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Better Late Than Never: The Equitable Power of Federal Courts to Remedy Harms Caused by Historical Housing Discrimination

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BETTER LATE THAN NEVER: THE EQUITABLE POWER OF FEDERAL COURTS TO REMEDY HARMS CAUSED BY HISTORICAL HOUSING DISCRIMINATION

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"Our precedents . . . firmly establish that where . . . state-imposed segregation has been demonstrated, it becomes the duty of the State to eliminate root and branch all vestiges of racial discrimination . . . ." [1]

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[2]

I. INTRODUCTION

More than fifty-five years have elapsed since the passage of the Fair Housing Act.[3] While there is reason to celebrate this momentous milestone, there is also cause for concern. Indeed, there is no denying that segregation and racial disparities in access to safe, stable, and affordable housing remain glaring reminders of the

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1. Milliken v. Bradley, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting).
2. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971).
3. 42 U.S.C. §§ 3601–3619; Pub. L. No. 90-284, 82 Stat. 73 (1968).

nation's stubborn legacy of housing discrimination.[4]

While there may be consensus regarding the existence of these disparities, attempts to identify the reasons therefor lead to complexity and debate. No doubt there are some who would resist the premise that overt discrimination of generations past has any relevance—much less legal relevance—to contemporary conditions. The argument, presumably, goes something like: Given the passage of time since the civil rights movement of the 1960s, segregation and concomitant disparities in access to housing opportunity are *de facto* and not *de jure*.[5] If that premise is accepted, a logical conclusion is that solutions lie exclusively in the realms of the personal and political, not legal.

That approach, or some variation of it, has been adopted by courts, including the United States Supreme Court.[6] As a result, even progressive and optimistic commentators such as Richard Rothstein dejectedly note that "even if we came to a nationally shared recognition that government policy has created an unconstitutional, *de jure*, system of residential segregation, it does not follow that litigation can remedy this situation."[7] It is rational to express skepticism regarding the use of litigation as a viable tool to remedy historical injustices; likewise, it is appropriate to suggest that a communal or political response to the vast sea of discrimination from eras past would be the ideal.[8]

Yet, the present climate of political polarization will likely leave ideas about racial restorative justice in the realm of theory.[9]

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4. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW (2019); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). *See also* Andrew Darcy, *Using State Law to Enforce Affirmatively Further Fair Housing Obligations: No Longer Fitting a Square Peg in a Round Hole*, 29 CARDOZO J. EQ. RTS. & SOC. J. 593, 596–600 (2023) (describing the history of segregation and housing discrimination in the United States and its ongoing effects).

5. "[T]he differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate." Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 208 (1973).

6. *See*, *e.g.*, Milliken, 418 U.S. at 756 (Stewart, J., concurring) (rejecting a judicial desegregation order based on the assumption that Detroit became segregated, not based on any government behavior, but rather based upon factors such as "in-migration, birth rates, economic changes, or cumulative acts of private racial fears"). *See also infra* Section II.A (describing the Supreme Court's retrenchment from robust enforcement of civil rights).

7. ROTHSTEIN, *supra* note 4, at XI.

8. *Id.* at 195–213 (positing suggestions for addressing the ongoing disparities in access to opportunity caused by the history of government created segregation).

9. For example, the federal government cannot pass even modest reforms aimed at ensuring that low-income Americans have easier access to safe, affordable housing. *See, e.g.*, *US: Failure to Pass Build Back Better Act Imperils Rights*, HUM. RTS. WATCH (Dec. 20, 2021, 6:00 AM) www.hrw.org/news/2021/12/20/us-failure-pass-build-back-better-act-imperils-rights [perma.cc/9WT4-AKAW] (noting that the Build Back Better bill, which

Moreover, to suggest that courts are categorically absolved of the obligation to do the hard work of assessing how historical wrongs have resulted in present-day harms seems to run afoul of the maxim that where there is a right, there should be a remedy.[10]

And, thus, this Article aims to attack that premise. Specifically, it challenges the proposition that the federal judiciary is impotent to address current harms that flow from historical wrongs. It does so by contending that, when the proper conditions are present, federal courts can and should use their equitable powers to address contemporary, community-wide harms that are linked to past, government-backed housing discrimination.[11]

This thesis is inspired by a federal district court opinion: *Los Angeles Alliance for Human Rights v. City of Los Angeles*.[12] There, using a racial-justice lens, the court concluded that the City and County of Los Angeles were liable under the Equal Protection Clause of the Fourteenth Amendment for taking insufficient action to remedy the homelessness crisis in the area commonly known as "Skid Row."[13] The court observed that Black Angelenos comprised less than ten percent of total area residents but nearly half of the unhoused residents of Skid Row.[14] Tracing this disparity to forms of *de jure* housing discrimination from the twentieth century, the court held that the government played a direct role in creating the modern-day increased rate of homelessness for Black Angelenos.[15] As a result, the court declared that the government had an ongoing, yet unfulfilled, obligation to provide a remedy.[16] Concluding that it had broad authority to issue injunctive relief, the court boldly used it, ordering the City and County to offer housing to every unhoused person living in Skid Row within a matter of months.[17]

This is an appropriate place to provide a spoiler alert: the trial

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would have included housing assistance for low-income Americans could not pass both houses of Congress).

10. *See*, *e.g.*, Marbury v. Madison, 5 U.S. 137, 163 (1803) (stating that "'where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded'") (quoting BLACKSTONE'S COMMENTARIES); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1485-86 (1987) ("Few propositions of law are as basic today—and were as basic and universally embraced two hundred years ago—as the ancient legal maxim, *ubi jus, ibi remedium*: Where there is a right, there should be a remedy.").

11. *See infra* Section IV.

12. LA All. for Hum. Rts. v. City of Los Angeles, 2021 WL 1546235 (C.D. Cal. Apr. 20, 2021), *vacated and remanded sub nom.*, LA All. for Hum. Rts. v. Cnty. of Los Angeles, 14 F.4th 947 (9th Cir. 2021). While this is not orthodox nomenclature, to avoid confusion between the orders issued by the District Court and the Ninth Circuit Court of Appeals, I will refer to the former as "*LA Alliance I*" and the latter as "*LA Alliance II*."

13. *LA Alliance I*, 2021 WL 1546235 at *44.

14. *Id.* at *2.

15. *Id.* at *3–38.

16. *Id.* at *44–45.

17. *Id.* at *60–62.

court's order was ultimately vacated by the Ninth Circuit Court of Appeals.[18] But the vacatur was the direct result of the fact that the plaintiffs had not pled any race-based claims.[19] The Ninth Circuit did not question—and, in fact, explicitly endorsed—the district court's vast equitable powers to remedy constitutional violations that have contributed to Los Angeles's homelessness crisis.[20] And, thus, the court of appeals seems to have signaled support for the district court's fundamental rationale.

While *LA Alliance* may at first appear to be an outlier of limited jurisprudential value, upon closer examination it reveals a strong footing, as well as significant potential for future cases. Not only does it find its root in seminal cases like *Brown v. Board of Education*,[21] it also hearkens back to the so-called public housing desegregation cases that spanned the late twentieth and early twenty-first centuries.[22] In particular, it shares resemblances with one from Baltimore, *Thompson v. HUD*.[23]

Thompson was brought by Black residents of Baltimore's public housing authority, who argued that federal and local government officials were responsible for the continued segregation of Black people in Baltimore public housing—housing that suffered disproportionately from societal ills like crime and poverty.[24] Much like the court in *LA Alliance*, the *Thompson* court engaged in a detailed historical analysis of both overt racial discrimination in Baltimore in the early and mid-1900s as well as the related structures that subsequently allowed for rapid demographic changes—including so-called "white flight"—that perpetuated racial segregation and socio-economic isolation.[25] The *Thompson* court ultimately concluded that the U.S. Department of Housing and Urban Development ("HUD") had failed to satisfy affirmative obligations under the Fair Housing Act ("FHA") to take steps to end segregation.[26] That finding led the court to conclude that the only viable remedy was for HUD to take a regional approach—that is, one inclusive of the predominantly white, suburban counties surrounding Baltimore City—to the siting and development of

18. LA All. for Hum. Rts. v. Cnty. of Los Angeles, 14 F.4th 947 (9th Cir. 2021).

19. *Id.* at 957.

20. *Id.* at 961 ("The district court undoubtedly has broad equitable power to remedy legal violations that have contributed to the complex problem of homelessness in Los Angeles.").

21. 347 U.S. 483 (1954).

22. For an overview of the public-housing desegregation cases, *see generally* Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333 (2007).

23. 348 F. Supp. 2d 398 (D. Md. 2005).

24. *Id.* at 404–05.

25. *Id.* at 405–07.

26. *Id*. at 408–09.

public housing.[27]

These two decisions, while dealing with very different factual circumstances and different legal principles, reveal a theme: The immense potential of the equitable power of federal courts to address the ongoing effects of past government-supported housing discrimination. Indeed, they demonstrate that present-day governmental inaction, given the backdrop of intentional housing discrimination, can potentially open the door for judicial intervention in the name of housing justice.

Undoubtedly, there are limitations to the theory that this Article proposes; reciprocally, and maybe more importantly, given the pervasiveness of past housing discrimination, the theory requires limitations to avoid it espousing governance by undemocratic judicial fiat.[28] But in the pages that follow, this Article attempts to extract the importance from cases like *LA Alliance* and *Thompson v. HUD* and to suggest that they lend themselves to practical application. Finally, this Article aims to provide them with a philosophical and jurisprudential home. To do so, it proceeds as follows.

