about half of local governments nationwide receive revenue from a sales tax.²⁰³ And for those municipalities that can collect sales taxes, this source of funding is both a more politically popular²⁰⁴ and more flexible option.

Consider Evanston, which pledged the first \$10 million of its 3% sales tax on newly legalized marijuana to its reparations fund.²⁰⁵ Because Evanston’s marijuana tax is not directly imposed on property owners, the program avoids the issue of eligible Black residents paying taxes into their own reparations fund. This choice of funding has another interesting feature: it connects to the subversive work of reparations itself. As Evanston City Council members noted in 2019, over 70% of people arrested on marijuana-related charges in Evanston in the preceding three-year period were Black, even though they make up less than 17% of the city’s population.²⁰⁶ It is symbolically appropriate, then, to excise a tax on marijuana to fund Black reparations.²⁰⁷

Municipalities across the country have already begun to levy these types of “special” taxes on particular industries; many could conceivably divert these taxes into a reparations fund. For example, in 2016, Philadelphia passed the Philadelphia Beverage Tax—commonly called the “soda tax”—which taxes distributors of sweetened beverages.²⁰⁸ As

²⁰¹ Whitney B. Afonso, *State LST Laws: A Comprehensive Analysis of the Laws Governing Local Sales Taxes*, 37 *Pub. Budgeting & Fin.* 25, 26 (2017).

²⁰² David L. Sjoquist, *Diversifying Municipal Revenue in Connecticut* 1 (2015).

²⁰³ Scharff, *supra* note 197, at 303.

²⁰⁴ Americans despise property taxes. See *The Most-Hated Tax—and What States Are Doing About It*, Nat’l Conf. of State Legislatures (July 24, 2023), <https://www.ncsl.org/fiscal/the-most-hated-tax-and-what-states-are-doing-about-it> [<https://perma.cc/P9QM-JW58>].

²⁰⁵ See *Evanston Local Reparations*, *supra* note 8 (follow “Legislative Actions to Date” dropdown).

²⁰⁶ 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> [<https://perma.cc/4WCB-5YY5>]; Teo Armus, *A Chicago Suburb Wants to Give Reparations to Black Residents. Its Funding Source? A Tax on Marijuana.*, *Wash. Post* (Dec. 2, 2019, 7:25 AM), <https://www.washingtonpost.com/nation/2019/12/02/evanston-illinois-reparations-plan-african-americans-is-marijuana-tax/> [<https://perma.cc/WMQ7-YQ4B>].

²⁰⁷ This tactic is somewhat in line with the “invest/divest” framework, which “calls for reallocating money from systems that harm marginalized communities to supportive community-based programs instead.” Simone, *supra* note 24, at 370. This tactic may include reallocating money from police budgets to community services, a way for reparations programs to become “abolition in action” themselves. *Id.* at 371.

²⁰⁸ *Williams v. City of Philadelphia*, 188 A.3d 421, 424 (Pa. 2018).

of last year, the tax has generated over \$409 million in revenue for the city,²⁰⁹ which has been used to fund a universal pre-K program, support public schools, and rebuild public infrastructure.²¹⁰ Those funds could easily be used for a reparations program instead. And in Pennsylvania, at least, this means of revenue-raising has been judicially approved: the Pennsylvania Supreme Court upheld the tax over a state preemption challenge as a valid use of the city's authority.²¹¹ Another popular "special" tax is the plastic bag tax, which levies a small fee (generally between five and ten cents) on the purchase of plastic bags.²¹² Many cities have successfully implemented these taxes already.²¹³

Beyond sales taxation, many cities are also empowered to levy "tangible personal property" taxes on certain movable assets, such as automobiles, boats, and jewelry.²¹⁴ Most states allow municipalities to collect taxes on personal property; a few do not.²¹⁵ Municipalities able to collect these taxes may use them as another funding source that, like marijuana, connects to historic harms perpetrated against Black communities. For example, the ability to afford an automobile helped fuel

²⁰⁹ Christy Brady & Rebecca Rhynhart, Data Release: Beverage Tax Revenue and Expenditures, Off. of the Controller, City of Phila., <https://controller.phila.gov/philadelphia-audits/data-release-beverage-tax/> [<https://perma.cc/8N6F-XCXC>] (last visited Aug. 30, 2024).

