RACE AS EVIDENCE: THE HISTORICAL RACIAL NEXUS AND EQUAL PROTECTION

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ABSTRACT

This Essay accepts strict scrutiny as the constitutional terrain within which race-conscious policy must operate and builds a refined framework for equal protection analysis: the Historical Racial Nexus ("HRN"). HRN offers a narrow tailoring theory designed to survive contemporary judicial scrutiny by charting a third path between colorblind formalism and categorical race-based remedialism. Rather than treating race as a present-day identity classification, HRN reconceptualizes race as historical evidence of specific, documented government-inflicted injury. Under this approach, constitutionally permissible race-conscious policy is grounded in temporally and geographically defined acts of state action and ties eligibility for redress to demonstrable causal connections to that harm.

In a legal landscape marked by increasing judicial hostility to race-based remedies, for example in *Students for Fair Admissions v. Harvard*, HRN provides a constitutionally grounded reframing that uses race as an evidentiary lens to trace and remedy state-sponsored discrimination. Unlike policies that rely on broad identity categories or generalized claims of social inequality, HRN anchors reparative legislation in historically specific government conduct.

Through retrospective analysis of the Evanston, Illinois municipal reparations initiative and the federal Civil Liberties Act of 1988, this Essay demonstrates how policies structured around an identifiable historical nexus can satisfy contemporary formulations of strict scrutiny by articulating a compelling governmental interest, remedying past constitutional injury, and employing narrowly tailored means. The Essay situates HRN within equal protection jurisprudence and argues that the framework aligns with the Supreme Court's doctrinal requirements while preserving space for democratically enacted, historically accountable policymaking.

HRN also addresses a longstanding tension between social scientific understandings of race as fluid and socially constructed and the law's tendency to treat race as fixed and essential. By distinguishing race as identity from race as historical evidence, HRN offers a more contextually grounded and normatively coherent model for race-conscious policy. In doing so, it reimagines how equal protection can meaningfully fulfill its remedial promise, grounding race-conscious legislation in history, causation, and accountability while expanding the constitutional imagination.

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INTRODUCTION

The use of racial criteria in governmental policy is subject to a great deal of conceptual confusion, which often leaves it unlinked to social and historical context.[1] This Essay accepts strict scrutiny (bracketing a great deal) as the terrain to be navigated and develops a refined framework for equal protection analysis grounded in a historical nexus between governmental harm and racial specificity. The Historical Racial Nexus ("HRN") offers an alternative basis for redress, distinct from race as a present-day identity category, by anchoring reparative policy in specific, documented instances of state-sanctioned racial discrimination. Unlike broader race-conscious measures that rely on generalized claims of inequality or present racial status, HRN-based policies tie eligibility to a direct evidentiary link between identifiable government action and the individuals or descendants affected by that harm. [2]

Questions about the use of race in policy frameworks which have emerged following the Supreme Court's interpretation of Strict Scrutiny in *Students For Fair Admission v. Harvard* (2023) ("SFFA") raise important provocations to prevailing judicial understandings of the relationship between race, equal protection, and strict scrutiny.[3] This Essay retrospectively examines the use of race in two reparations[4] policy frameworks—the recent

1. *See generally*, Benjamin Eidelson & Deborah Hellman, *Unreflective Disequilibrium: Race-Conscious Admissions After* SFFA, 4 AM. J.L. & EQUAL. 295 (2024).

2. Several scholars have pointed out that reparations can or should be grounded in state-inflicted harm. *See, e.g.*, Eric Yamamoto, Charles Ogletree & Reva Siegel.

3. *See, e.g.*, Issa Kohler-Hausmann, *What Did* SFFA *Ban? Acting on the Basis of Race and Treating People as Equals*, 66 ARIZ. L. REV. 305, 312–14 (2024); Avital Fried, *Equal Standards for Equal Protection: Revisiting Race Discrimination in Jury Selection After* SFFA, 134 YALE L.J. 709 (2025); Justin Driver, *The Cure as Disease: The Conservative Case Against SFFA v. Harvard*, 2023 SUP. CT. REV. 1, 10 ("SFFA's approach to the strict scrutiny framework that the Court embraced in Grutter nonetheless represented a sea change from the earlier era.").

4. Reparations are legislative actions which seek to provide repair in relation to past government actions. They are the result of a political and democratic process and as

municipal housing reparations framework developed in Evanston, Illinois,[5] and the policy framework developed in the federal Civil Liberties Act of 1988[6]—to argue for a refined conceptual use of race in reparatory legislative policy as one of HRN. It also addresses a considerable source of confusion in law around the construction of race: Social scientists have often stated that while race is not a fixed category,[7] the effects of racism are profound and intersectional.[8] To contrast, the law often presumes that race is a fixed identity category instead of a social construction with porous and ever-changing boundaries, and it often fails to account for intersectional complexities.[9]

The HRN framework realizes a conception of race that reframes the use of race not as providing advantage vis-a-vis racial identity[10] or as a proxy[11] for generalized disadvantage, but as an evidentiary marker of government inflicted past harm.[12] Under such a model, race is not the basis on which a benefit is conferred at the exclusion of others, but rather it is one aspect of

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such may discriminate against other racial groups in whatever specific atonement the reparations are addressing. *See* Obadele v. U.S., 52 Fed. Cl. 432, 443 (2002), aff'd, 61 F. App'x 705 (Fed. Cir. 2003).

5. CITY OF EVANSTON, 126-R-19 A RESOLUTION: ESTABLISHING A CITY OF EVANSTON FUNDING SOURCE DEVOTED TO LOCAL REPARATIONS (2019).

6. H.R. 442, 100th Cong. (1988).

7. *See generally*, Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21 (2013).

8. *See generally*, Mara Loveman & Jeronimo O. Muniz, *How Puerto Rico Became White: Boundary Dynamics and Intercensus Racial Reclassification*, 72 AM. SOCIO. REV. 915 (2007).

9. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 201–210 (2023). In *SFFA*, race is viewed as an easily identifiable and fixed characteristic as opposed to one that is socially constructed through relations with social power. *Id.*

10. Again, this is how the Supreme Court characterizes the affirmative action program in *SFFA*, for example. *See Students for Fair Admission*, 600 U.S. at 201–210.

11. *See generally*, Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605 (2015) (providing an expanded explanation of how categories are used as proxies in equal protection).

12. *See generally* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (providing a critique of formal equality, upon which historical context is essential in crafting constitutionally permissible remedies).

identification of those who were situated in the path of deliberate and documented government action that caused measurable injury.[13]

For example, race-based harm resulted from explicit governmental choices such as those related to discriminatory zoning,[14] redlining,[15] deed restrictions,[16] financing,[17] inheritance,[18] and property seizure.[19] Remedial and reparatory policies would benefit by being able to reference the racial aspects of this harm, which are readily identifiable. Identifying the racialized nature of harm in such circumstances does not confer advantage upon

13. For example, when the federal government creates aid packages for the victims of natural or man-made disasters, eligibility is limited by the individual's proximity to a specific event, such as 9/11 or a hurricane. For a description of the 9/11 Victim's Compensation Fund, *see* Kyle D. Logue & Kenneth S. Abraham, *The Genie and the Bottle: Collateral Sources Under the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 591 (2003) ("… the Fund can be viewed as an innovative alternative to tort liability, analogous to workers' compensation or auto no-fault insurance, that pays more generous benefits than these systems but (of course) to a more narrowly defined set of beneficiaries.")

14. Note, *Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right*, 135 HARV. L. REV. 1104, 1104 (2022) ("[T]he zoning movement also buoyed efforts to separate neighborhoods by race, income, and social class. In *Village of Euclid v. Ambler Realty Co.*, the U.S. Supreme Court justified zoning's burden on property rights in part by pointing to the necessity of sequestering the new apartment—'a mere parasite'—for fear that higher-density housing would infect American social values and instigate 'race suicide.'").

15. Danielle Stokes, *From Redlining to Greenlining*, 71 UCLA L. REV. 628, 631 (2024) ("Although the Fair Housing Act of 1968 marked the beginning of the end of redlining as a formal practice, scholars have analyzed the many ways in which its legacy of injustice persists today. For instance, research has shown redlining's impact on education and community development. It has shown the associated lack of public transportation. And it has documented the prevalence of food deserts and other sources of food insecurity.").

16. Charles M. Lamb, *Housing Discrimination and Segregation in America: Problematical Dimensions and the Federal Legal Response*, 30 CATH. U. L. REV. 363, 402–04 (1981).

17. *Id.*

18. *See, e.g.*, Brenda D. Gibson, *The Heirs' Property Problem: Racial Caste Origins and Systemic Effects in the Black Community*, 26 CUNY L. REV. 172 (2023).

19. Jill M. Fraley, *Eminent Domain and Unfettered Discretion: Lessons from a History of U.S. Territorial Takings*, 126 PENN ST. L. REV. 609 (2022).

individuals based on racial identity,[20] but acknowledges past government misconduct or mistakes and its lingering, systemic effects. By linking redress to documented governmental action, HRN offers a path for government redress that is distinct from the basis of the affirmative action policies that have fallen into disfavor in the Supreme Court.[21]

The Equal Protection Clause of the Fourteenth Amendment prohibits racial classifications in policy unless they are justified by a compelling government interest and narrowly tailored to achieve that interest.[22] In practice, this has meant that nearly all race-conscious policies that have come before the Supreme Court have been determined to be unconstitutional.[23] However, the Supreme Court continues to say that the application of strict scrutiny is not an impossible standard, even when the pathways for constitutional policies are indeed ever narrower.[24] The HRN framework sheds new light on constitutional arguments around narrowly tailored, harm-based reparative measures and whether they can withstand equal protection scrutiny.

Thus, HRN is a critical refinement of the legal understanding of how race can inform remedial policy without violating constitutional constraints. It suggests a framework in which race is not used to provide an abstract or merely categorical

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20. This is how the majority in SFFA characterized race and affirmative action benefits. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 220 (2023) ("The point of respondents' admissions programs is that there is an inherent benefit in race qua race—in race for race's sake.").

21. Cara McClellan argues that the same race-based justifications used to strike down affirmative action policies in *SFFA* are used to maintain existing racial hierarchy while relying on formal principles of colorblindness. *See* Cara McClellan, *Evading a Race-Conscious Constitution*, 25 U. PA. J. CONST. L. ONLINE (2023).

22. *See Students for Fair Admissions, Inc.*, 600 U.S. at 206–07 ("Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as 'strict scrutiny.' Under that standard we ask, first, whether the racial classification is used to 'further compelling governmental interests.' Second, if so, we ask whether the government's use of race is 'narrowly tailored'—meaning 'necessary'—to achieve that interest." (internal citations omitted)).

23. *See generally*, James E. Fleming & Linda C. McClain, *The Myth of Strict Scrutiny for Fundamental Rights*, 12 DARTMOUTH L. J. 1 (2014) (explaining the relationship between strict scrutiny and equal protection).

24. *See Students for Fair Admissions, Inc.*, 600 U.S. at 206–07.

basis for benefits, but as evidence of a traceable state-driven injury. This refinement matters. Under traditional Equal Protection doctrine, policies that make distinctions based on race are presumed suspect and functionally "dead on arrival."[25] The use of HRN, however, uses race to mark a harm that is anchored in time, place, and government action. Conceptually different from current or contextual identification with "race," the HRN allows policy makers to address the harms of past racial discrimination in a way that aligns with constitutional principles, emphasizing causation, documentation,[26] and specificity as opposed to broad racial generalizations. In doing so, HRN offers an objective approach to racial redress, which may be more resilient in the face of judicial scrutiny.

I. THE HISTORICAL RACIAL NEXUS: TWO RETROSPECTIVE EXPLORATIONS.

Put simply, the HRN serves as a framework through which policymakers can design reparative measures for past injustices with racial contours without triggering the constitutional pitfalls associated with race-based classifications.[27] While traditional remedial policies often rely on present-day racial identity (i.e., race) as a proxy for systemic harm,[28] this Essay advocates for the

25. *See generally*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (showing that strict scrutiny is not necessarily fatal but very strict).