Part I explores the equitable powers of federal courts in the civil rights arena, generally.[29] The natural starting place for such an examination is the school-desegregation line of cases. From there the Article explores the various tools that courts have at their disposal to address systemic housing discrimination. Part II provides a detailed overview of the *LA Alliance* decision and subsequent history. Part III analogizes *LA Alliance* to the public-housing desegregation cases by providing an overview of *Thompson v. HUD*. From there, key principles from the foregoing sections are highlighted, with significant attention devoted to the complex relationship between causation and responsibility. Part IV, the conclusion, provides a summary of the foregoing sections and offers examples of how the principles discussed in the Article might apply in practice today.

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27. *Id.*

28. Given the pervasiveness of racial discrimination in all aspects of life, and especially with respect to housing, *see* ROTHSTEIN, *supra* note 4, it is unrealistic to assume that courts could or would address all past wrongs.

29. An important point of which to take note here is that this Article does not purport to review the history of government-endorsed and government-enacted housing discrimination. Instead, it largely takes that history, which is voluminous, as a given. Moreover, other scholars have already made the case in great detail. *See generally* ROTHSTEIN, *supra* note 4.

II. THE GENERAL POWER OF THE FEDERAL COURTS TO ADDRESS THE VESTIGES OF SEGREGATION AND DISCRIMINATION

A. The Equitable Authority of Federal Courts and the School Desegregation Cases

The equitable powers of federal courts are something to behold with awe.[30] While legislative and executive branches are responsible for creating and executing laws, federal courts hold something of a trump card over them: they can declare laws unconstitutional and can, in certain circumstances, direct government officials and agencies—both federal and state—to act or refrain from acting.[31] Indeed, as many law students learn in the early days of Constitutional Law, "it is emphatically the province of the judicial branch to say what the law is."[32]

The civil rights era of the mid-twentieth century provided an opportunity for that power to be brightly displayed.[33] Indeed, federal courts showed their might in a series of school desegregation cases beginning with the seminal one: *Brown v. Board of Education*.[34] *Brown*, of course, set the stage for the desegregation of public schools in the United States as the Supreme Court famously decreed "separate but equal" to be anything but equal.[35]

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30. And, depending on the position you take on a particular issue, also maybe some concern. *See*, *e.g.*, Jamelle Bouie, *This is How to Put the Supreme Court in Its Place*, N.Y. TIMES (Oct. 14, 2022), www.nytimes.com/2022/10/14/opinion/supreme-court-reform.html [perma.cc/B65M-N83L] (opining on the need to "restrain an overbearing and ideological Supreme Court").

31. While this proposition is now well established, there is, of course the question of what result if the Executive Branch refused to follow a judicial directive or engages in unconstitutional conduct. In *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861), which related to President Lincoln's unilateral suspension of the writ of habeas corpus, Chief Justice Taney wrote at the conclusion of his decision, after holding that the suspension was unconstitutional, "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome.".

32. *Marbury*, 5 U.S. at 177.

33. *See*, *e.g.*, Alyssa Cochran, *Judicial Courage, Judicial Heroes, and the Civil Rights Movement*, ABA J. (Feb. 5, 2019), www.americanbar.org/groups/judicial/publications/appellate_issues/2019/winter/judicial-courage-judicial-heroes-and-the-civil-rights-movement/ ("During the 1950s through the 1970s, a critical period of the civil rights movement, a handful of judges courageously sided with equal justice and the rule of law over racist customs and cultural norms.").

34. 347 U.S. 483 (1954).

35. *Id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

On the contrary, the Court held that racial segregation was unconstitutional disparate treatment on the basis of race.[36]

While the Court acknowledged that lower courts would be challenged to breathe life into the holding, it provided a ringing endorsement of their authority and capability to rise to that challenge.[37] The Court wrote,

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. . . . . Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.[38]

Brown's monumental holding was, however, watered down by the Court's vague directive to school boards to desegregate with "all deliberate speed."[39] That phrase appeared to invite school districts to wiggle their way out of *Brown*'s core directive, and some intransigent local government officials did just that.[40]

Thus, litigation continued, and the Supreme Court had the opportunity to address other school desegregation cases in *Brown*'s wake.[41] In *Swann v. Charlotte-Mecklenburg Bd. of Ed.*,[42] the Court doubled down on its endorsement of the equitable authority of federal courts to order relief designed to remedy constitutional violations. *Swann*'s holding was simple and powerful: local school districts had a mandate to ensure that "'racial discrimination would be eliminated root and branch.'"[43] Further, the Court noted, "[i]f school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked."[44] That authority, the Court continued, "is broad, for breadth and flexibility are inherent in equitable remedies."[45] Thus, district courts were instructed to use any and all tools at their disposal to effect desegregation, even if that involved issuing orders that would require a reordering of local

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36. *Id.*

37. Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) ["*Brown* II"].

38. *Id.* at 299–300.

39. *Id.* at 301.

40. *See*, *e.g.*, Julian Bond, *With All Deliberate Speed*, 90 IND. L. J. 1671, 1676 –77 (2015) ("For the first ten years after 1954, the emphasis was more on 'deliberate' than on 'speed.' . . . [A]ll deliberate speed meant any conceivable delay. Actual integration was more a legal fiction than fact.").

41. *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

42. 402 U.S. 1 (1971).

43. *Id.* at 15 (citation omitted).

44. *Id.*

45. *Id.*

affairs.[46]

Yet just two decades after *Brown*, the Court began to retrench from its support of strong enforcement of civil rights by federal courts.[47] That retrenchment manifested itself in, among other cases, *Milliken v. Bradley*.[48] *Milliken* demonstrated the Court's skepticism that, in the post-*Brown* world, patterns of segregated living and its related ills could be legally tied to the *de jure* segregation of the pre-*Brown* world.[49] Relatedly, the Court began to cabin the authority of the federal courts to implement structural reforms to address the vestiges of segregation in public education.[50]

The narrow issue confronting the Court in *Milliken* was whether a federal district court had the authority to order the desegregation of the Detroit public schools by attempting to integrate with the schools of the surrounding, mostly white suburbs.[51] The Court's majority rejected the lower court's remedial order because it claimed that the surrounding school districts had played no role in the segregation of Detroit's schools.[52] In his

46. Davis v. Bd. of Sch. Comm'rs of Mobile Cnty., 402 U.S. 33, 37 (1971).

47. It is notable that the Court's change in approach coincides with the end of the Warren Court, which was famously progressive, and the beginning of the Burger Court, whose jurisprudence appeared to reflect a reaction to the Warren Court's expansive civil rights and liberties jurisprudence. *See* Paul Bender, *Is the Burger Court Really Like the Warren Court?*, 82 MICH. L. REV. 635, 636 (1984) (contending that there was a "conservative counter-revolution" on the Court in the 1970s when six members of the Court were replaced by Republican presidents); *see also* Bond, *supra* note 40, at 1677 (noting that since *Brown*, "there have only been four years when both the courts and the executive branch actively supported its implementation").

48. 418 U.S. 717 (1974). This is not the first time, nor the last, that the Supreme Court took two steps back in the context of civil rights by suggesting that the role slavery and subsequent discrimination has played was irrelevant or a relic of the past. *See*, *e.g.*, Civil Rights Cases, 109 U.S. 3, 25 (1883) ("When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."); Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) (stating that the majority's decision to weaken the Voting Rights Act "when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet").

49. *See infra* notes 50–56 and accompanying text.

50. *Id.*

51. *Milliken*, 418 U.S. at 721.

52. *Id.* at 752–53. This Article does not address the important debate regarding whether integration, in and of itself, is the most important goal, or whether ensuring that all communities, regardless of racial composition, enjoy equal resources and access to opportunities is. *See* Edward G. Goetz, *The Fair Housing Challenge to Community Development, in* FURTHERING FAIR HOUSING: PROSPECT FOR RACIAL JUSTICE IN AMERICA'S NEIGHBORHOODS 46 (2021) (arguing that more emphasis should be placed on community development to increase opportunity for marginalized communities of color).

concurring opinion, Justice Stewart held,

> It is this essential fact of a predominantly Negro school population in Detroit—caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears—that accounts for the 'growing core of Negro schools,' a 'core' that has grown to include virtually the entire city. *The Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist*.[53]

Thus, the Court effectively held that anything characterized as *de facto* segregation, even in the immediate wake of *Brown*, would act as a bar to relief aimed to ameliorate the effects of *de jure* segregation.

The Court's decision was justified by an extremely narrow level of abstraction used to answer the core question of legal responsibility. Justice Thurgood Marshall, in dissent, called the majority out for that view and criticized it for being willfully blind to how segregation in Detroit was not the result of exclusive intracity actions and omissions, but rather segregation that permeated the entire State of Michigan.[54] He wrote:

> [Notwithstanding] a record showing widespread and pervasive racial segregation in the educational system provided by the State of Michigan for children in Detroit, this Court holds that the District Court was powerless to require the State to remedy its constitutional violation in any meaningful fashion. Ironically purporting to base its result on the principle that the scope of the remedy in a desegregation case should be determined by the nature and the extent of the constitutional violation, the Court's answer is to provide no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.[55]

Justice Marshall thus took a broader view than the majority of what was occurring in Detroit, finding that segregation throughout Michigan was related to Detroit's racial composition. The legal consequence, in his view, was simple: "[W]here, as here, state-imposed segregation has been demonstrated, it becomes the duty of the State to eliminate root and branch all vestiges of racial discrimination and to achieve the greatest possible degree of actual desegregation."[56] Nevertheless, the majority's holding in *Milliken*

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53. *Id.* at 756 (Stewart, J., concurring) (emphasis added).

54. *Id.* at 781. (Marshall, J., dissenting).

55. *Id.* at 782.

56. *Id.* Justice Douglas noted in dissent how the structure of state and local government could be designed to avoid responsibility for desegregating. *Id.* at 763 (Douglas, J., dissenting) ("The core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a

became the law of the land, and it has had a lasting, restricting effect on efforts to desegregate public schools.[57]

B. Housing Discrimination Cases and the Equitable Authority of Federal Courts

The school desegregation cases were, in at least some respects, proxies for addressing harms caused by residential housing segregation.[58] But it would be folly to conflate them. Indeed, housing discrimination cases have charted a unique jurisprudential path.