²¹⁰ Sarah Peterson, Five Years Later: How the Beverage Tax Has Changed Lives and Communities, City of Phila. (June 16, 2021), <https://www.phila.gov/2021-06-16-five-years-later-how-the-beverage-tax-has-changed-lives-and-communities/> [<https://perma.cc/9WQJ-MK5>].

²¹¹ See *Williams*, 188 A.3d at 437.

²¹² State Plastic Bag Legislation, Nat'l Conf. of State Legislatures, <https://www.ncsl.org/environment-and-natural-resources/state-plastic-bag-legislation> [<https://perma.cc/46MT-9YVC>] (last updated Feb. 8, 2021).

²¹³ Including this Author's current home of Charlottesville, Virginia. Virginia is not a home-rule state. However, in 2020, the state legislature authorized any county or city to adopt the Virginia Disposable Plastic Bag Tax. See Va. Code Ann. §§ 58.1-1745–58.1-1748 (2020). But cities do need to be aware of the rising state preemption trend in this area. See Richard Briffault, *The Challenge of the New Preemption*, 70 *Stan. L. Rev.* 1995, 2000–01 (2018).

²¹⁴ For an example of a state empowering municipalities to levy personal property taxes, see Va. Code Ann. § 46.2-752 (2024) ("[C]ounties, cities, and towns may levy and assess taxes and charge license fees on motor vehicles, trailers, and semitrailers.").

²¹⁵ For a fifty-state survey, see Garrett Watson, Tax Found., No. 668, *States Should Continue to Reform Taxes on Tangible Personal Property 9* (Aug. 2019), https://files.taxfoundation.org/20190807085823/TaxFoundation_FF668.pdf [<https://perma.cc/W9XE-55HR>].

“white flight” to the suburbs²¹⁶ and continues to impact the health of Black communities situated near highways due to urban renewal.²¹⁷

Another possible source of reparatory power lies in land use. Most cities are given a large degree of autonomy to control the use of land within their jurisdictions, including zoning authority.²¹⁸ Rather than focus reparations on taxing and spending powers, cities could create a “Land Back” type of reparations program (a method pioneered by indigenous communities).²¹⁹ Asheville, for example, could have kept the land it gained via urban renewal and established a community land trust instead,²²⁰ or given it back to the people who once lived there.²²¹ Manhattan Beach, California, recently engaged in a small-scale version of this when, in 2023, it returned oceanfront land known as “Bruce’s Beach” to the descendants of the Black owners from whom the city government had stripped it nearly 100 years prior.²²² Alternatively, cities could take the Santa Monica approach and grant eligible Black residents preferential treatment in the affordable housing selection process.²²³ Land-use powers give cities a host of other options for reparations programs.

²¹⁶ See Richard Florida, *How Cars Divide America*, Bloomberg (July 19, 2018, 8:00 AM), <https://www.bloomberg.com/news/articles/2018-07-19/how-the-car-keeps-americans-apart> [https://perma.cc/B7KU-LSBY].

²¹⁷ Sammy Roth, *How White and Affluent Drivers Are Polluting the Air Breathed by L.A.’s People of Color*, L.A. Times (Mar. 9, 2023, 6:00 AM), <https://www.latimes.com/environment/newsletter/2023-03-09/white-drivers-are-polluting-the-air-breathed-by-l-a-s-people-of-color-boiling-point> [https://perma.cc/KSY5-MGN2].

²¹⁸ Org. for Econ. Coop. & Dev., *The Governance of Land Use* (2017), <https://www.oecd.org/regional/regional-policy/land-use-United-States.pdf> [https://perma.cc/KS4V-YTSD].

²¹⁹ Wendy S. Greyeyes, *The Nation Within: Prospects for an Indigenous Future*, 52 Sw. L. Rev. 271, 278 (2023).

²²⁰ Jessica Grannis, *Community-Driven Climate Solutions: How Public-Private Partnerships with Land Trusts Can Advance Climate Action*, 44 Wm. & Mary Env’t L. & Pol’y Rev. 701, 711 (2020).