26. There are administrability problems with documentation, though many recent reparations focus on more documentable harms, such as housing discrimination within the past 100 years. This is a downside. For example, the Evanston reparations program focused on harm between 1919 and 1969. *See* CITY OF EVANSTON, *supra* note 5.

27. At least as they are currently enumerated by, for example, *SFFA*. *See generally*, *Students for Fair Admissions, Inc.*, 600 U.S. at 181.

28. Reparations, for example for slavery, may consider reliance on present-day racial identifications for Black Americans for redress. In part, this is due to the "sacred intentions" of reparations, which invoke a need for repair and transformation after generations of discrimination and bias. *See* Cicely L. Fleming, *Op-Ed: Why I Voted Against Evanston's Reparations Program*, CHI. TRIB., Mar. 27, 2021, [https://perma.cc/EY3N-

use of the HRN as a more precise and legally resilient alternative.[29] Rather than asking whether an individual is currently a member of a racial group, the HRN inquires whether that individual or their ancestors was harmed by specific, identifiable government actions that targeted racial classifications within a particular historical and social context.

By grounding redress in documented instances of state-inflicted racial harm, the HRN allows for the development of policies that are anchored in history and context rather than identity. To put it another way, the use of HRN would be used as evidence of past harm, rather than race in the present sense being used as the basis for a benefit. The policy, then, is structured around historical harm, using factors like time, place, ancestry, and documented policy records to define who was affected and who should be eligible for redress. In doing so, the framework offers a constitutionally sound, narrowly tailored approach to racial redress that aligns with equal protection doctrine while preserving the possibility of meaningful historical accountability.

Presently, equal protection analysis hinges on a level of scrutiny determination based on what particular kind of personal characteristics that claims of discrimination are formulated in.[30] Race is one of the categories that the court has determined should be subject to the highest level of scrutiny.[31] As a result, a government that must defend laws with classifications based on race faces a heavier scrutiny burden than, for example, if a law classified based on gender, which requires only intermediate

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8NUU]. There are also practical reasons, such as a lack of documentation of those who were enslaved. Who is "deserv[ing]" of this redress—for example, only those whose ancestors were enslaved (impossible to prove), all Black Americans, including recent immigrants? These issues are difficult to transcend in what is necessarily the political process of reparations. *See, e.g.*, *Who Should Be Eligible to Receive Detroit Reparations?*, NAT'L AFR. AM. REPARATIONS COMM'N (Mar. 7, 2022), [https://perma.cc/W93G-7RB6].

29. This concept was initially developed in previous work in Lisa Lucile Owens, *An Argument for Housing Reparations*, 77 ME. L. REV. 243, 284–87 (2025).

30. Winkler, *supra* note 25, at 821.

31. *Id.* at 834.

scrutiny.[32] Other categories and differentiations face the much lower burden of rational basis review.[33]

Race is subject to a higher burden in equal protection because policies which include race are thought to also be more likely to be rooted in the type of prejudice that is not supportable in American democracy. Although identity is central to the origins of equal protection and the development of identity categories within that jurisprudence,[34] the use of identity categories also often undermines the objective of equal protection.[35]

Nevertheless, there is useful information in identity designations, which is one reason for their continued reliance. When understood as indicators of relational power imbalance, which are historically and contextually situated, identity categories can help reveal patterns of harm. Recently, the use of race as a static category has failed under a formalist, anticlassification regime of interpretation which finds fault with the unmoored use of race—used in terms of present identity—to find entitlement to remedy for systemic injustice.[36] The HRN framework shifts the use of static racial classifications to racial

32. There are various reasons for this. Much of the jurisprudence around equal protection comes from the civil rights era, which was heavily focused on ameliorating racial inequality.

33. *See generally*, Note, *When Rational Basis Review Bit*, 138 HARV. L. REV. 1843 (2025).

34. As Lauren Sudeall Lucas shows, "[e]qual protection's reliance on identity is understandable in light of its origins. The institution of slavery, from which the Reconstruction Amendments arose, and more modern legal regimes enforcing or permitting overt discrimination, used the law to explicitly oppress individuals sharing certain identity traits. These regimes gave rise to group-based identities, which, in turn, gave rise to group-based social movements. The group-based exclusionary nature of the law solidified the social identities of these movements. Given the centrality of identity to both legal and social frameworks, it was logical for those aiming to change the law to focus on altering the perception of certain identities and, later, on rendering identity an illegitimate basis for legal differentiation." Sudeall Lucas, *supra* note 11, at 1616.

35. Such categories are seen as overly broad or they are only proxies for harm. *See e.g.*, Sudeall Lucas, *supra* note 11, at 1616.

36. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 220 (using phrases like "on the basis of race alone," to indicate present-day racial identification).

identity as historical evidence, tied to specific policies which resulted in de facto racial discrimination and, thus, racialized harm. Such a reframing addresses both the critique that categories cannot be used in universalizable ways and that refraining from acknowledging demographic contours of harm will lead to further subordination.[37] One of HRN's key contributions is in pointing out that there is a difference between policy which hinges on static identity categories like race and one that hinges on contextual relationships with history and power.

Historical identity categories are able to do work in this context because they are anchored in objective harm--systemic harm can be shown through data analysis, and there are verifiable events, policies, or governmental actions that produce measurable harms.[38] Thus, the point that the Supreme Court makes in SFFA, for example, that identity categories as currently used are unconstitutional because they are broad,[39] interminable,[40] unmeasurable,[41] and un-linkable with any kind of verifiable specific harm[42] are avoided. In situating identity within specific frames based in time, policy or geography, what otherwise might be seen as a racial category subject to fail under strict scrutiny, to one of an evidentiary link between state action and injury. Using HRN, as opposed to race, in this way preserves the usefulness of

37. For additional discussions on antisubordination versus anticlassification, *see, generally*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

38. A recent wave of municipal reparations has focused initially on research which heavily documents racialized harm because of specific, municipal government action. *See, e.g.*, PROVIDENCE MUN. REPARATIONS COMM'N, REPORT OF THE PROVIDENCE MUNICIPAL REPARATIONS COMMISSION § 8 (2022).

