

Ogletree Reparative Bar Association



DESIGNING CONSTITUTIONALLY DURABLE REPARATIONS PROGRAMS

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A Reparations Law Guide

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Under the most accurate interpretation of current United States Supreme Court jurisprudence, municipal reparations programs are not constitutionally doomed. Their constitutionality depends on whether a municipality can identify a specific government-linked harm, build a credible evidentiary record, define eligible beneficiaries with care, and design remedies that are tailored to provide a remedy for the government linked injury.

This guide is intended for attorneys advising reparations commissions, elected officials, agencies, and program administrators. It translates core constitutional principles into practical design questions that can help local communities strengthen reparations programs before they are challenged.

It is impossible to design a reparations program that will eliminate all litigation risk. Even frivolous legal challenges always remain a possibility. But a program should be able to explain, consistent with current laws, why the program is a remedy for specific documented harms rather than a generalized racial preference, or broad equity initiative. If that can be done, and current Supreme Court jurisprudence is followed, a municipal reparations program will survive a constitutional challenge.

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WHY ARE HARM REPORTS CRUCIAL FOR THE LEGALITY OF REPARATIONS PROGRAMS?

Harm reports are crucial because they create the factual and legal record that allows a municipality to justify reparations as a remedy for specific government-linked harms rather than as a generalized race-conscious benefit. In current constitutional terms, a harm report helps establish the municipality's compelling interest, define the injury, identify the harmed population, and connect the remedy to the documented harm.

A They help establish a compelling governmental interest.

A municipality cannot rely only on the existence of racial inequality or historical injustice in the abstract. The report should identify what the municipality did, authorized, permitted, enforced, funded, failed to prevent, or benefited from. A harm report provides the constitutional justification. It documents the specific governmental conduct that created or deepened the injury and explains why the municipality has a legitimate and compelling interest in repair.

B They distinguish reparations from generalized racial preference.

A harm report helps show that the program is not giving benefits based on race alone. It shows that the municipality is repairing specific harms connected to government action. If race-conscious criteria are used, the report should explain how race is tied to the harm itself. This helps frame race-conscious reparations as repair for documented race-based injury, not as a generalized provision of benefits on the grounds of racial preference.

C They provide a basis for review of the reparations remedy.

A strong harm report gives courts, policymakers, and the public a concrete basis for evaluating the program. It identifies the harm to be repaired, the population affected, and the relationship between the proposed remedy and the injury.

D They support building a remedy that is precisely designed to remedy the specific harm.

Without a harm report, narrow tailoring the remedy to the harm becomes difficult, because the municipality has not clearly defined what the harm was on the basis of data or documentation. The report supplies the factual predicate for designing eligibility criteria, remedy type, scope, duration, and implementation.

WHY ARE REPARATIONS DIFFERENT FROM AFFIRMATIVE ACTION OR DEI?

Reparations are different from affirmative action or Diversity, Equity, and Inclusion (DEI) programs because they are not designed to promote diversity, representation, or general inclusion. Reparations are designed to address specific harms caused, authorized, tolerated, or deepened by the party seeking to make things right. This distinction matters because while race conscious programming promulgated in order to support broader diversity in society have come under fire, the constitution clearly allows programs designed to remedy for specific past harms.

A They respond to specifically identified harms.

Affirmative action and DEI programs are often framed around access, representation, institutional diversity, and/or inclusion. Reparations are different because they begin from discussion of a prior injury. The central question is not whether the program increases diversity, but whether the municipality is repairing a specific harm that it caused, enabled, or failed to prevent.

B They are grounded in accountability and discussion of the past.

The constitutional basis for reparations is strongest when the municipality can identify its own role in the harm. That role may include direct action, discriminatory policy, exclusion from public benefits, failure to protect residents, uneven enforcement, or participation in systems that deprived residents of property, opportunity, safety, or public resources. Reparations should be

framed as government accountability for government-linked harm.

C They require a remedial objective.

Vague or abstract goals are especially vulnerable because courts may assume the goal is a generalized effort to social engineer diversity. Reparations programs are stronger when the objective is concrete: repairing specifically documented dispossession, exclusion, underinvestment, displacement, lost opportunity, or other harms identified in the record. A municipality should be able to explain what injury the program addresses and how the selected remedy responds to that injury.

D The distinction matters because it implicates a separate jurisprudence.