²²¹ This type of land-back strategy has catalyzed a litigation wave of African Americans seeking old family land seized through eminent domain abuses. Audra D.S. Burch, *A New Front in Reparations: Seeking the Return of Lost Family Land*, N.Y. Times (June 14, 2023), <https://www.nytimes.com/2023/06/08/us/black-americans-family-land-reparations.html> [https://perma.cc/82H9-V9KY].

²²² Clyde McGrady, *Bruce’s Beach Was Hailed as a Reparations Model. Then the Family Sold It*, N.Y. Times (Feb. 20, 2023), <https://www.nytimes.com/2023/02/19/us/bruces-beach-sold-reparations.html> [https://perma.cc/JY8C-VNV9]. Willa and Charles Bruce, two Black entrepreneurs, built a thriving beach resort on the land in 1912 catering to Black beachgoers. The city condemned the property in 1924 and paid the Bruce family a pittance for it. *Id.*

²²³ See *supra* Section I.B.

B. Avoiding the “Death Star” of State Preemption

A second consideration for cities hoping to pioneer reparations is state preemption. States today have shown an appetite for aggressively preempting local law—some even go so far as to impose penalties on local government for enacting disfavored legislation at all.²²⁴ This preemption wave is generally advanced by Republican-dominated state governments and used to strike down progressive city policy.²²⁵ Take Florida, which recently passed a law preempting local governments from reducing their police budgets in the wake of the Black Lives Matter movement.²²⁶ Professor Richard Briffault calls these aggressive state actions “the new preemption.”²²⁷

The new preemption tends to coalesce on a few industry-specific areas of city policy, such as firearms, tobacco, broadband, ride-sharing, and environmental regulation.²²⁸ States have also demonstrated a particular interest in preempting employment laws such as local minimum wage and paid leave policies.²²⁹ One infamous flashpoint in the preemption battle occurred in 2016, when North Carolina preempted a Charlotte ordinance allowing transgender people to use the bathroom consistent with their gender identity.²³⁰ Given the vehemence with which Republican-dominated states use preemption to dispose of progressive city policies, it would not be surprising to see a state preemption challenge to a municipal reparations policy.

So how should local governments plan to face such a challenge? The first step is to structure their reparations programs wisely *ex ante*. That means, in the first instance, understanding their political environment. In home-rule states—particularly where the state grants some level of home-rule immunity—cities will be more likely to have success against a preemption challenge, and perhaps states will choose not to bring a challenge at all. Cities subject to Dillon’s Rule are unlikely to have the

²²⁴ Scholars call this “punitive preemption.” Briffault, *supra* note 213, at 1997; Schragger, *supra* note 148, at 1182.

²²⁵ Briffault, *supra* note 213, at 1997–98.

²²⁶ Rick Su, Marissa Roy & Nestor Davidson, Preemption of Police Reform: A Roadblock to Racial Justice, 94 *Temp. L. Rev.* 663, 663–64 (2022).

²²⁷ See Briffault, *supra* note 213, at 1997.

²²⁸ See Schragger, *supra* note 148, at 1170–74.

²²⁹ *Id.* at 1174–76.

²³⁰ For a complete history of the so-called “Bathroom Bill” fight, see Mark Dorosin, North Carolina’s H.B.2: A Case Study in LGBTQ Rights, Preemption, and the (Un)democratic Process, 122 *W. Va. L. Rev.* 783 (2020).

same type of success.²³¹ To analyze the likelihood of a specific preemption bill getting through state government, cities should identify if they sit in a Republican-trifecta state—where conservatives control the governorship and both houses of government—or whether state government is split.²³² Of course, cities in Democratic-run states will have the best chance of enacting reparations unbothered by state government.

Second, cities will best insulate themselves when they use their preexisting core powers to create a reparations program—i.e., taxing, spending, and land use—rather than attempting to create new powers. It is far easier for a state to pass a specific preemption bill banning the use of some *new* city power than it is for them to ban a city from using a longstanding, core power. Although some states have threatened—or already passed—“nuclear” preemption bills, which strip municipalities of many of their core governing abilities, these “nuclear” bills aimed at city power are (1) rare and (2) much more likely to face political resistance than preemption bills responding to a *new* use of local authority.²³³ Even conservative cities in conservative states are joining the resistance against these “nuclear” state power grabs.²³⁴

Once a city’s reparations program is in place, local leaders should consider harnessing political coalitions to defend their policy from state challenge. In America’s hyperpolarized and nationalized political environment, local politics are rarely local—city politics are often the first

²³¹ See *supra* Part III.