39. *Students for Fair Admissions, Inc.*, 600 U.S. at 216 ("For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad.")

40. *Id.* at 313 (citation omitted). They "must be limited in time." *Id.*

41. *Id.* at 214 ("Because '[r]acial discrimination [is] invidious in all contexts,' we have required that universities operate their race-based admissions programs in a manner that is 'sufficiently measurable to permit judicial [review]' under the rubric of strict scrutiny. . . Respondents have fallen short of satisfying that burden.").

42. The majority's argument, essentially. *Students for Fair Admission*, 600 U.S. at 260 (Thomas, J., concurring) ("But, neither have even attempted to explain how their current racially discriminatory programs are even remotely traceable to their past discriminatory conduct.").

races as a marker for understanding harm while also avoiding the present-day pitfalls of overly broad classifications.

This section explores two examples successful legislation that were framed in terms of 'race' at the time of their passage, but which can analyzed used retrospectively to demonstrate the meaning and potential power of HRN[43]: The recent municipal reparations program created in Evanston, IL, and the Federal Civil Liberties Act of 1988. Both programs described below employ race as a contextual, historically grounded evidentiary marker of government-inflicted harm.

Though these programs are wildly different in scope, scale, design and context, both illustrate how governments might structure reparative policies around a documented historical nexus of state-inflicted racial harms. Rather than using race as a categorical basis for benefit, each program links eligibility to specific historic events in which specific government's specific actions produced measurable injury. Through grounding such policies in temporally and administratively identifiable instances of harm, the policies model how an HRN may be used to withstand the critiques associated with Constitutional scrutiny.

A. Evanston's Reparations Program

Beginning in 2020, several municipal governments across the United States began the process of atoning for past racialized harm in response to a renewed interest in racial justice brought by the Black Lives Matter movement and various instances of police

43. The nature of the use of race as HRN is identified post-hoc. While the HRN framework was not explicitly adopted by policy makers at the time the policies were written, constitutional frameworks (i.e. rational basis review or even strict scrutiny were articulated by courts in response to practice as well). HRN is an emerging practice that should be formalized into doctrine.

violence.[44] One of the ways that cities focused on ameliorating harm was through reparations. Evanston, Illinois's initiative, for example, provides $25,000 grants for homeownership, mortgage assistance, or home improvement to eligible recipients.[45] Evanston's policy, one of the most successful of its time, has brought legal challenges under the Equal Protection Clause which are ongoing.[46]

Evanston's reparations program offers a strong practical illustration of the possibilities of the HRN framework in action. Unlike policies that rely on broad racial categories or current identity, Evanston ties eligibility for reparations to specific, documented acts of city-sponsored racial discrimination in housing between 1919 and 1969.[47] The program focuses on harms inflicted directly by the municipality—such as redlining, exclusionary zoning, and displacement—which are temporally and geographically defined, well-documented, and explicitly racialized in their historical context.[48] These harms were identified through dedicated research of the historical record. [49]

There are three ways in which one may qualify for the benefits of the Evanston reparations. First, one could have been personally a Black or African American citizen of Evanston during the time in which Evanston identified that the discriminatory

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44. *See, e.g.,* Shira Stein, *Is Sorry Enough? What Black Americans are Owed in Reparations,* WASH. POST (Mar. 25, 2024) https://www.washingtonpost.com/nation/2024/03/25/reparations-san-francisco-apology/.

45. Blair Paddock, *Evanston City Council Approves $25K Direct Cash Payments in Expansion of Reparations Program*, WTTW NEWS (Apr. 1, 2023) [https://perma.cc/XC3B-AQP7].

46. *See* Class Action Complaint at ¶ 27, Flinn v. City of Evanston, No. 1:24-cv-04269 (N.D. Ill. May 23, 2024).

47. Memorandum from Kimberly Richardson, Interim Assistant City Manager for the City of Evanston, Ill., to the Mayor and Members of City Council (Mar. 22, 2021), [https://perma.cc/FY5F-E5K9].

48. *See Evanston Local Reparations*, CITY OF EVANSTON, (last visited April 23, 2026) [https://perma.cc/8TU4-6XVG] ("Reparations, and any process for restorative relief, must connect between the harm imposed and the City. The strongest case for reparations by the City of Evanston 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, when the City banned housing discrimination.").

49. *Id.*

policies took place.[50] Second, one could have a Black or African American ancestor who lived in Evanston at the time that the discriminatory policies took place.[51] Third, one could show that discrimination occurred in Evanston against them personally or against their ancestor during the time identified by the city, without having to show relation to a Black or African American ancestor.[52]

By requiring applicants to demonstrate either personal experience of this discrimination or ancestral ties to those harmed as the focus of discriminatory policies, Evanston's reparations policy centers historical evidence rather than present-day race, aligning closely with HRN's goal of using race as a marker of state-inflicted injury rather than as a basis for distributing benefits. In doing so, the program may avoid the constitutional vulnerabilities of affirmative action-style remedies and instead creates a narrowly tailored, compelling model that can be meaningfully reviewed and supported.[53] Evanston thus tees up HRN exceptionally well,

50. Memorandum from Kimberly Richardson, *supra* note 47.

51. *Id.* This attenuated assumption of harm (i.e. that the harm was upon an entire group without having to show specific harm) sets the Evanston initiative apart from, e.g., the following analogy to the CLA. Aggregate presumptions of harm do have precedent in the form of class action settlements or other forms of compensation such as that related to asbestos exposure. These rely on an assumption that harm was functionally ubiquitous, and proof of individual harm would make justice functionally impossible. *See generally*, Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess?*, 88 TUL. L. REV. 1039 (2014). Similarly, the eligibility of ancestors (intergenerational harm) for redress sets this program apart from the CLA. There are several ways that intergenerational harm can be measured, such as through longitudinal data analysis or other models. For examples of methods, *see* Andrea E. Willson & Kim M. Shuey, *A Longitudinal Analysis of the Intergenerational Transmission of Health Inequality*, 74 J. GERONTOL. B PSYCHOL. SCI. & SOC. SCI. 181 (2018) and M.K.M. Lünnemann et al., *The Intergenerational Impact of Trauma and Family Violence on Parents and Their Children*, 96 CHILD ABUSE & NEGLECT 104134 (2019).