If the process above is followed, reparations programs should not be analyzed as ordinary DEI or affirmative action measures. After *Students for Fair Admissions v. Harvard (2023)*, programs justified by broad diversity or inclusion goals may face heightened skepticism, particularly where the goals are difficult to measure or review. Reparations, by contrast, can rest on a more concrete remedial foundation: specific government-linked harm, an identified injured class, and a remedy designed to address that injury. The line of cases is different, for example implicating *City of Richmond v. Crosson (1989)*. The stronger the record of harm and the closer the fit between harm and remedy, the more constitutionally durable the program becomes.

HOW CAN A HARM REPORT DEMONSTRATE A COMPELLING GOVERNMENTAL INTEREST?

A compelling governmental interest exists when the municipality can show that it is remedying specific harms connected to governmental action, policy, enforcement, exclusion, or failure to act. The strongest reparations programs do not rely on broad claims of societal discrimination alone. They identify the municipality's role in producing or maintaining the harm and explain why repair is a legitimate public responsibility.

A General historical injustice is not enough by itself.

A municipality may acknowledge broad histories of slavery, segregation, racial exclusion, displacement, or economic exploitation, but a constitutional defense requires more than recognition of societal wrongdoing. The municipality should identify concrete harms within its own jurisdiction and connect those harms to public action or inaction. This does not mean the city must prove every injury with courtroom-level precision, but it should build a record that shows more than generalized inequality.

B The municipality should identify its own role in the harm.

The strongest compelling interest arises when the city can show what it did, authorized, enforced, funded, tolerated, or failed to prevent. This may include discriminatory zoning, racially exclusionary housing policy, land dispossession, urban renewal displacement, unequal access to public services, discriminatory licensing or contracting, exclusion from municipal benefits,

discriminatory policing, or other government-linked harms. The key is to show that the reparations program responds to a harm connected to the municipality’s own conduct or responsibility.

C The harm should be specific and connected to present effects.

A compelling interest is stronger when the city can explain how past government-linked harm continues to shape present conditions. The report should connect historical conduct to current effects such as wealth loss, displacement, underinvestment, exclusion from opportunity, property deprivation, health disparities, educational inequity, or other measurable injuries. This helps demonstrate that the program is not merely symbolic or aspirational, but remedial.

D A compelling interest should be stated in remedial terms.

The city’s stated interest should not be framed as simply “advancing equity,” “promoting diversity,” or “addressing racial disparities” in the abstract. Those goals may be part of the broader public purpose, but the constitutional framing should be more precise. The stronger formulation is: the municipality seeks to remedy specific government-linked harms documented in the record and to repair the continuing effects of those harms through a tailored reparations program.

HOW DO THE HARM FINDINGS TRANSLATE INTO NARROWLY TAILORED REMEDIES?

Harm findings translate into narrowly tailored remedies when the municipality can show a clear relationship between the documented injury, the people eligible for repair, and the remedy selected. Narrow tailoring does not mean a reparations program must be timid or symbolic. It means the city can explain why this remedy, for this group, responds to this harm.

A The remedy should be causally linked to the injury.

The form of repair should flow from the harm identified in the report. The municipality should be able to explain what harm occurred, how the government contributed to it, and why the selected remedy responds to that injury. Property loss, displacement, or exclusion from homeownership may support housing assistance, land return, property tax relief, or compensation. Exclusion from contracting or business opportunity may support capital assistance, procurement access, technical support, or business development. Education, health, cultural loss, or community disinvestment should likewise be matched with responsive remedies.

B The beneficiary class should be tied to the documented harm.

Eligibility should be defined by connection to the injury, not over-broad categories. Relevant criteria may include lineage, residency, neighborhood, displacement history, exposure to a particular policy, exclusion from a public benefit, loss of property, or other documented relationship to the injury. Race-conscious criteria

may be legally supportable where race was the grounds on which the harm itself was inflicted. In those cases, the record should explain why race is a necessary eligibility requirement and how it connects to the remedial purpose. In some cases, however, direct evidentiary proof identifying every injured party may not be available.

C The municipality should address alternatives.

A program is stronger when the city can show that it considered alternative ways to achieve the same remedial goal. This does not require abandoning race-conscious design where race was a central factor in the distribution of the harm, nor does it require choosing the weakest or most politically comfortable remedy. It does require explaining why the selected approach is the appropriate remedial tool, including whether race-neutral proxies, geography, lineage, income, residency, or policy-exposure criteria would adequately reach the harmed population.