Shortly after *Milliken* was decided, the Supreme Court resisted *Milliken*'s restrictive holding in a case involving the segregation of Chicago's public housing developments. In *Hills v. Gautreaux*,[59] the district court held that the Chicago Housing Authority ("CHA") had administered its public housing program in a racially discriminatory manner.[60] HUD, another defendant, did not dispute that it had violated federal law and the Constitution "by knowingly funding CHA's racially discriminatory family public housing program[.]"[61] With that acknowledgement, the district court was confronted with "the difficult problem of providing an effective remedy for the racially segregated public housing system that had been created by the unconstitutional conduct of CHA and HUD."[62]

With HUD's acknowledgment of constitutional and civil rights violations, the narrow legal issue confronting the Supreme Court was "whether the remedial order of the federal trial court may extend beyond Chicago's territorial boundaries."[63] The case took a tortuous procedural path, but, ultimately, HUD asked the Supreme Court to review the court of appeals' direction to the district court

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remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State. The result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts.").

57. *See*, *e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 (2007) (relying on *Milliken* in an opinion rejecting a Seattle plan to achieve racial diversity in its public schools).

58. *See*, *e.g.*, Austin Indep. Sch. Dist. v. United States, 429 U.S. 990, 994 (1976) (Powell, J., concurring) ("The principal cause of racial and ethnic imbalance in urban public schools across the country North and South is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing whether public or private cannot be attributed to school authorities.").

59. 425 U.S. 284 (1976).

60. *Id.* at 296.

61. *Id.*

62. *Id.* at 289.

63. *Id.* at 286.

to adopt "a comprehensive metropolitan area plan," which impacted not just Chicago but its surrounding areas.[64] HUD argued that such a remedy was inconsistent with the holding in *Milliken*.[65]

The Supreme Court disagreed, finding that, although the case dealt with segregation in Chicago, a regional remedy was appropriate.[66] What differentiated *Gautreaux* from *Milliken*? According to the Court, the distinction came down to the role that the defendant had played in creating the allegedly unconstitutional condition. As the Court explained:

> In *Milliken*, there was no finding of unconstitutional action on the part of the suburban school officials and no demonstration that the violations committed in the operation of the Detroit school system had had any significant segregative effects in the suburbs. . . . [and] thus constituted direct federal judicial interference with local governmental entities without the necessary predicate of a constitutional violation by those entities or of the identification within them of any significant segregative effects resulting from the Detroit school officials' unconstitutional conduct. Under these circumstances, the Court held that the interdistrict decree was impermissible because it was not commensurate with the constitutional violation to be repaired.[67]

But HUD was a defendant with regional responsibility, which, had substantial legal significance. Thus, the Court held, *Milliken* should not be read too broadly regarding the general power of the federal courts to impose broad injunctive relief to combat the effects of discrimination:

> Nothing in the *Milliken* decision suggests a Per se rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred. . . .
>
> To foreclose such relief solely because HUD's constitutional violation took place within the city limits of Chicago would transform *Milliken's* principled limitation on the exercise of federal judicial

64. *Id.* at 291.

65. *Id.* at 292.

66. *Id.* at 293–94.

67. *Id.* To be clear, the Court was not suggesting that HUD had the authority or obligation to build public housing in communities around Chicago. Rather, the Court noted that HUD had tools at its disposal to encourage those communities to welcome low-income households and that such actions would be consistent with HUD statutory duties under the FHA, without overriding local discretion and control. *Id.* at 301. It is worth questioning whether the superficially reasonable distinction between *Gautreaux* and *Milliken* holds up under scrutiny. If Michigan's government was complicit in the structures that allowed for Detroit's schools to become segregated, why was the district court limited in its remedy, but not HUD? Might it be that Michigan *could* require and enforce a regional school desegregation mandate, but HUD could not do the same with respect to housing? In other words, might the distinction lie in the very fact that the remedy in *Gautreaux* was necessarily milder than that which could have been at issue in *Milliken*?

> authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct.[68]

And while the Court did not mandate any specific form of injunctive remedial relief, its order served as a reminder regarding the vast potentiality of the federal courts in the fight for housing justice.[69]

Gautreaux is not an outlier. For the past fifty-plus years, courts have not shied away from issuing injunctive relief against government defendants who have been found liable for housing discrimination.[70] Since 1968, courts have been aided by the FHA as an enforcement tool.[71] The FHA has a broad mandate, which prohibits not only intentional discrimination but also actions that have a discriminatory effect.[72] Moreover, the FHA imposes an obligation on HUD and other executive agencies to "further" the

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68. *Hills*, 425 U.S. at 300.

69. The practical effect of the *Gautreaux* ruling is more complex. As part of the case's settlement, HUD provided Section 8 vouchers to members of the class to move out of public housing and into private housing. *See* Dennis Keating, *Lessons from a Chicago Saga*, SHELTERFORCE (Apr. 23, 2007), www.shelterforce.org/2007/04/23/lessons_from_a_chicago_saga/ [perma.cc/4F7E-Q5DY] (describing the outcome of the *Gautreaux* settlement, including its implementation challenges). Yet, given the barriers associated with using a Section 8 voucher, only a small percentage of families actually were able to move. *Id.* Some have considered that project to be an utter failure. *See* EDWARD G. GOETZ, NEW DEAL RUINS: RACE, ECONOMIC JUSTICE & PUBLIC HOUSING POLICY 123–54 (2010) (questioning the benefits of relocating public-housing residents). The aftermath of *Gautreaux* touches on the incredibly challenging issue of how to enforce court mandated injunctions in the face of political uproar. This Article does not purport to answer the question of whether those challenges make it less appropriate to seek judicial intervention in the first place.

70. *See* Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 715–23 (2017) (describing how courts have rejected municipalities' exclusionary zoning policies).

71. As the Third Circuit noted in 1977:

> Until relatively recently, federal courts were not often called upon to adjudicate Title VIII claims. We attribute this circumstance to our impression that, at least with respect to alleged discrimination in housing by governmental agencies, the inquiry into claimed equal protection violations has made unnecessary a separate consideration of the "coextensive" rights and remedies afforded by Title VIII. However, given the increased burden of proof which *Washington v. Davis* and *Arlington Heights* now place upon equal protection claimants, we suspect that Title VIII will undoubtedly appear as a more attractive route to nondiscriminatory housing, as litigants become increasingly aware that Title VIII rights may be enforced even without direct evidence of discriminatory intent.

Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977).

72. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015).

FHA's goals.[73]

Thus, in the housing context, courts have been able to reject government policies, practices, and decisions that perpetuate segregation or unfairly burden racial minorities.[74] For example, when localities have refused to allow developers to develop multi-family housing that would provide housing to people of color in predominantly white neighborhoods, courts have overridden the decision and directed municipalities to rezone.[75] Courts have also enjoined enforcement of local ordinances[76] and rejected localities' decisions regarding where to place public housing.[77]

It is rare, however, that a court addresses head-on the more difficult question of how to approach continuing harms to communities caused, not by a zoning decision or development project, but by action—or inaction—that perpetuates past *de jure* segregation. There is, however, an exception to that generality.

III. LA ALLIANCE

In 2020, a group of landlords and residents sued the County and City of Los Angeles in federal court in an effort to get their elected leaders to do something about the crisis of unhoused people sleeping on the streets of downtown Los Angeles in the area known as "Skid Row."[78] Skid Row is a fifty-block neighborhood east of downtown Los Angeles, which is home to between nine and fifteen thousand unhoused people.[79] The plaintiffs alleged several causes of action, ranging from public nuisance to violations of the Americans with Disabilities Act.[80] None, however, were based on

73. 42 U.S.C. §§ 3608(d), (e)(5).

74. *See* Schwemm, *supra* note 70, at 713.

75. *See*, *e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 942 (2d Cir.), *aff'd in part sub nom.*, Town of Huntington v. Huntington Branch, NAACP., 488 U.S. 15 (1988) (directing the District Court to order the defendant municipality to rezone a section of its town).

76. *See*, *e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1188 (8th Cir. 1974) ("We, therefore, reverse and remand with instructions to the District Court to enter a permanent injunction upon receipt of this Court's order, enjoining the enforcement of the ordinance.").

77. *See*, *e.g.*, United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1219 (2d Cir. 1987) ("Accordingly, the district court properly rejected the City's contention that its decisions not to construct minority housing in any virtually all-white area were immune from scrutiny, and appropriately proceeded to determine whether housing in Yonkers was in fact segregated, whether that segregation was caused or enhanced in substantial part by the City's conduct, and whether that conduct was intentionally segregative."); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 153 (3d Cir. 1977).

78. *LA Alliance II*, 14 F.4th at 953.

79. *Skid Row, Los Angeles*, WIKIPEDIA, www.en.wikipedia.org/wiki/Skid_Row,_Los_Angeles [perma.cc/2J7T-CEBU] (last visited Nov. 17, 2023).