²³² Cities should also note if they sit in a state that is particularly jumpy with preemption. See *infra* note 233.

²³³ Florida, Oklahoma, and Texas became the first states to threaten this type of legislation. See Briffault, *supra* note 213, at 2007. Texas actually went through with it. Its so-called “Death Star bill” grants exclusive legislative authority to the state in eight areas: agriculture, business and commerce, finance, insurance, labor, natural resources, occupations, and property. The law is currently being challenged in a Texas state appeals court after the lower court found the law unconstitutional. See Matt Sledge, *After Fierce Debate, Texas ‘Death Star’ Law Has Yet to Be Used in Houston, Other Big Cities*, Houston Landing (Nov. 13, 2023, 4:00 AM), <https://houstonlanding.org/after-fierce-debate-texas-death-star-law-has-yet-to-be-used-in-houston-other-big-cities> [https://perma.cc/322A-MRY].

²³⁴ Many Republican-led cities in Texas joined the legal battle against the “Death Star bill.” See Michael Hardy, *Republican and Democratic Cities Band Together to Blow Up the Death Star Bill*, Tex. Monthly (Nov. 2023), <https://www.texasmonthly.com/news-politics/republican-and-democratic-cities-band-together-to-blow-up-the-death-star-bill/> [https://perma.cc/B89Y-XY8L].

battlegrounds of the “culture wars.”²³⁵ But the trend toward politicizing local legislation can actually *aid* cities in building coalitions to support them against state preemption challenges. Take the reaction to North Carolina’s 2016 bill preempting Charlotte’s transgender bathroom policy: almost immediately after the bill passed, both local and national companies expressed serious concerns about doing business in the state,²³⁶ and several cities across the country banned non-essential publicly funded travel to North Carolina.²³⁷ Soon afterward, Bruce Springsteen cancelled his concert in Greensboro,²³⁸ PayPal rescinded plans to build a new operations center in Charlotte,²³⁹ and, devastatingly for the basketball-centric state, the NCAA relocated some March Madness games to other states.²⁴⁰ The economic and political consequences of the “bathroom bill” blowback likely cost Republican Governor Pat McCrory the election²⁴¹ and eventually led to the repeal of the preemptive legislation.²⁴² In other states, private business boycotts have also been successful in stopping discriminatory state laws.²⁴³

²³⁵ See generally Mark Chou & Rachel Busbridge, *How Local Governments Govern Culture War Conflicts* (2020) (documenting the rise of local government as an important political front in national culture wars). See Schragger, *supra* note 148, at 1226–28.

²³⁶ Katherine Peralta & Rick Rothacker, *Red Hat, Biogen, NCAA Speak Out on NC Law Restricting LGBT Protections*, *News & Observer* (Raleigh) (Mar. 25, 2016, 2:14 PM), <https://www.newsobserver.com/news/business/article68093347.html> [<https://perma.cc/DY4X-BGK7>].

²³⁷ Colin Campbell, *New York, Four Cities Ban Government Travel to NC over LGBT Law*, *News & Observer* (Raleigh) (Mar. 29, 2016, 6:18 PM), <https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article68797392.html> [<https://perma.cc/PNW9-UD92>].

²³⁸ Mark Berman, *Bruce Springsteen Cancels North Carolina Concert to Protest Bathroom Law*, *Wash. Post* (Apr. 8, 2016, 7:35 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/04/08/bruce-springsteen-cancels-n-c-show-to-protest-bathroom-law/> [<https://perma.cc/6NB4-WXSP>].

²³⁹ Rick Rothacker, Ely Portillo & Katherine Peralta, *PayPal Withdraws Plans for Charlotte Expansion Over HB2*, *Charlotte Observer* (Apr. 5, 2016, 7:32 PM), <https://www.charlotteobserver.com/news/business/article70001502.html> [<https://perma.cc/6EYX-ZE35>].