D The program should closely connect the harm to the remedy

Narrow tailoring is strengthened when the program includes clear eligibility rules, defined remedy categories, administrative discretion, review mechanisms, and a reasonable scope or duration. The city should avoid rigid racial balancing, over-broad classifications, or remedies that appear disconnected from the harm report. The more clearly the program shows fit between harm, beneficiary, and remedy, the stronger its constitutional posture.

WHAT MAKES A REPARATIONS PROGRAM CONSTITUTIONALLY VULNERABLE?

A reparations program becomes constitutionally vulnerable when the municipality cannot clearly connect the program to documented government-linked harm. The main risk is not that reparations are inherently impermissible. The main risk is that a program may appear too broad, too abstract, or too disconnected from the specific injury it seeks to repair.

A The record is too thin or too general.

A program is vulnerable when the municipality relies on broad references to racism, inequality, or historic injustice without identifying specific local harms. General disparity data may help provide context, but it should not carry the constitutional argument alone. The record should identify the relevant conduct, the affected population, and the continuing effects of the harm.

B The government nexus is unclear.

A reparations program is weaker when the municipality cannot explain its own role in creating, enforcing, authorizing, tolerating, or benefiting from the harm. The constitutional argument is strongest when the program is tied to governmental responsibility. If the harm appears only societal or private, the city should explain why municipal action is still justified.

C The beneficiary class is over-broad or lacks causation to injury.

Eligibility criteria should track the documented harm. A program is vulnerable when the beneficiary class is defined too broadly, relies on race alone without a clear, locally based historical explanation as to why, or includes people who could not be plausibly impacted by the specific injuries detailed in the report. The city should be able to explain how the harm report suggested the need to provide a benefit to this group.

D The remedy is not tailored to address the specific harm.

A program is vulnerable when the selected remedy does not correspond to the injury identified in the record. For example, a harm report focused on property loss should explain why the remedy repairs property-related injury, wealth loss, displacement, or related consequences. Remedies do not need to be perfectly connected (often harm in one area causes unforeseen consequences in another part of life), but the explanation should be well reasoned, proportionate, and there should be a connection to the harm.

E The program uses buzz words or vague language

Terms like “racial balancing,” “diversity,” or generalized “equity” can weaken the constitutional framing if they replace remedial language. Vague goals, indefinite duration, or failure to consider alternatives may also increase risk. The program should consistently use the language of harm, responsibility, repair, and fit.

WHAT STRENGTHENS A REPARATIONS PROGRAM BEFORE LITIGATION BEGINS?

A reparations program is strongest when the municipality builds the constitutional defense into the program from the start. This means treating the harm report, legislative findings, ordinance language, eligibility criteria, and remedy design as connected parts of one remedial framework—all designed to survive litigation. The goal is to make the program’s purpose, record, and design clear before any challenge is filed. This is why it is important for lawyers to take a play a role in every step of the process

A Building the harm report as a legal record.

The harm report should do more than narrate history. It should identify specific harms, document the municipality’s role, name affected populations where possible, and connect past conduct to present effects. The report should create a usable record for policymakers, administrators, and future legal defense.

B Incorporating findings into the ordinance or resolution.

The municipality should not leave the constitutionally sound arguments for the repair only in the harm report. The ordinance or resolution should include clear findings about the harm, the government nexus, the affected population, and the remedial purpose of the program. This helps preserve the connection between the record and the remedy.

C Defining eligibility with precision.

Eligibility should reflect the documented injury. Criteria may include lineage, residency, neighborhood, displacement history, policy exposure, exclusion from public benefits, loss of property, or other connections to the harm. Where race-conscious criteria are used, the municipality should explain why race is part of the injury and why the criterion is necessary to reach the harmed population.

D Tie each remedy to a harm category.

Each remedy should correspond to a documented injury. Cash payments, land return, housing support, business support, education funds, health services, cultural repair, or community investment should be linked to the harms they are meant to address. This makes the program easier to explain and harder to characterize as a generalized preference.

WHAT STRENGTHENS A REPARATIONS PROGRAM AGAINST TIMING CONCERNS?

A reparations program is stronger when the municipality can articulate the expected duration, review process, or endpoint of the remedy where appropriate. Remedies should continue only until their reparative goal is complete. Some remedies, such as institutional reforms, commitments to non-repetition, memorialization, or structural changes, may be ongoing or permanent. Others, such as financial compensation, may be strengthened by defined time limits tied to the documented harm, remedial purpose, and ability to measure progress.