80. Complaint at 71–89, L.A. Alliance for Human Rights v. City of Los Angeles, No. 2:20-cv-02291-DOC-KES (C.D. Ca1. Mar. 10, 2020), ECF No. 1.

race.[81]

Judge David Carter of the Central District of California oversaw the case and, for nearly a year after the complaint had been filed, worked with the parties to help them reach a settlement.[82] Although the plaintiffs had not pled any race-based claims, the court appeared focused on the racial implications of the situation.[83] Indeed, during colloquies with the parties, Judge Carter questioned the racial demographics among the unhoused living in Skid Row and how those compared with the population at large.[84] Despite his apparent best efforts, however, settlement talks collapsed.[85]

Judge Carter then issued an order to show cause requiring the parties to provide, among other things, "inventories of County and City properties" and "financial disclosures."[86] Curiously, he also required them to brief the "'outer limit of the Court's structural equitable remedy power'" as well as to describe "all equitable remedies available to the Court that would require the City . . . to take action to provide relief to the homeless community.'"[87] The plaintiffs responded to the order by filing a motion for a preliminary injunction that asked the court to issue an order directing the defendants to house all unhoused residents of Skid Row.[88]

Shortly thereafter, Judge Carter handed down a 109-page, single-spaced opinion granting the plaintiffs' motion.[89] The opinion's introduction made clear that racial injustice would be its dominant theme. Judge Carter was explicit from the get-go that he believed the homelessness crisis in Los Angeles, generally, and on Skid Row, specifically, was a direct by-product of the combination of past *de jure* racial discrimination and ongoing structural racism. He wrote:

> The Civil War brought a formal end to the institution of slavery, but a century and a half after the Gettysburg Address, the "unfinished work" of which President Lincoln spoke remains woefully unfinished.
>
> Here in Los Angeles, how did racism become embedded in the policies and structures of our new city? What if there was a conscious effort, a deliberate intent, a cowardice of inaction? Through redlining, containment, eminent domain, exclusionary zoning, and gentrification—designed to segregate and disenfranchise communities of color—the City and County of Los Angeles created a legacy of entrenched structural racism. As shown most clearly in the

81. *Id.*
82. *LA Alliance II*, 14 F.4th at 953.
83. *Id.*
84. *Id.* at 954.
85. *Id.* at 953.
86. *Id.* at 953–54.
87. *Id.*
88. *Id.* at 954.
89. *LA Alliance I*, 2021 WL 1546235; Civil Minutes, LA Alliance for Human Rights v. City of Los Angeles, No. 2:20-cv-02291-DOC-KES (C.D. Ca1. Apr. 20, 2021), ECF No. 277.

> present crisis of homelessness, the effects of structural racism continue to threaten the lives of people of color in Los Angeles.
>
> Today, people of color, and Black people in particular, are vastly overrepresented in Los Angeles's homeless population. While Black people comprise only eight percent of Los Angeles's population, they make up 42% of its homeless population. As of January 2020, the Los Angeles Homeless Services Authority reported that 21,509 Black people were without permanent housing in Los Angeles (LAHSA). The current inaction on the part of the City and County of Los Angeles has allowed the harms of their racist legacy to continue unabated, leaving Black people—and especially Black women—effectively abandoned on the streets. . . . The time has come to redress these wrongs and finish another measure of our nation's unfinished work.[90]

From that powerful opening, Judge Carter then presented a thorough and detailed historical recounting of the ways in which local government in the Los Angeles area engaged in, or acquiesced to, forms of housing discrimination throughout the twentieth century.[91] Among other things, he described how:

- Los Angeles used eminent domain in a discriminatory manner, both destroying communities of color and taking individual—albeit valuable—land parcels from Black families.[92]
- Government at all levels severely restricted housing supply for aspiring Black homeowners by allowing and enforcing redlining and restrictive covenants.[93]
- Aid for the homeless was distributed in a discriminatory manner. Specifically, he noted it was largely reserved for white, unhoused people, while the Black unhoused population was forced to rely on the goodwill and charity of community groups.[94]
- The confluence of the crack-cocaine epidemic in the 1980s and related aggressive policing in communities of color resulted in an inescapable cycle of incarceration and housing instability for many Black Angelenos.[95]

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90. *LA Alliance I*, 2021 WL 1546235, at *1 (footnotes omitted).

91. *Id.* at *3–18.

92. *Id.* at *7 ("Restricted to a limited number of neighborhoods allowing communities of color, non-white freeway evictees were forced to find housing in already condensed, segregated areas of South and East Los Angeles, away from job centers and beset with freeway pollution.").

93. *Id.* at *4–6.

94. *Id.* at *7 ("Despite Black Angelenos representing a disproportionate share of those experiencing unemployment and poverty in the city, a disproportionate share of public and private services assisting the homeless continued to cater to older white individuals. Indeed, the white male population continued to receive far more that its proportional share of homeless aid through the 1970s.").

95. *Id.* at *9. Discrimination, the Court noted, was not cabined to the realm of housing. *Id.* at *3, 15. Economic and employment discrimination were

Judge Carter then described how Los Angeles-area government not only provided the background for housing instability among communities of color, but also took affirmative steps to confine the unhoused to Skid Row.[96] For example, he described how the City created "a fifty-block 'physical containment' zone designed to contain and perpetuate poverty" and that the police force was used to create and enforce Skid Row's border.[97] As might be expected, the so-called "containment zone" had deplorable conditions: crime, violence, disease, and substance-use disorder were incredibly prevalent.[98]

And the results have been horrifying: "at least 1,383 people experiencing homelessness died on the streets of Los Angeles County in 2020."[99] While government officials paid lip service to the problem, in Judge Carter's view, they had failed to do enough to seriously address what had become a human rights crisis.[100] Thus, he stated:

> This Court cannot idly bear witness to preventable deaths. This ever-worsening public health and safety emergency demands immediate, life-saving action. The City and County of Los Angeles have shown themselves to be unable or unwilling to devise effective solutions to L.A.'s homelessness crisis. For the reasons discussed below, the Court must now do so.[101]

Turning from the problem to the potential solution, Judge Carter reasoned that *Brown* and *Swann* authorized him to address the severe harms impacting the unhoused residents of Skid Row.[102] Notably, he rejected the premise that past *de jure* forms of discrimination were irrelevant to the present state of affairs.[103] Citing *Swann*, Judge Carter stated, "if the racially disparate impacts of a previous Equal Protection Clause violation persist[], the violating party ha[s] a responsibility of eradicating those impacts."[104] He added:

> The above cases [*Brown* and *Swann*] arose out of a recognition of a history entrenched in racial discrimination, the persistent present-day impacts of such discrimination, and a pressing need to remediate such impacts. In front of this Court today is a history similar to, and deeply intertwined with, the circumstances that gave rise to the above cases. The Court today addresses decades of racial discrimination that have culminated in a Los Angeles homelessness

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likewise common, and the inability to have stable work and job opportunities contributed to housing instability. *Id.*

96. *Id.* at *8.
97. *Id.*
98. *Id.* at *33–34.
99. *Id.* at *20.
100. *Id.* at *18–21.
101. *Id.* at *37.
102. *Id.* at *38–39.
103. *Id.* at *39.
104. *Id.* at *38.

> crisis with a significant loss of life and deprivation of humanity—peaking at 1,383 deaths just last year.[105]
>
> . . . .
>
> Based on the Court's findings of these historical constitutional violations, a persisting legacy of racially disparate impacts—including a rising number of deaths, and the City and County's knowing failure to adequately address the issue despite numerous opportunities and resources to do so, this Court is pressed to grant an affirmative injunction ordering the City and County to actively remedy its homelessness crisis.[106]

Judge Carter determined that several legal theories[107] allowed for such an affirmative injunction, but the core of his reasoning centered around a "state-inaction-as-action" theory.

> Here, Black people, and Black women in particular, are dying at exponentially higher rates than their white counterparts, and these disparate death rates can be directly traced to a history of structural racism and discrimination. . . . When state inaction has become so egregious, and the state so nonfunctional, as to create a death rate for Black people so disproportionate to their racial composition in the general population, the Court can only reach one conclusion—state inaction has become state action that is strongly likely in violation of the Equal Protection Clause.[108]

While the concept of state inaction being used as a basis to find Fourteenth Amendment liability is not novel,[109] there is an element of novelty in finding liability based on the government's failure to address the policies and systems that have allowed *de jure* violations to persist and thrive to such an extent that they are responsible for a public-health crisis.[110] Novelty did not lead to timidity, however. Judge Carter explicitly embraced the progression of the law he was proposing: "The Court acknowledges that this conclusion advances equal protection jurisprudence, but it is wholly consistent with and flows naturally from analogous federal statutes,

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105. *Id.* at *39.

106. *Id.* at *41.

107. *Id.* ("While Defendants contend that 'there is no causal connection' between the City and County's actions and the position that the homeless community finds itself in, the Court finds that there is little question that but for discriminatory policies, like redlining, that prevented Black residents from purchasing property and building intergenerational wealth, the Black community would be in a significantly different position today.").

108. *Id.* at *45.

109. *See, e.g.*, David M. Howard, *Rethinking State Inaction: An in-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221 (2017) (detailing how inaction on the part of government actors can be sufficient to invoke the "state action" requirement for constitutional purposes); *see also* Timm v. Delong, 59 F. Supp. 2d 944, 959 (D. Neb. 1998) (collecting cases where state inaction satisfied the state action requirement).

110. *LA Alliance I*, 2021 WL 1546235, at *45.

rulemakings, and executive actions."[111]

So, what did Judge Carter do? He directed the City and County to offer and provide, if accepted, shelter or housing to everyone living in Skid Row within 180 days—with much shorter timelines for certain subsets of the general population (*e.g.*, unaccompanied minors).[112] In so doing, Judge Carter rejected the defendants' contention that he could not dictate matters that implicate municipal spending or executive policy.[113] Relying on the Supreme Court decision *Brown v. Plata*,[114] he held that district courts have "authority to use their equitable powers when necessary to address constitutional violations even where those powers shape local government's authority and impacts their budget."[115]

As the spoiler alert at the beginning of this Article noted, Judge Carter's order was vacated by the Ninth Circuit Court of Appeals, and the case was remanded.[116] Since the plaintiffs had not pled any race-based claims, the court of appeals concluded that Judge Carter should not have premised his order on a theory involving racial discrimination.[117] The Ninth Circuit's opinion does not, however, leave the underlying decision without value or significance.

