Local Government Reparations:

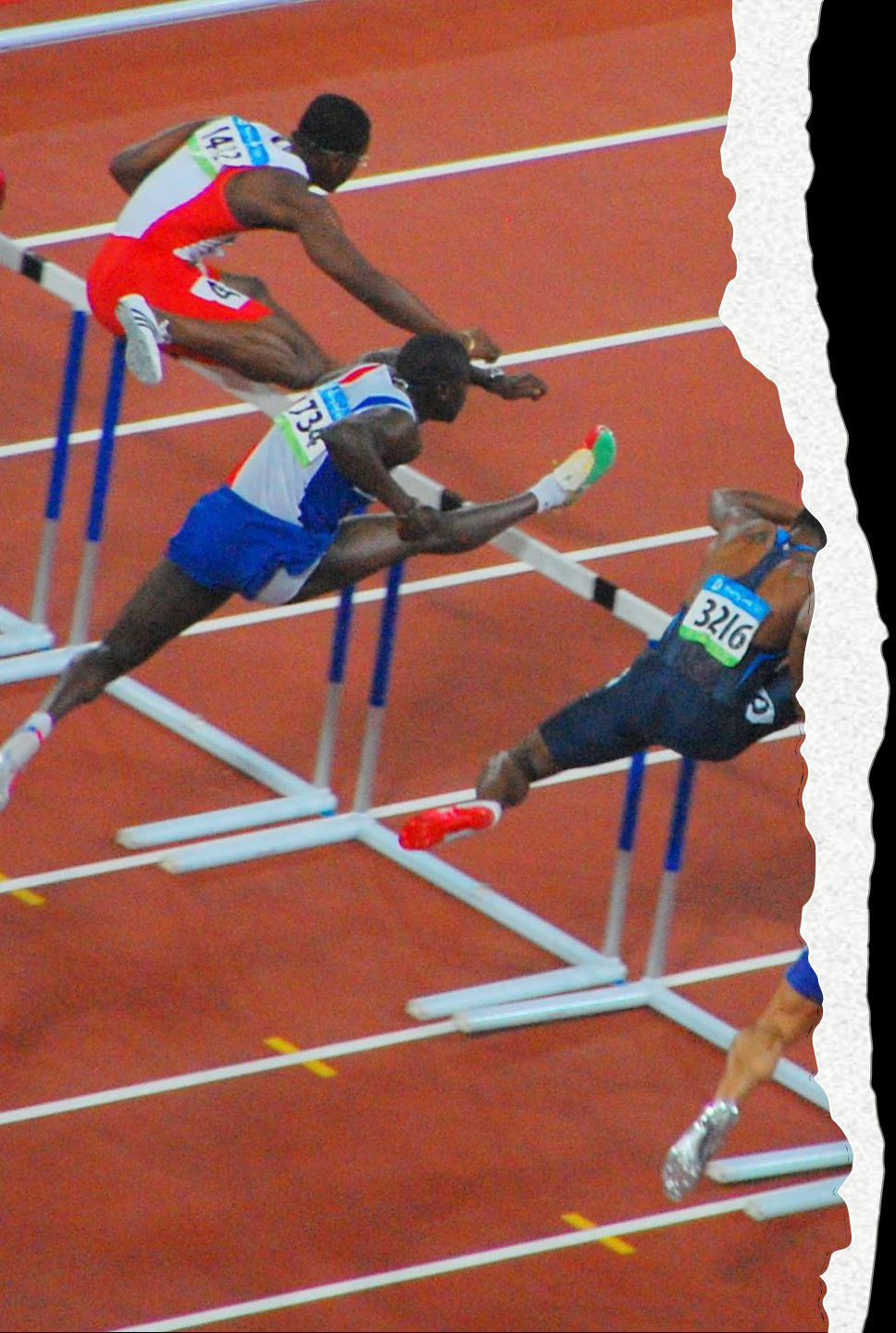
Crafting Restorative Policy That Meets Constitutional Muster

What is “reparations?”

- Reparation – making of amends *for a wrong one has done*, by paying money to or otherwise help those who have been wronged
- Examples:
  - Rebuilding Germany after WWII (the Marshall Plan)
  - Japanese Americans (Civil Liberties Act of 1988)
  - Germany paying Israel re: the Holocaust
  - District of Columbia Compensated Emancipation Act

Local Reparations Initiatives

- Evanston, Illinois
- Ashville, North Carolina
- Providence, Rhode Island



Hurdles to Reparations

- Fourteenth Amendment
  - Originally meant to protect the rights of newly naturalized citizens of the United States—former slaves
- United States policy has been to remove discriminatory barriers rather than implement restorative justice

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Hurdles to Reparations

- Race-based discrimination was legal
  - Education, employment, voting, etc.
- Civil Rights Acts of 1865 and 1965
  - Eliminated the ability to discriminate based on race
  - Even with barriers removed, long lasting effects of racism still in place
    - Despite accounting for roughly 13% of the population of the United States, Black people account for higher percentages in COVID related deaths; have shorter life spans than their white counterparts; have lower high school graduation rates than their Asian, white, or Latinx counterparts; and have the second lowest graduation rates from 4-year college programs, leading only Native Americans
      - https://www.usatoday.com/in-depth/news/2020/06/18/12-charts-racial-disparities-persist-across-wealth-health-and-beyond/3201129001/

Hurdles to Reparations

- Only the United States Congress has the authority to "solve" race-based discrimination using race-conscious restitution and restoration.
  - City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)
    - "That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision."
    - Even if a state has delegated authority to a local subdivision to "eradicate the effects of private discrimination within its own legislative jurisdiction…[t]his authority must, of course, be exercised within the constraints of § 1 of the Fourteenth Amendment."



Strict Scrutiny

- Suspect class
  - Race, religion, gender
- Compelling government interest

- Narrowly tailored means to fit the compelling goal “so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *J.A. Croson Co.*, 488 U.S. at 493.

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City of Richmond v. J.A. Croson Co. 488 U.S. 469 (1989)

- The City of Richmond adopted a Minority Business Utilization Plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more "Minority Business Enterprises" (MBEs).
  - MBEs must be at least 51% owned by Black, Spanish-speaking, Asian, Native-American, Eskimo or Aleut citizens.

How to create a program that is remedial, race-conscious AND Constitutional

- What lessons can we learn from *Croson*?
  - What "sin" was the City of Richmond's program meant to remedy?
    - Was it committed by the City itself or a general issue in the community?
    - Was there evidence of that sin?
  - How does a municipality decide what sin to address?
    - Arbitrary or based in evidence?
  - What information is SCOTUS looking for in order to authorize a race-conscious program aimed at restitution?