A Consider sunset provisions where appropriate.

The strongest reparations programs have clear goals. Even if the programs envision long term administration, that fact should be articulated and explained, and the long term timeline accurately described. A sunset provision slated for decades in the future would survive legal scrutiny better than one that sought to implement a remedy indefinitely.

B Focus on measurable repair of the documented harm.

A strong report targets its remedial purpose at a documented harm. Where a remedy is time-limited, the municipality should explain how the timeframe relates to the specific injury, the remedial purpose, and the ability to measure progress. Time limits or review periods can help surviving strict scrutiny review, but they are not enough on their own to make a program constitutionally durable. The goal is not to create an indefinite remedy for an

overgeneralized harm, but to design a specific reparative measure that remains connected to the documented injury and, where appropriate, ends or is reassessed once it has accomplished its defined purpose.

C Utilize explicit expiration dates when appropriate.

Some remedies may be strengthened by an explicit, defined expiration or application period. This may especially be useful for remedies such as direct payments, grant programs, or pilot programs. The program should be disciplined and realistic in its design so that repair can be achieved by the expiration date. When there are sunset provisions implemented, the municipality should explain why that period is appropriate and how repair will be measured and achieved by the defined end date.

D Demonstrate administrative efficiency.

The program should include clear review time periods, renewability mechanisms, and practical administrative rules. Regular review can ensure the maintenance of targeted goals, accurate measurements of progress, and protection against program inefficiencies. Renewal may also be appropriate if the program has not fulfilled its reparative function in the set time period. The goal is to ensure that the remedy remains accountable and designed to achieve repair efficiently.

Municipal reparations programs are strongest when they are built from a clear remedial chain: harm, government responsibility, affected population, and tailored repair. The constitutional question is not whether reparations are categorically impermissible, but whether the municipality can show that its program responds to specific documented harms and is designed with sufficient care.

A strong harm report does more than tell history. It supplies the factual foundation for the municipality's compelling interest, supports narrow tailoring, and helps distinguish reparations from generalized racial preference. The strongest programs make the connection between record and remedy visible at every stage: report, ordinance, eligibility, implementation, timing, and public explanation.

Scholarship

- Lisa Lucile Owens, *An Argument for Housing Reparations*, 77 Me. L. Rev. 243 (2025).
- Carlton M. 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 (2009).

Cases

- *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
- *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).
- *United States v. Paradise*, 480 U.S. 149 (1987).
- *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).
- *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
- *Rice v. Cayetano*, 528 U.S. 495 (2000).
- *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).
- *Students for Fair Admissions, Inc. v. University of North Carolina*, 600 U.S. 181 (2023).

Additional Authorities

- Civil Liberties Act of 1988, 50 U.S.C. §§ 1989b to 1989b-9.

1. Build the Record

- **Harm identified:** What specific injury is the municipality seeking to repair?
- **Government nexus established:** What did the municipality do, authorize, enforce, fund, tolerate, fail to prevent, or benefit from?
- **Evidence documented:** Does the record include harm reports, legislative findings, testimony, archival materials, data, policy history, or expert analysis?

2. Define the Legal Purpose

- **Compelling interest stated:** Is the program framed as repair for specific government-linked harm?
- **Present effects connected:** Does the record explain how the harm continues to affect people, families, neighborhoods, institutions, or communities?
- **Remedial language used:** Does the ordinance speak in terms of harm, responsibility, repair, and fit?

3. Design the Remedy

- **Eligibility tied to harm:** Are beneficiaries connected to the documented injury?
- **Remedy matched to injury:** Is there a causal link between the harm and the selected form of repair?
- **Timing matched to remedy:** Does the program explain whether the remedy is time-limited, subject to review, renewable, or ongoing because of its reparative goals?
- **Alternatives considered:** Has the municipality considered whether race-neutral, proxy-based, geographic, lineage-based, income-based, or policy-exposure criteria could reach the harmed population?

4. Reduce Vulnerability

- **Overbreadth avoided:** Does the program avoid vague goals, rigid quotas, indefinite duration, unsupported racial classifications, or racial balancing language?
- **Flexibility preserved:** Are there clear procedures, administrative standards, review mechanisms, and opportunities to adjust implementation?
- **Findings embedded:** Are factual findings and remedial purpose included in the adopting ordinance or resolution?

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