On the contrary, the court of appeals suggested that Judge Carter's reasoning and authority to issue broad, equitable relief were on solid footing. It went out of its way to note that the "parties take no issue with the district court's conclusion that structural racism has played a significant role in the current homelessness crisis in the Los Angeles area."[118] Most importantly, the Ninth Circuit endorsed district courts' ability to use their equitable jurisdiction to tackle challenging, societal problems: "The district court undoubtedly has broad equitable power to remedy legal violations that have contributed to the complex problem of homelessness in Los Angeles."[119]

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111. *Id.*

112. *Id.* at *60–62.

113. *Id.* at *58–59.

114. 563 U.S. 493 (2011).

115. *LA Alliance I*, 2021 WL 1546235 at *59 ("There are financial considerations inherent to any equitable relief requiring action from a governmental entity; however, federal courts have an obligation to enforce the Constitution and the laws of its United States.").

116. *LA Alliance II*, 14 F.4th at 947.

117. *Id.* at 952 (9th Cir. 2021) (noting that "none of Plaintiffs' claims is based on racial discrimination, and the district court's order is largely based on unpled claims and theories. . . . [moreover,] they did not allege or present any evidence that any individual Plaintiff or LA Alliance member is Black—much less Black and unhoused").

118. *Id.* at 952.

119. *Id.* at 961. After the case was remanded, LA Alliance filed an amended complaint, which pled race-based claims and addressed the historical and structural racism, upon which Judge Carter premised his order. *See* Amended and Supplemental Complaint, LA Alliance for Human Rights v. City of Los Angeles, No. 2:20-cv-02291-DOC-KES (C.D. Cal. Nov. 1, 2021), ECF No. 361.

And, thus, while certainly limited in its practical effect given its vacatur, *LA Alliance* remains an eye-opening decision that challenges the concept of judicial impotence to address ongoing harms derived from structural inequities. Yet, it leads to a deeper set of questions.

IV. A PRACTICAL AND PHILOSOPHICAL APPROACH

What is to be made of *LA Alliance*? Is it merely an anomaly? A decision unmoored from precedent that we can sweep under the rug because of its dreaded red flag on Westlaw?[120] Others have suggested that the decision is merely the expression of a judge who was fed up with political platitudes and intransigence and who did not care if—and, perhaps, even hoped that—his order would fail "brilliantly."[121]

This Article proposes a different lens with which to view the decision. While *LA Alliance* admittedly pushes the boundaries in some respects, it is not without precedent. While not perfectly analogous, *Brown* and *Swann* provide the fundamental building blocks for decisions like *LA Alliance*.[122] Closer to home, the public-housing desegregation cases, beginning with *Gautreaux*[123] embrace

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In June 2022, Judge Carter approved the settlement with the City, which required it to spend billions to create up to 16,000 new shelter beds. *See Judge Approves City's Settlement of LA Homelessness Lawsuit*, SPECTRUM NEWS (June 9, 2022, 12:03 PM), www.spectrumnews1.com/ca/la-west/homelessness/2022/06/09/la-alliance--la-come-to-agreement-in-homelessness-lawsuit [perma.cc/EZR4-CQSL].

Judge Carter rejected the plaintiffs' settlement with the County two prior times, the second time leading to the County seeking relief from the Ninth Circuit—unsuccessfully. Doug Smith, *Judge Approves L.A. County Deal for 3,000 Mental Health and Substance Use Treatment Beds*, L.A. TIMES (Sep. 29, 2023, 3:00 AM), www.latimes.com/california/story/2023-09-29/judge-approves-l-a-countys-agreement-for-3-000-new-mental-health-and-substance-use-treatment-beds [perma.cc/K3UC-JEEB]. In September 2023, however, the County and plaintiffs reached an agreement that required the County to provide 3,000 new mental health and substance use treatment beds, which Judge Carter approved. *Id.*

120. As many lawyers and law students know, a red flag appearing on a decision on Westlaw "warns that the case is no longer good law for at least one of the points of law it contains. For instance, the decision was reversed on appeal or overturned years later by a decision of the same court." *Westlaw tip of the week: Checking cases with KeyCite*, THOMSON REUTERS, https://legal.thomsonreuters.com/blog/westlaw-tip-of-the-week-checking-cases-with-keycite/ (last visited Jan. 26, 2024).

121. Gregory A. Alonge, *"Judicial Frustration": A Local Judge's Bold Attempt to Solve the Homelessness Crisis from the Bench*, 56 LOY. L.A. L. REV. 267, 309–10 (2023).

122. *See supra* Section II.A.

123. After *Gautreaux*, there were a number of cases involving the desegregation of public-housing developments in cities that included Baltimore, Boston, Dallas, Yonkers, and Dallas. *See generally* Roisman, *supra* note 22 (providing an overview of the public-housing desegregation cases with a focus

the principle that when government actors have engaged in discriminatory practices that have resulted in segregation and the concomitant disparate access to opportunity, they have an affirmative obligation to provide a remedy.[124] And one of the public-housing desegregation cases stands out as *LA Alliance*'s closest jurisprudential cousin: *Thompson v. HUD*.[125]

And, thus, this Article contends that there are practical lessons learned from *LA Alliance* which can be applied to current or future cases. Accordingly, this Part proceeds in three sections. First, it describes *Thompson* and draws out the shared themes with *LA Alliance*. Second, drawing upon *Thompson* and *LA Alliance*, this section attempts to extrapolate the key practical points that can be applied in other cases. Third, it attempts to identify the philosophical framework that supports and provides structure to cases like *Thompson* and *LA Alliance*.

A. Thompson v. HUD

Thompson was a class action lawsuit brought on behalf of Black residents of Baltimore's public-housing authority against local elected officials, Baltimore City, the Baltimore Housing Authority, and HUD.[126] The plaintiffs alleged that "since 1954 the leadership of Baltimore City . . . engaged in a pattern and practice of discrimination against Blacks in regard to public housing" and that all defendants "failed to take required action to ameliorate the effects of past race-based discrimination in regard to public housing."[127]

In an extensive decision that spanned 322 pages (albeit double spaced), Judge Marvin Garbis traced the intersection between race and public housing in Baltimore from the antebellum era to the twenty-first century.[128] Part of that history involved active, intentional discrimination; other parts addressed the structures that allowed mostly white, better-resourced Baltimore residents to leave the city during a period of urban decline.[129]

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on Baltimore).

124. *See*, *e.g.*, *Gautreaux*, 425 U.S. at 289 (noting that HUD conceded it had "knowingly fund[ed] CHA's racially discriminatory family public housing").

125. Thompson v. HUD, 348 F. Supp. 2d 398 (D. Md. 2005). I will refer to this case going forward as "*Thompson I*", as the court issued a related subsequent opinion, Thompson v. HUD, No. CIV.A.MJG-95-309, 2006 WL 581260 (D. Md. Jan. 10, 2006) to which I will refer as "*Thompson II*".

126. *Thompson I*, 348 F. Supp. 2d at 404–05.

127. *Id.* at 407.

128. *Id.* at 405–07, 443–63, 465–506.

129. *Id.* at 406. ("During the four decades following *Brown I*, major demographic changes affected the housing patterns in Baltimore City and the surrounding counties. The City lost many industrial jobs and experienced a major population decline as residents, primarily White and above average in affluence, moved to the counties while the City population diminished and

Given the role that history played in the opinion, the court paid special attention to the statute of limitations.[130] Those claims that were time barred, the court would not consider.[131] But that did not mean things that occurred decades in the past were irrelevant. Referring to the "Open Period" as that in which the statute of limitations had not run, the court held that plaintiffs could litigate both (1) "[c]laims for alleged 'active' wrongs committed during the Open Period" and (2) "[c]laims for failure, during the Open Period, to take required action to ameliorate the effects of past wrongful racial discrimination."[132]

Regarding the second type, the court held "vestiges of public housing segregation can adversely impact numerous members of a disadvantaged class for prolonged periods of time, thus warranting the imposition on offending state actors of obligations to alleviate such burdens."[133] The failure to alleviate such burdens, in the court's eyes, was sufficient "action" to entertain providing equitable injunctive relief.[134]

The court found no evidence that local government actors had behaved in a discriminatory fashion during the "Open Period" and further found that they had taken sufficient affirmative steps to alleviate the harms from past active wrongs.[135] The same was not true, however, for HUD.[136] The core of this conclusion was that "[p]urposeful discrimination of a pervasive and chronic nature may confer upon governments an affirmative duty to remedy past wrongs."[137] It was this obligation with which the court believed HUD had fallen short of compliance.

The court elaborated that, for decades—including after *Brown*—the federal government supported discrimination in the private housing market, thereby impacting the ability of Black Baltimore residents to find housing opportunities outside the City.[138] Given the demographic changes and the federal government's prior support of discriminatory practices, the court

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became more than majority (and later about two-thirds) African–American.").

130. *Id.* at 407–09.

131. *Id.*

132. *Id.*

133. *Id.* at 413–14.

134. *Id.* at 464.

135. *Id.* at 408–09.

136. *Id.*

137. *Id.* at 443.