52. Memorandum from Kimberly Richardson, *supra* note 47.

53. There are many aspects of the programs like the one in Evanston, IL, that, in terms of equal protection, set it apart from the affirmative action programs like those discussed in *SFFA*, which may indicate the possibility of them surviving strict scrutiny at the Supreme Court. For example, reparations which are tied to specific government actions and given by the government that conducted that action are considered to be

offering both a legally defensible and administratively feasible approach to reparations that could inform future reparations programs.[54]

Evanston's program requires applicants to prove that their Black or African American ancestors resided in Evanston at the time the city enacted and enforced racially discriminatory housing policies.[55] However, the policy accounts for the systemic discrimination, which the city government supported, by assuming that any Black individual in the city at that time would have been impacted. Because the program assumes that all Black residents at the time faced systemic discrimination, the need to prove individual instances of harm is eliminated. This is the essence of HRN and the way that it links equal protection to consideration of systemic harm along a historical nexus.

Despite offering a race-neutral path to eligibility for reparations, Evanston's program has been subject to an ongoing lawsuit in the form of an equal protection challenge.[56] The Plaintiffs in the challenge have stipulated that the requirement of having a Black or African American ancestor, applicable to two of three eligibility categories (a third being race neutral but with a higher evidentiary burden), constitutes a constitutionally impermissible racial classification that excludes non-Black individuals who may have experienced comparable harm.[57] They further argue that this increases the burden placed on non-Black

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different from university boards trying to ameliorate all social inequality. For a full analysis of this claim, see Lisa L. Owens, *An Argument for Housing Reparations*, 77 ME. L. REV. 243 (2025). *See also*, Memorandum from Kimberly Richardson, *supra* note 47, at 2–3 (acknowledging historical harm and outlining participant eligibility as being related to historically harmed groups).

54. The program is nonetheless vulnerable to legal challenges under equal protection doctrine, particularly if it is perceived as using present-day race as a proxy for harm rather than relying solely on historically grounded evidence.

55. *See* Memorandum from Kimberly Richardson, *supra* note 47.

56. *See* Class Action Complaint at ¶ 27, Flinn v. City of Evanston, No. 1:24-cv-04269 (N.D. Ill. May 23, 2024).

57. *Id.* at ¶ 15.

claimants which raises further concerns of disparate treatment in violation of Equal Protection. [58] They claim that

> At no point in the application process are individuals in the first and second groups required to present evidence that they or their ancestors experienced housing discrimination or otherwise suffered harm because of an unlawful Evanston ordinance, policy, or procedure, or some other unlawful act or series of acts by Evanston between 1919 and 1969. In effect, Evanston is using race as a proxy for having experienced discrimination during this time period.[59]

The fallacy in this argument may also be explained through the lens of HRN. Evanston has identified a compelling government interest in remediating past government-inflicted harm (in the form of racial discrimination), and this interest is well-established as being compelling.[60] The HRN is a tool through which this interest may be described--there is a historical nexus between the government harm and the systemic contours of the harm which fall along the lines of race.[61] They have also narrowly tailored a response to those who were harmed or whose ancestors were harmed through specific discriminatory government policies, along with systemic harm that resulted specifically from them. This is not done in terms of a 'category' of 'race', which might include any Black individual who happens to have settled in Evanston. The HRN is quite different in that it invokes a limiting principle in the

58. *See id.* at ¶ 36.

59. *See id.* at ¶ 15.

60. The Federal government identified a similar compelling interest in the CLA of 1988, for example. *See* Civil Liberties Act of 1988, 50 U.S.C. § 4215 (1988).

61. If a contemporary Black resident of Evanston could only demonstrate that they had a non-Black ancestor in Evanston at the time period identified, they would ostensibly only be able to qualify through the third race neutral category with the higher evidentiary burden as well.

historical nexus, only those individuals who were affected by those policies and their ancestors who were in turn affected by those policies may qualify for reparations. The historical nexus between race and government action definitively shows the coordinates of repair.

Evanston's reparations program is one example of how the use of an HRN can operate as a constitutional bridge between race conscious reparatory policy and equal protection doctrine. The program grounds eligibility in a documented history of local municipal racially discriminatory policy, as opposed to present racial identity. Though the program's use of HRN has still invited legal challenges on equal protection grounds, its structure reflects a shift away from race as a categorical preference and towards the use of race as an evidentiary marker of government-inflicted harm. Thus, the use of race is used as a record of injury rather than one that confers benefit to the exclusion of others just as deserving. The judicial fate of the Evanston initiative remains to be seen, but the use of HRN remains open in the narrow pathway through strict scrutiny.

B. The Federal Civil Liberties Act of 1988[62]

While the Evanston reparations program offers a contemporary paradigm for the use of HRN, there are other examples where conceptualizing HRN, as opposed to race, is useful. Nearly four decades before Evanston created its reparations program, the federal government of the United States enacted the Civil Liberties Act of 1988 (CLA)[63], which also, I again identify in retrospective analysis, grounded its reparative framework through a specific instance of historical, government-perpetrated racial harm. Although the scale and context of the program is different than that in Evanston, the underlying logic remains consistent. Both policies tie eligibility for the redress offered by the policy to

62. *Id.*
63. *Id.*

the direct relationship between state action and racialized injury.[64] This section examines the CLA as an early embodiment of the framework identified in this Essay as one of HRN.