²⁴⁰ Andrew Carter, *NCAA Pulls Championship Events from North Carolina Over HB2*, *Charlotte Observer* (Sept. 13, 2016, 1:39 PM), <https://www.charlotteobserver.com/sports/article101464492.html> [<https://perma.cc/SW3H-4KDA>].

²⁴¹ Jim Morrill, *Tolls—and HB2—Became Roadblocks for Pat McCrory*, *News & Observer* (Raleigh) (Nov. 10, 2016, 8:30 PM), <https://www.newsobserver.com/news/politics-government/election/article113752089.html> [<https://perma.cc/M4D5-NEF7>] (“According to an exit poll Tuesday, 66 percent of North Carolina voters said they oppose the law.”).

²⁴² Dorosin, *supra* note 230, at 809.

²⁴³ Schragger, *supra* note 148, at 1229.

If states attempt to preempt city reparations policies, cities can solicit the same type of public-private coalition seen in the North Carolina “bathroom bill” fight by tapping into the salience of the Black Lives Matter movement. In the wake of George Floyd’s murder, most of the largest companies in America lined up to donate money to racial equity initiatives and to publicly oppose police brutality.²⁴⁴ Many of those private investments focus on the same types of things cities would seek to do with reparations: fostering economic, educational, and housing equality.²⁴⁵ If cities get their PR right—that is to say, if cities frame reparations in language about opportunity, fairness, and equality—they may well be able to win corporate support in a battle against a state seeking to preempt their reparations. And as North Carolina taught us in 2016, those allies can make all the difference.

If cities are taken to court, there are a few legal strategies they can deploy. Of course, this also depends upon the particular structure of home rule in their state. A few states go far to protect local regulation.²⁴⁶ Even states that don’t go as far often have “restrictions on [their] legislative processes which, while not necessarily aimed at protecting local governments per se, can provide a basis for challenging preemptive legislation.”²⁴⁷ Beyond these individual state provisions, cities in *imperio*-home-rule regimes can argue that their reparations programs are a matter of “local concern” properly handled locally—indeed, cities are compensating their *own* citizens for historic harms that the cities *themselves* perpetrated. And of course, cities can appeal to the values of federalism long espoused by the Court.²⁴⁸ But as many scholars

²⁴⁴ Tracy Jan, Jena McGregor & Meghan Hoyer, Corporate America’s \$50 Billion Promise, Wash. Post (Aug. 24, 2021, 7:03 PM), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> [<https://perma.cc/RUC2-8N3L>].

²⁴⁵ *Id.*

²⁴⁶ See *Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles*, 812 P.2d 916, 925, 930 (Cal. 1991) (holding that state preemption bills must be reasonably related to an issue of statewide concern and be narrowly tailored to that concern); *City of Canton v. Ohio*, 766 N.E.2d 963, 966–68 (Ohio 2002) (holding that only a “general” state law can preempt local regulations, and construing “general” narrowly).

²⁴⁷ Briffault, *supra* note 213, at 2011.

²⁴⁸ *Bond v. United States*, 564 U.S. 211, 221 (2011) (“The federal structure allows local policies ‘more sensitive to the diverse needs of a heterogeneous society,’ permits ‘innovation and experimentation,’ enables greater citizen ‘involvement in democratic processes,’ and makes government ‘more responsive’” (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))); *Avery v. Midland County*, 390 U.S. 474, 481 (1968) (“In a word, institutions of local government have always been a major aspect of our system, and their responsible and

recognize, getting to this point does not bode well for the city—even with layers of home-rule protection, the state will likely prevail.²⁴⁹ Staying out of court is the city’s best option.

CONCLUSION

Despite the obstacles states may place in their path, cities remain the most promising venue for piloting reparations programs. Given their political appetites and proximity to formerly discriminatory policies, cities are well-suited to craft effective and constitutional reparations.

While the work of redistributive justice is nowhere close to done, cities can and should lead the way in this time of national racial reckoning. If we are to see “a revolution of the American consciousness,” then we must start somewhere.²⁵⁰ If not our cities, then where?

responsive operation is today of increasing importance to the quality of life of more and more of our citizens.”).

²⁴⁹ Schragger, *supra* note 148, at 1220–21 (recognizing the statewide political forces that drive state courts to favor state legislative authority over local authority).

²⁵⁰ Coates, *supra* note 3.