138. *Id.* at 472 ("By 1955, HUD acknowledged that '[t]he effects of a long history of rejections by Federal Housing Administration and by Federal Housing Administration mortgagees prior to the evolvement of more favorable attitudes toward Negro purchasers cannot be easily eradicated. For years, Negro brokers 'understood' that the Federal Housing Administration was not for them or their clients.' . . . . In 1970, HUD Secretary George Romney, calling past federal housing policy 'clearly indefensible,' admitted that federal housing policy, including FHA 'red-lining,' 'contributed to the creation of segregated housing patterns.'") (citations omitted).

concluded that HUD could and should have taken a regional, as distinct from intra-city, approach to the development of public housing.[139] This, the court reasoned, would have allowed for integrated public housing even in the era of demographic changes (*e.g.*, so-called "white flight").[140] In the key portion of the opinion, the court stated:

> Geographic considerations, economic limitations, population shifts, etc. have rendered it impossible to effect a meaningful degree of desegregation of public housing by redistributing the public housing population of Baltimore City within the City limits. . . . .
>
> In light of HUD's statutory duties and the fact that its jurisdiction and ability to exert practical leverage extend throughout the Baltimore Region, it was, and continues to be unreasonable for the agency not to consider housing programs that include the placement of a more than insubstantial portion of the Plaintiff class in non-impacted areas outside the Baltimore City limits. . . . .
>
> It is high time that HUD live up to its statutory mandate to consider the effect of its policies on the racial and socioeconomic composition of the surrounding area and thus consider regional approaches to promoting fair housing opportunities for African–American public housing residents in the Baltimore Region. This Court finds it no longer appropriate for HUD, as an institution with national jurisdiction, essentially to limit its consideration of desegregative programs for the Baltimore Region to methods of rearranging Baltimore's public housing residents within the Baltimore City limits.[141]

Based on this conclusion, the court concluded that HUD was liable, as a matter of law, for noncompliance with its affirmative fair housing obligations.[142] And the optimal, if not only, remedy

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139. *Id.* at 407–09.

140. *Id.* at 408–09.

141. *Id.* at 408.

142. *Id.* at 465. Left open after the decision was the possibility that HUD could also be liable under the Equal Protection Clause; the Court, however, determined a trial was necessary on that cause of action. *Id.* at 443. The Court stated:

> Since Plaintiffs have demonstrated past affirmative and purposeful segregatory actions by Defendants in the administration of housing policy, the Court must determine the extent and nature of Defendants' obligations on the basis of the circumstances here presented. Equal Protection liability will lie if Plaintiffs demonstrate that Defendants, regardless of their Open Period intent, failed to fulfill such obligations during the Open Period.

Id.; see also id. at 451 (noting that "the Court will allow the parties to present evidence on Federal Defendants' intent in the remedial phase" but that the Court would not "now resolve the questions relating to Federal Defendants' intent that would be pertinent to the Constitutional claim").

Although HUD is a federal agency, and not a "state" actor, the doctrine of

according to the court, was for HUD to take a regional approach to siting public housing.[143]

HUD raised two primary objections to the court's consideration of equitable remedies. First, it contended that the court lacked authority to enter relief against it because it had not made any decision or taken any action. This, HUD argued, constrained the court's ability to consider issuing relief under the Administrative Procedures Act—the method for judicial review of claims against HUD based on violations of the FHA's affirmatively furthering fair housing ("AFFH") obligation[144]—as well as the Constitution.[145]

The court dismissed the contention. In the court's words, "[e]ven if the HUD's failure to properly consider a regional approach to public housing in Baltimore City were labeled as a failure to act, a remedy would be possible" under the Administrative Procedures Act.[146] A similar conclusion followed for the constitutional question, with the court holding that if "HUD failed to meet its constitutional obligation to remove vestiges of prior *de jure* segregation from the Baltimore Region there could be liability even without a present discriminatory intent."[147] The court elaborated that it is the "prior intentional discrimination that created the duty for HUD to remove vestiges of that prior discrimination during the Open Period," thus making clear that present intent was not dispositive.[148]

Second, HUD objected that a regional approach was not an appropriate remedy given that the surrounding municipalities were not implicated in the litigation or the alleged discrimination.[149] The court, however, did not bow to *Milliken*-like concerns regarding a regional remedy.[150] The court acknowledged the history of demographic changes to Baltimore and its environs in the post-*Brown* era.[151] But instead of using that history to suggest it was

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reverse incorporation allowed the District Court to consider Equal Protection liability. *See* Bolling v. Sharpe, 347 U.S. 497, 500, (1954), *supplemented sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (holding that the Fifth Amendment imposes an equal protection obligation on federal actors); *Thompson I*, 348 F. Supp. 2d at 451 (noting that the doctrine of reverse incorporation makes the Equal Protection Clause applies to HUD via the reverse incorporation doctrine).

143. *Thompson I*, 348 F. Supp. 2d at 464.

144. *Id.* at 464–65.

145. Thompson v. HUD, No. CIV.A.MJG-95-309, 2006 WL 581260, at *3 (D. Md. Jan. 10, 2006) [*Thompson II*].

146. *Id.* at *6.

147. *Id.* at *7.

148. *Id.*

149. *Id.* at *10 ("They contend, therefore, that since there was no showing that the original segregation existed outside of Baltimore City, the remedy can only involve actions within Baltimore City. Accordingly, they argue, the Court could not compel HUD to consider the regional impact of its public housing decisions.").

150. *See supra* notes 49–56 and accompanying text (discussing *Milliken*).

151. *Thompson II*, 2006 WL 581260, at *11.

impotent to issue relief, the court doubled down on the need for drastic relief.

In so doing, it implicitly recognized how explicit *de jure* segregation directly resulted in *de facto* segregation; the two were not necessarily legally distinct. While Baltimore City may have been responsible for segregation within its public housing developments in the early part of the twentieth century, in later years, segregation manifested itself in a more complex manner. As the court noted, "The essence of the segregation was to keep African–American residents of public housing in the Baltimore Region concentrated in black ghettos within Baltimore City and out of white neighborhoods in the city and the counties."[152] The court continued, noting that "[t]he absence of a substantial number of African–American public housing residents in the counties is an indication of the presence, not the absence, of race based segregation in the Baltimore Region."[153] Based on this rationale, the court concluded that it had the power to issue relief that could extend throughout the Baltimore region.[154]

And, thus, *Thompson*, while factually distinct from *LA Alliance*, is nevertheless thematically similar. They both stand for the proposition that, in the housing context, courts will not absolve government actors of past wrongs if those wrongs continue to cause modern harms—regardless of present intent. Moreover, it reinforces the principle that purported *de facto* causes of segregation and disparities in access to opportunity must be carefully questioned and viewed in proper historical context. Indeed, "the metamorphosis that racism and discrimination [have] undergone since the Fair Housing Act,"[155] according to these two courts, will not be used as a shield against liability.

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152. *Id.*

153. *Id.*

154. *Id.* (stating that if "HUD failed to meet a constitutional obligation to remove vestiges of prior segregation of African Americans in areas of Baltimore City, it is distinctly possible that relief extending beyond the city borders would be warranted").

155. Lawrence Lanahan, *The Legacy of a Landmark Case for Housing Mobility*, BLOOMBERG CITYLAB (Jan. 31, 2020, 3:24 PM), www.bloomberg.com/news/articles/2020-01-31/the-legacy-of-a-landmark-case-for-housing-mobility [perma.cc/H3SL-KTGT]. *Thompson* ultimately settled in 2012, when HUD agreed to provide families residing in Baltimore's public housing developments the option "of moving from high-poverty areas to neighborhoods throughout the Baltimore region with low poverty rates and better educational and economic opportunities. Each family that chooses to move receives a Housing Choice Voucher, housing and credit counseling, and other supports to smooth the transition." *National Low Income Housing Coalition, Court Approves Settlement in Baltimore Fair Housing Case*, NAT'L LOW INCOME HOUS. COAL. (Nov. 30, 2012), www.nlihc.org/resource/court-approves-settlement-baltimore-fair-housing-case [perma.cc/8257-4SYT].

B. The Practical Import

Recognizing that *LA Alliance* is not a jurisprudential anomaly, the next analytical question is whether there are lessons that it and *Thompson* can offer. There are at least four.

First, inaction is actionable. Both *LA Alliance* and *Thompson* demonstrate how the failure to address the vestiges of historical housing discrimination can pave the way for liability, regardless of present intent. While it is unsurprising that AFFH obligations require government to do more than merely not discriminate (as its name and history suggest[156]), the same is also true for the Equal Protection Clause.

There is no doubt that state *action* is the pillar of Equal Protection jurisprudence.[157] Thus, straightforward cases involve situations in which the government has undoubtedly taken affirmative steps that have resulted in harm.[158] Yet, government's omissions and failures to act can, under certain circumstances, be an appropriate factual predicate for Equal Protection purposes.[159]

LA Alliance puts a slightly different twist on the theory. It holds that the inaction theory can be raised in the context of historical, government-created harm that has been left to fester.[160] Under such a theory, the government has inherited a legal responsibility to take steps necessary to address the harms that flow therefrom.[161] Failing to do so, according to the principle, is sufficient to invoke constitutional guarantee to Equal Protection.

This principle naturally flows from cases like *Brown* and its

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156. *See* Darcy, *supra* note 4, at 600–04 (describing the history of AFFH interpretation and enforcement).

157. *See*, *e.g.*, Shelley v. Kraemer, 334 U.S. 13 (1948) ("Since the decision of this Court in the Civil Rights Cases . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."). Ironically, *Shelley* involved a situation in which the discriminatory "action" was predominantly private; the exception was that the courts were being used to sanction the discriminatory conduct, which the Supreme Court found to be inconsistent with the Equal Protection Clause.

158. *See* John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOW. L.J. 621, 628 (2016) (noting that "[p]olice misconduct clearly involves state action").

159. Howard, *supra* note 109, at 155.

160. *Id.* at 255 ("A state is responsible for the equal protection of its citizens, and allowing structural injustice to continue is action for which the state is responsible."); *id.* at 273 ("A state failing to rectify structural injustice makes the conscious decision to permit the infringement of equal protection for its citizens, and this should constitute state action for the purposes of the Constitution.").

161. *See infra* section III.C for a discussion of the nature of causation and responsibility.

progeny.[162] It does not mean, however, that a litigant's job is any easier, especially when the intentional discrimination occurred long ago. On the contrary, where inaction is the key to the case, a litigant adopts a high evidentiary burden, which leads to the second point.