The CLA is one of the most explicit acknowledgments by the Federal Government of its direct role in racial injustice. Enacted over 40 years[65] following the internment of Japanese Americans during the second world war, the CLA authorized $20,000 in reparations to surviving individuals[66] who were interned, as well as a formal apology issued by the government of the United States.[67] The passage of the CLA meant that the US government formally conceded to the racially discriminatory nature of its own conduct, and also linked that to a narrowly tailored policy scheme which provided redress.

The CLA only occurred after years of intensive political pressure, including public hearings and findings from Congressionally established commissions.[68] The reports issued from these commissions noted that individuals were interned because of "racial prejudice, war hysteria, and a failure of political leadership".[69] In response, the CLA was grounded in the official historical record of racial animus and financial loss.[70]

Crucially, the CLA's racial classification was not viewed as presumptively unconstitutional. Courts reviewing the law upheld the racial classification under equal protection principles finding that it satisfied strict scrutiny because of its clear remedial purpose and narrow tailoring. The CLA focused on a documented, state-

64. *See id.* (defining who is an "eligible individual" under the Act).

65. *The Long Road to Redress*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, [https://perma.cc/796V-ABFS].

66. 50 U.S.C. § 4215(a). Notably, not to families or ancestors of those who had already died. *Id.*

67. *Id.*

68. *The Long Road to Redress*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, [https://perma.cc/796V-ABFS].

69. S. 1009, 100th CONG. §I(4) (1st Sess. 1987).

70. S. 1009, 100th CONG. §I(5) (1st Sess. 1987).

inflicted, race-based harm. The CLA thus set both legal and political precedent for policy frameworks that seek redress for historical racial harm through legislative action.

In one case which challenged the CLA on equal protection grounds, *Obadele v. United States*,[71] Black plaintiffs argued that African Americans similarly deserved redress for slavery and other systemic discrimination. The court rejected their claim, stating that the plaintiffs did not meet the statutory eligibility criteria.[72] More specifically, they lacked the Japanese ancestry and had not been subject to the specific government actions addressed by the CLA.[73] The court emphasized that while the plaintiffs may have suffered historical injustice, redress for that harm had not yet been won through the political process.[74] The decision underscored that the reparations under the CLA were not based on a general entitlement to justice, but on a narrowly defined, legislatively recognized class of victims tied to a specific government action. The court effectively affirmed that reparations are possible and lawful, but only when grounded in clear legislative intent and historical specificity, a point that reinforces the utility of an HRN framework.

HRN moves away from using race as a present identity marker and instead uses specific, documentable acts of discrimination by the government to define eligibility for redress. By rooting reparations in provable historical government wrongdoing, HRN mirrors the successful logic of the CLA and avoids the constitutional pitfalls that doomed broader claims like those in *SFFA*. In short, *Obadele* shows that reparations can be constitutional when they are tightly tied to historical governmental

71. 52 Fed. Cl. 432, 433–35 (2002). Jurisdiction for administering policy claims was granted here under the Civil Liberties Act of 1988. *Id.* at 434; 50 U.S.C. § 4215(h)(1).

72. *Id.* at 435.

73. *Id.*

74. Obadele v. United States, 52 Fed. Cl. 432, 443 (2002) ("[T]he Plaintiffs are really only saying that the victims and heirs of one historical wrong have succeeded in persuading the public and Congress of their entitlement to redress, whereas Dr. Obadele and like-minded advocates are in the process of trying to achieve that same result for another historical wrong.").

acts even when they are limited by considerations of race, exactly what the HRN is designed to do.

While the Evanston program and the CLA differ in many ways, the two policies share a common constitutional logic. Both frameworks operate within the contours of what this Essay identifies as the HRN. As with the Evanston program, the CLA illustrates that race, when not used as a mere proxy for identity but rather as a marker for injury caused by state action, can form a constitutional basis for race-conscious remedial policy. Such policy does not suggest racial preference, but rather explicit accountability achieved through constitutional and democratic legislative processes.

II. FROM RACE TO THE HISTORICAL RACIAL NEXUS

There is excellent critical literature on the quest of 'making equal protection protect', and the various problems and inconsistencies implicit in the major views on equal protection.[75] For example, Lauren Sudeall argues that the equal protection doctrine relies too heavily on identity-based categories such as race or gender, and that doing so flattens and oversimplifies complex experiences.[76] If identity is used as a proxy for discrimination, it is seemingly impossible for equal protection law to address the substantive harm of discriminatory policies.[77] Similarly, HRN is one practical way in which the strict and judicially unpopular categories of race might be discarded in favor of categories that better address substantive harm.

One issue further implicit to the use of strict categories in interpreting and applying equal protection is how race is treated in

75. *See e.g.*, *Making Equal Protection Protect*, 138 HARV. L. REV. 2113 (2025); Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651, 652–53 (2024).

76. *See generally*, Sudeall Lucas, *supra* note 11, at 1605.

77. *Id.*

the social sciences versus how it is treated in law. In social science, race is not understood as biologically determined or as part of a fixed identity, but as socially constructed by a variety of historical and contextual forces.[78] Of course, race continues to have salience in terms of the consequences of racism and discrimination despite its fluidity, though legal doctrine often treats race as objective and stable. Such a mismatch hearkens to the mismatch which Sudeall explores --systemic discrimination is simply not well-reflected within insular identity categories.

The HRN framework addresses this mismatch, at least in part, by reframing the use of race in certain policies not as static classification, but as historical evidence of state harm. Using race in this way acknowledges that race is socially constructed while still recognizing the concrete nature of racial discrimination. One divisive issue in reparations policy is the question of deservedness, and HRN also helps to address this by allowing a shift away from deservedness based in static identity categories, and towards asking questions concerning, for example, which individuals were harmed by state actions that targeted people racialized as Black at a particular time in history.

Through using HRN—a historically situated indicator of injustice unconnected to an individual's present identification with racial categories--as opposed to an individual trait, HRN offers a more nuanced way of including race in policy making. This refocuses policy on the relationship between race and state power, further opening a space for addressing racial harm through law without reproducing the same inequality the equal protection clause is meant to ameliorate.