Second, history matters. In both *LA Alliance* and *Thomspon*, the courts went to great length to provide a thorough and detailed accounting of local discrimination effectuated by government actors.[163] The Supreme Court has, for decades, made explicitly clear that the Equal Protection Clause does not allow government actors to employ methods to remedy "generalized" race-based societal harms.[164] Nor does it allow for challenges premised solely upon disparate effect.[165] But those restrictions will yield if a court is instead being called upon to redress a concrete harm related to specific wrongs.[166]

Thus, a detailed historical recounting is an essential building block in any case that attempts to tie overt discrimination of the past to the present-day state of affairs. That historical recounting will allow litigants to rebut the seemingly impenetrable boundary between *de jure* and *de facto*. Professor Olatunde C. Johnson suggests that, in the context of shaping progressive housing policies, the first step a locality can take to address its ongoing racial disparities is to audit its history.[167] As Professor Johnson summarized,

> Cities can start by looking at their histories with respect to exclusionary zoning mechanisms, racially restrictive covenants, denials of municipal services, failures to enforce housing laws, urban renewal, segregated siting and construction of public housing, or appraisal practices. The audit can help cities build their evidentiary base and establish an administrative record, which can serve to support future race-conscious policies.[168]

Such an audit might also prove useful for litigation purposes. Indeed, it is what will allow a court to connect the past with the

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162. *LA Alliance I*, 2021 WL 1546235 at *38–43.

163. *See supra* Sections II, III.A (describing *LA Alliance* and *Thompson* decisions).

164. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (prohibiting remedial statutory schemes based on a "generalized assertion that there has been past discrimination").

165. Washington v. Davis, 426 U.S. 229, 232 (1976).

166. *Cf.* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 207 (2023) (noting that the Constitution allows for racial classification when "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" but distinguishing that from attempts by the state to remedy "societal discrimination through explicitly race-based measure").

167. Housing Solutions Lab, *Event Recap: Legal Frameworks for Addressing Racial Disparities* (April 28, 2022), www.localhousingsolutions.org/lab/notes/event-recap-legal-frameworks-for-addressing-racial-disparities [perma.cc/7F9W-6DRA].

168. *Id.*

present, thereby triggering an affirmative responsibility to act.[169]

Third, those impacted by the injury must share some features of a "class"—a class that shares common characteristics and geographic location.[170] Neither court made this point explicitly, but it is fair to infer that the definable limitations in the size and common features of the affected groups provided assurances to the courts in both *LA Alliance* and *Thompson*. The limitations had the effect of allowing the courts to order relief that did not implicate wholesale restructuring of society.[171] For example, the plaintiffs in *Thompson* were residents of public housing within Baltimore and in *LA Alliance* the impacted group was unhoused persons within the geographically confined area of Skid Row.[172] Without such limiting features, a court may view any potential relief as unmanageable.[173]

Fourth, to raise a successful challenge, the remedy that

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169. An exemplary model of such a racial-justice audit can be found in the efforts made in Evanston, Illinois. *See generally* Morris (Dino) Robinson, Jr. et al., *Evanston Policies and Practices Directly Affecting the African American Community, 1900 - 1960 (and Present)*, CITY OF EVANSTON (Nov. 2021), www.cityofevanston.org/home/showpublisheddocument/67191/637715545144570000 [perma.cc/F4TJ-XYAS]. There, the City commissioned a group to undertake such a historical analysis. *Id.* The result was a working document, the purpose of which was "to present evidence and factual information related to historic and contemporary instances where the City of Evanston might have facilitated, participated in, enacted, or stood neutral in the wake of acts of segregative and discriminatory practices in all aspects of engagement with the Evanston Black community." *Id.*

While arguably not a statutory or regulatory prerequisite for assessing liability for violations of the AFFH mandate, courts do appear to find government complicity in discrimination and segregation a critical aspect of finding liability. *Thompson I*, 348 F. Supp. 2d at 465 (noting that "Plaintiffs have demonstrated past affirmative and purposeful segregatory actions by Defendants in the administration of housing policy" thus requiring them to "ameliorate the effects of past discriminatory segregation").

To avoid the fate of the LA Alliance order, litigants would be wise to present this research, statistical evidence, and expert evidence in the course of litigation and in inadmissible form. The Ninth Circuit criticized Judge Carter's reliance on extra-record research. *LA Alliance II*, 14 F.4th at 957–58.

170. Under Fed. R. Civ. P. 23, a class must be sufficiently numerous and must share common questions of law and fact.

171. As authors like Richard Rothstein have documented, government-endorsed and promoted race-based discrimination was embedded in the fabric of the United States. *See generally* ROTHSTEIN, *supra* note 4. It would be unrealistic to expect the federal courts to address each such instance, which is why, the thesis of this Article notwithstanding, community and political solutions remain ideal.

172. *Thompson I*, 348 F. Supp. 2d at 407; *LA Alliance I*, 2021 WL 1546235 at *61.

173. Using *LA Alliance* as a cautionary tale, it is critical that the plaintiffs share the characteristics with the "class." The plaintiffs in *LA Alliance* failed at the appellate level in part because there were no plaintiffs that were Black, unhoused residents of Skid Row. *LA Alliance II*, 14 F.4th at 958 (stating that "Plaintiffs brought no race-based claims, they did not allege or present any evidence that any individual Plaintiff or LA Alliance member is Black—much less Black and unhoused").

plaintiffs seek must be within the capacity of the defendants to accomplish. Make no mistake about it: the courts in both *Thompson* and *LA Alliance* were bold, as neither court had any qualms getting involved in policy, planning, and fiscal matters.[174] But, critically, the relief that the courts considered was manageable.[175] And, despite being bold, the relief was narrowly targeted and designed to address the specific complained-of harms: In *LA Alliance* the order centered around providing housing to residents of Skid Row, and in *Thompson* it centered around methods to take a regional approach to public housing in the area around Baltimore City to increase the opportunities for integration.[176] In *LA Alliance,* Judge Carter had studied the inventory of the City's vacant properties and budget, thereby achieving some level of assurance that the defendants could comply with his order.[177] In *Thompson*, the court did not provide a specific remedy (and the case ultimately settled), but the court nevertheless discussed its belief that there was nothing impeding HUD from making an honest assessment of ways to expand public

174. *LA Alliance I*, 2021 WL 1546235 at *55–62. Judge Carter noted that "[t]he Court's equitable powers allow it to tailor relief to different circumstances, regardless of any procedural complexity." *Id.* at *55. *See also Thompson I*, 348 F. Supp. 2d at 409 ("The case shall proceed to the remedial phase. The Court shall hear evidence regarding the appropriate action to take to insure that HUD shall, in the future, adequately consider a regional approach to the desegregation of public housing in the Baltimore Region."). *Cf.* United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1235 (2d Cir. 1987) ("Where such a violation has been found, the court should tailor the remedy to fit the nature and extent of the violation."). In *Yonkers*, the Second Circuit upheld the District Court's order dictating given "the City's prior disregard of governmental urging that it select housing sites outside of Southwest and its historical willingness to forgo federal funding in order to preserve segregated housing patterns." *Id.* at 1236–37.

175. *LA Alliance I*, 2021 WL 1546235 at *58 ("[I]f a district court finds an ongoing Constitutional violation, it is obligated to impose a remedy, while budgetary and capacity concerns can be adequately addressed by the court by giving the party sufficient discretion in how to remedy the violation."); *Thompson I*, 348 F. Supp. 2d at 414 (noting that it "may be difficult to specify the precise obligations that arise out of past discrimination" and that *Brown II* "imposes upon formerly discriminating government entities obligations to disestablish segregation in good faith, fairly and equitably, with due consideration of 'local conditions' and with 'practical flexibility,' 'reconciling public and private needs' yet acting promptly and reasonably, to eliminate the vestiges of discrimination and segregation").

176. *LA Alliance I*, 2021 WL 1546235 at *60–62; *Thompson I*, 348 F. Supp. 2d at 409. It is beyond the scope of this Article to address the very serious question of how to practically implement court orders or handle political pushback in the face thereof. *Cf.* Marianne Yen, *Judge Holds Yonkers in Contempt*, WASH. POST (Aug. 3, 1988), www.washingtonpost.com/archive/politics/1988/08/03/judge-holds-yonkers-in-contempt/750d5ab1-165d-434b-8bb6-f1c3267e4557 [perma.cc/GE3N-TP65] ("[A] federal judge today held the Westchester County suburb in contempt for failing to comply with his three-year-old housing desegregation order[.]").

177. *LA Alliance I*, 2021 WL 1546235 at *60–61.

housing beyond the reach of Baltimore City.[178]

C. Causation and Responsibility

Intentionally omitted from the discussion above is the concept of causation, which admittedly is the one that is hardest to break down into a neat "lesson learned," for it is the one that escapes facile explanation.[179] Legally, when determining liability, litigants and courts tend to hunt for the "proximate cause" of an alleged harm.[180] But usually that applies when operating within the framework of private liability or retributive justice,[181] which do not fit well in the paradigms discussed above. Indeed, when dealing with structural injustice that has perpetuated concrete wrongs committed long ago, it is difficult if not impossible to assign blame in the traditional sense.

Yet, if we re-work the responsibility model to one of public rights and restorative justice,[182] the focus shifts. Concepts of responsibility begin to transition from blame assignment to asking the question of "How can we do better?"[183] And with that approach,

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178. *Thompson II*, 2006 WL 581260, at *2. Specifically, the Court noted that:

> the Fair Housing Act required HUD to at least consider regional approaches in exercising its considerable leverage over public housing in a manner that does not perpetuate segregation patterns that resulted from de jure segregation in public housing in Baltimore City. HUD can fulfill this mandate without building or siting public housing itself. What HUD must do is consider, in good faith, regional approaches to desegregation in public housing in the Baltimore Region.

Id.