III. ADVANTAGES AND CRITIQUES OF THE HISTORICAL RACIAL NEXUS

While the HRN framework offers a promising doctrinal innovation, it is not without limitations. Advantages and critiques

78. *See id.* at 1627 n.93.

of HRN, at least as it exists in theory, are discussed in further detail below.

A. Advantages of HRN

Situating the HRN framework within equal protection jurisprudence shows how it might address Constitutional concerns that have previously led to invalidation of more generalized race-conscious policies like affirmative action. HRN satisfies strict scrutiny by directly aligning with the constitutional requirements established in key Equal Protection jurisprudence. In *Adarand Constructors v. Peña*, it is iterated that race-conscious policies must serve a compelling governmental interest and be narrowly tailored to that interest.[79] HRN meets this standard through the grounding of reparative efforts in specific, documented acts of government-inflicted racial harm, unlike claims that are grounded in more generalized claims of societal discrimination. This distinction is critical, as *Regents of the University of California v. Bakke*[80] and *City of Richmond v. Croson*[81] both emphasize that policies aimed at remedying vague, broad patterns of discrimination fail strict scrutiny. Rather, HRN identifies precise historical actions, such as those related to redlining, urban renewal, or exclusionary zoning, carried out by specific governmental entities, and which ties eligibility to individuals demonstrably affected by that conduct.[82]

79. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

80. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

81. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (The means of accomplishing the compelling interest must be chosen "so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.")

82. Such as, for example, in Providence where "[d]uring the 20th century, race-based discrimination continued as municipal, state, and federal government-sanctioned redlining, discriminatory employment and housing practices, urban renewal, and

For example, Evanston's reparations program, which limits benefits to those harmed by the city's housing policies between 1919 and 1969, mirrors the kind of concrete, historically rooted redress that courts have previously upheld, such as in *Obadele v. United States*, where reparations for Japanese American internment were deemed constitutionally sound, even against an equal protection challenge, because they were based on specific, documented government actions and resulted from a legitimate democratic practice.[83]

The HRN framework also fulfills the narrow tailoring requirement by using historically defined criteria, such as time, place, ancestry, and government records, to identify beneficiaries, rather than relying on present-day racial identity. This approach avoids the overbreadth that the Supreme Court rejected in *Students for Fair Admissions v. Harvard*, where race-conscious admissions policies were struck down for lacking measurable goals and for relying on imprecise racial categories.[84] By using HRN to define a class of harmed individuals through historical evidence rather than race per se, reparatory policies are both more legally durable and more consistent with constitutional principles. In this way, HRN offers a doctrinally sound model for racial redress that remains viable even under the increasingly constrained interpretations of Equal Protection.

The HRN framing re-invigorates the role of race in law not as means of categorizing or privileging, but as a historical signal of state-inflicted harm. In so doing, HRN responds to specific doctrinal constraints in equal protection jurisprudence. At the

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interstate highway improvements deconstructed largely African heritage and limited-income neighborhoods including Fox Point, Upper South Providence, West Elmwood, College Hill and Lippitt Hill." Report of the Providence Mun. Reparations Comm'n (Aug. 2022).

83. Obadele v. United States, 52 Fed. Cl. 432, 433 (2002) ("The statute established within the Justice Department Civil Rights Division the Office of Redress Administration (ORA) to identify individuals eligible for relief in connection with those wrongs associated with the World War II emergency action.").

84. *See* Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll., 600 U.S. at 214, 226 (2023).

same time, the framework preserves the possibility of legislative redress.

Beyond its constitutional utility, HRN offers a deeper, more accurate way of understanding the relationship between race and equal protection. One of the persistent challenges in legal and policy discourse is the reliance on race as a static identity category which does not adequately reflect inequality.[85] Courts have increasingly rejected the use of race, particularly when it is used as a stand-in for disadvantage or harm without clear evidentiary grounding. HRN addresses this issue by shifting the focus from who someone is now to what happened to them or their ancestors through state action. It also further reinforces the legal principle that remedies must be rooted in injury, not inferred from group membership, which is also one of the central barriers to enaction of reparatory policies.[86]

Finally, HRN helps to reconcile tensions between legal formalism and the social complexity of identity, systemic discrimination, and state action.[87] A historical lens not only makes policies more legally defensible but also acknowledges the ways in which the state has used race to distribute harm. In turn, HRN opens the door for race-conscious but constitutionally grounded policymaking that is rooted in accountability rather than abstraction. It allows governments to repair past injustices without

85. *See e.g.*, Sudeall Lucas, *supra* note 75, at 1646.

86. Jennifer Ludden, *Cities May Be Debating Reparations, but Here's Why Most Americans Oppose the Idea*, NPR (Mar. 27, 2023) [https://perma.cc/W9GJ-X79L] ("'You can't take what we know now and try to superimpose yourself onto 150 years ago,' says Jeff Bernauer, visiting from Huntsville, Alabama. He calls racism a sin and says of course slavery was wrong. But to try and make amends at this point makes no sense. 'The generation that would be paying for it have nothing to do with what was done in the past,' he says. 'And then you're paying people that have nothing to do with it in the past.'").

87. Lisa L. Owens, *Revisiting Gender in Public Accommodations*, ___ N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming) (Further describing the relationship between formalism and social complexity in terms of gender and race).

relying on present-day race as a proxy[88], creating a stronger foundation for democratic legitimacy and social repair.

B. Anticipating Critiques of HRN

There are many possible critiques of HRN, some of which are enumerated here. Perhaps most relevantly, although HRN avoids using race as a basis for benefits, critics may argue that it still implicitly relies on race. Because applicants must demonstrate that harm occurred due to their or their ancestor's racial classification, some courts may interpret HRN as a subtler form of race-conscious policymaking. Additionally, in terms of, e.g., the Evanston reparations, courts may question whether post-hoc rationalizations of policy design, particularly those not explicitly framed in HRN terms at the time of enactment, can satisfy strict scrutiny's demand for narrow tailoring now. Thus, the conceptual distinction between race as evidence and race as classification may prove unstable in practice, especially if courts are inclined to treat ancestry-based qualifications as racial classifications.

Furthermore, administrability challenges are a central consideration in remedial policymaking.[89] Records which demonstrate ancestral race, for example, may be difficult to find or may not exist, and may greatly increase the time and cost of administering a program of redress.

88. *See id.*; *see generally* Sudeall Lucas, *supra* note 11.

89. For example, administrability challenges undergirded the CLA, which was the second federal reparations program to attempt redress for Japanese internment. Also, administrability challenges were a key reason for changes in the way awards were made in the Evanston reparations program. *See* American-Japanese Evacuation Claims Act, 50 U.S.C. § 1981 (1948); COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 461 (1983) ("The Act did not allow claims for lost income or for pain and suffering. Approximately $37 million was paid in claims, an amount far below what would have been full and fair compensation for actual economic losses. Awards were low because elaborate proof of loss was required, and incentives for settling claims below their full value were built into the Act."); *see also* Gina Castro, *City Council Approves Direct Cash Payment Reparations*, EVANSTON ROUNDTABLE (Mar. 27, 2023) [https://perma.cc/8EXU-43EC].

Additionally, HRN's focus on specific, limited acts of harm may be seen as too narrow and potentially excluding broader systemic injustices that may be harder to trace to a single government policy. The arguably technocratic focus of HRN may be insufficiently responsive to the full moral and structural scope of racial injustice. Finally, there is the risk that HRN could justify only modest or symbolic reparations, such as Evanston's $25,000 housing grants, which, while perhaps legally defensible, may fall far short of addressing generations of wealth deprivation and state-sanctioned exclusion. Thus, while HRN offers a constitutionally grounded path forward, its implementation must be carefully designed to ensure that it delivers meaningful redress to systemic harm.

HRN acknowledges the central critiques of critical race theory by rejecting both static racial categories and race-neutrality as an adequate framework for redress and instead centers race contextualized as a marker of historically specific harm. By grounding remedies in state-inflicted injury, HRN offers an approach that retains historical accountability while navigating the narrow doctrinal space currently yet available. However, under the CRT framework, criticism might find issue with the accommodation of judicial hostility to race-conscious policy that HRN essentially makes.[90]

Future scholarship should explore how HRN can be operationalized in legislation and public discourse, and how it might be integrated with race-neutral policy instruments that nonetheless aim to repair racialized harms.

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90. *See* Derek Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992). From this view, HRN might very well risk reinforcing the very structures that CRT seeks to dismantle by translating claims for justice into terms palatable to the hostile judiciary rather than demanding doctrinal transformation. Critics from the CRT tradition may also view HRN as overly constrained by formal legal categories and insufficiently responsive to the structural, intergenerational nature of racial injustice. As well, while HRN may appeal to courts or legislatures, it may additionally risk alienating grassroots reparations movements by narrowing the permissible kind of claims to cases with the strongest evidentiary foundation, contributing to access to justice issues.

CONCLUSION

As the narrow path for race-conscious policy continues to narrow, the call for new legal frameworks becomes urgent. HRN, developed here only in its most core theory, should be considered by the judiciary as part of equal protection analysis. It should also be considered by legislatures in designing programs that they wish to survive judicial review. Although this Essay articulates the HRN as a framework that may traverse such doctrinal ground, it may also address some of the key moral and social concerns around justice and fairness that have been articulated in the equal protection jurisprudence. The HRN framework reframes the use of race not as one of categorical identity upon which generalized remedies may be awarded, but as an evidentiary aspect of government and policy-inflicted discrimination. Thus, HRN distinguishes itself from the broad, identity-based approaches that have failed to pass strict scrutiny in the past.

Both the Evanston municipal reparations program and the CLA exemplify how HRN may function in practice. These initiatives provided redress to beneficiaries not because beneficiaries are members of specific racial groups, but because their eligibility is tied to historical state action which itself caused racially associated harm. Neither of these initiatives deploy race as a proxy for disadvantage, rather they use race as a tool for historical understanding. This specifically enables narrowly tailored reparative measures that correspond directly to governmental wrongdoing. They are able to then satisfy the core demands of strict scrutiny.

Decisions such as those in *Obadele* and *Students for Fair Admissions*[91] delineate a doctrinal boundary between race-conscious policies which rely on abstracted notions of diversity or general social inequality, and those that are created in response to specific, documented government-inflicted harm. *Obadele* further

91. Students for Fair Admission, Inc. v. Presidents & Fellows of Harvard Coll., 600 U.S. 181 (2023); Obadele v. United States, 52 Fed. Cl. 432 (2002).

points out that it is through the legislative process that these are legitimated--this is democracy at work and to deprive governments of the capability of making redress would be to curtail legitimate democratic processes.[92] HRN offers a principled approach to remedial policy that is both historically rigorous and legally resilient.

Some programs which are functionally created around concepts of redress have taken a race neutral approach. For example, the Chicago police reparations[93], though aimed at redress to communities of color, is a functionally race neutral policy. In considering how to proceed with remedial policy, this tactic should be considered alongside HRN. However, HRN may still be useful to establish historical causation, and other proxies (like zip code or socioeconomic data points) might be otherwise insufficient at capturing governmental harm.

The HRN framework elaborated here has the distinct potential to guide equitable policy in other domains marked by government malfeasance. As state and local governments confront historical legacies, the HRN framework is able to provide vocabulary and constitutional architecture for doing so within the narrow bounds of constitutional permissibility as it is currently (even if not ideally) defined. The HRN framework allows race to be acknowledged without being reified. As such, HRN presents the possibility of bridging the gap between past injustice and accountability, clearing the way for reparative justice that is grounded, lawful, and long overdue.

92. *Students for Fair Admission*, 600 U.S. at 181.

93. *See The Reparations Ordinance,* CHI. TORTURE JUST. MEM'LS, [https://perma.cc/6AFW-LYAG].