179. A fundamental principle of tort law is that in order for the tortfeasor to be held liable, it must have committed an act that was a proximate cause of the harm. *See* 86 C.J.S. TORTS § 24 ("In order to recover damages in a cause of action for any tort, a plaintiff must establish some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.").

180. *Id.*

181. *See Retributive Justice*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 18, 2014), www.plato.stanford.edu/entries/justice-retributive/ [perma.cc/JT9K-6TYX] (noting that retributive justice is based on the principle that "those who commit wrongful acts, especially serious crimes, should be punished even if punishing them would produce no other good").

182. *See* Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 640 (2021) ("Restorative [justice] approaches share the view that the proper response to an offense should focus not on punishment, but on meeting the needs of the victim, holding the offender accountable for the harm caused, taking steps to repair as much as possible the harm suffered by the victim and the community[.]").

183. This is not to suggest that racist and discriminatory behavior be

the barrier between *de jure* and *de facto* begins to dissolve.

Legal formalities aside, *LA Alliance* is a refreshing, albeit tragic, reminder of exactly what is at stake when dealing with issues of segregation and systemic housing discrimination. Indeed, it forces us to confront the fact that the effects of discrimination did not magically disappear when the FHA and other civil rights laws were passed in the 1960s. On the contrary, the decision makes explicit that, at least in the Los Angeles area, historical race-based discrimination was so prevalent and severe that it necessarily is related to current disparities in economic opportunity, housing stability, health outcomes, and interaction with the criminal justice system.[184]

But, to be clear, *LA Alliance* is not, at its core, about finding proximate cause or assigning guilt to any individual. Rather, it and *Thompson* are an indictment of structural racism.[185] The decisions attack the status quo for allowing the wounds of a bygone era to remain untreated and to allow them to metastasize.[186] The suggestion in both *LA Alliance* and *Thompson* is that the community at large (represented in each case by those who have assumed political power) has failed those who do not have the strongest voice and that, therefore, a societal remedy is necessary.[187]

While not discussed in *LA Alliance* or *Thompson*, each case has

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forgotten or absolved.

184. *See supra* Part III.

185. *LA Alliance I*, 2021 WL 1546235 at *44; *Thompson II*, 2006 WL 581260, at *10.

186. Echoes of this can be found in other lines of cases, including those involving how Black criminal defendants are treated differently in sentencing—especially when the victims of crimes are white. As Justice Brennan noted in a challenge to such sentencing scheme in Georgia:

> In more recent times, we have sought to free ourselves from the burden of this history. Yet it has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.

McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

187. *Id.*

elements of what philosopher Iris Marion Young described as the "social connection model" of responsibility for historical injustice.[188] This model differs from what she deems the traditional "liability model," commonly found in private-law litigation, in which a person or entity has wronged another person or entity and must compensate the wronged party for that harm.[189] According to Young, a social connection model of responsibility,

> consists in a shared responsibility that all members of a society have to redress structural injustice by dint of the fact that they contribute by their action to its production and reproduction. This model of responsibility does not assign blame or fault, but rather enjoins a political responsibility to organize collective action for change . . . . History matters in the social connection model, but not in order to reproach, punish, or demand compensation damages.[190]
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> . . .
>
> [Rather,] [a]n account of the continuities of present with past injustices is important . . . for understanding how the present conditions are structural, how those structures have evolved, and where intervention to change them may be most effective. Acknowledgment that current structural injustices have some roots in past injustice . . . provides additional weight to moral arguments for remedying these current injustices.[191]

This philosophical theory has analogues in both Fair Housing and Equal Protection jurisprudence. While the nominal defendants are government actors in both *LA Alliance* and *Thompson*, what is "government" other than, at least nominally, a reflection of the will of the majority in a community?[192] And while each case has named plaintiffs, at their cores, both decisions are examining community-wide harms and the obligation, if any, that government has to remedy them.

There is support under an Equal Protection analysis that may alleviate traditional concepts of causation. Scholars have noted, equal protection is less about "whodunnit" blame and more about requiring the state to ensure equality of the laws.[193] As explained

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188. Iris Marion Young, RESPONSIBILITY FOR JUSTICE 104–13 (2011).

189. *Id.* at 97–104.

190. *Id.* at 173.

191. *Id.* at 181–82. Young further noted that viewing present-day injustices impacting communities of color as being rooted in societal structures or systems requires "telling a social-scientific story of how a multiplicity of institutional rules, social policies, market forces, and expressed cultural meanings conspire to produce these limited options for many African Americans in ways that are difficult to change or overcome." *Id.* at 184.

192. *But see* Jack M. Balkin, *How Do We Measure the Will of the People?*, YALE U., www.jackbalkin.yale.edu/how-do-we-measure-will-people [perma.cc/QA9P-HDAG] (last visited Dec. 8, 2023) ("In fact, however, 'the will of the people' is a legal and political fiction.").

193. *See*, *e.g.*, Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 N.W. U. L. REV. 410 (1993).

by Professor Lawrence G. Sager,

> What courts have seemed to have forgotten, however, is that the [Equal Protection] state action doctrine is about responsibility, not solely causation, even though causation is normally how the responsibility arises. A state is responsible for the equal protection of its citizens, and allowing structural injustice to continue is action for which the state is responsible.[194]

A review of state-inaction jurisprudence makes clear that even if a government actor is not the immediate, proximate cause of some form of harm, it can nonetheless assume legal responsibility to address it.[195]

There can be no denying that in many cases, the harms will nevertheless be considered too attenuated at least for Equal Protection purposes for a court to offer a meaningful remedy.[196]

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194. *Id.* at 411. Professor Sager continued:

> If we believe, as we must, that slavery and its aftermath of legally endorsed racial caste was deeply unjust; and if we believe, as we should, that we continue to suffer social and economic divisions along the fault lines of race as a consequence of our history, it follows that justice not merely permits but requires the repair of this injustice. But nothing in constitutional case law anticipates the judicial enforcement of this obligation.
>
> The observation that a broad gap exists between our notions of political justice and the corpus of constitutional case law could be read as simply offering a good reason to reconsider and expand constitutional doctrine. Certainly, there is something to this. We should be careful not to let our sometimes timid exploration of the boundaries of constitutional justice limit our reflective imagination.

Id. *See also* Howard, *supra* note 109, at 273 ("The Equal Protection clause imposes an affirmative obligation for the states to provide for the equal protection of its citizens, and this duty can be violated by state inaction.").

195. *See* David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENT. 409, 413–14 (1993) ("When the government was actually caught red-handed, discriminating against African-Americans, then of course there was state action. . . . But even when the government was nominally not involved, the functional equivalent of state action might still be present, because much private action was for all practical purposes indistinguishable from government action.").

196. As the Supreme Court has noted in the school-desegregation context:

> It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a de jure violation. And the law need not proceed on that premise. As the de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system.

Freeman v. Pitts, 503 U.S. 467, 495–96 (1992).

Nevertheless, this section is intended to suggest that a categorical rejection of the conception that courts can play a role in assigning government responsibility for wrongs it has committed, even from long ago, (as well as government created or endorsed structural injustices) is the wrong approach. Indeed, this Article contends that both *LA Alliance* and *Thompson* got it right. And, if the elements discussed in Section III.B are carefully considered and addressed, the issue of causation need not always be a stumbling block to obtaining judicial relief in other cases.

V. CONCLUSION

This Article has attempted to scratch the analytical surface of the important question regarding the role of the federal judiciary to address present-day harms that relate to historical government-endorsed housing discrimination. To be clear, it does not suggest that litigation is a panacea that can be used to remedy every ill that can be tied to historical housing discrimination. Moreover, it has attempted to be transparent about the analytical weaknesses of the theory it espouses. Those acknowledgments notwithstanding, it seeks to put on a pedestal the *LA Alliance* decision, as well as older cases (*e.g.*, *Brown*, *Swann*, *Gautreaux*, and *Thompson*) that bolster its rationale and the spirit of its remedial order. Indeed, while *LA Alliance* lacks formal precedential value, it is not valueless: it suggests a path forward for invoking the judicial power based on a government inaction theory.

So, are there other examples where the theory espoused in this Article might apply? Consider, for example, situations in which environmental racism and housing justice collide.[197] If a local government had a historical record of contributing to the segregation of a community of color and physically restricting that community to an area zoned for industrial use, could members of the community sue under an AFFH or Equal Protection theory for a remedy that would alleviate ongoing health and quality-of-life concerns? Arguably, such a scenario would fit the model well. A court could potentially order relief that would involve rezoning, mobility options for residents, and/or community redevelopment.[198]

197. *What Is Environmental Racism?,* NAT'L RES. DEF. COUNCIL (May 24, 2023), www.nrdc.org/stories/what-environmental-racism [perma.cc/5V3J-QVMD] (noting that environmental racism includes "the intentional siting of polluting and waste facilities in communities primarily populated by African Americans, Latines, Indigenous People, Asian Americans and Pacific Islanders, migrant farmworkers, and low-income workers").

198. Recently, the City of Chicago resolved a case with HUD that related to environmental racism and Chicago's decision to build a recycling plant in a predominantly Black area. Bretty Chase, *Chicago, HUD Settle Environmental Racism Case as Lori Lightfoot Leaves Office*, CHICAGO SUN TIMES (May 12, 2023, 2:13 PM), www.chicago.suntimes.com/2023/5/12/23720343/hud-environmental-racism-lightfoot-general-iron-environmental-justice-housing-

Further, consider a situation in which government aggressively used eminent domain in a discriminatory manner against a community of color, which resulted in the loss of property, businesses, and community social fabric. Might this situation also call for a remedy in the form of required community reinvestment and economic development?[199] What about situations in which government acquiesced in the use of violence that led to the destruction of communities of color, limiting housing opportunities and creating an under-resourced neighborhood?[200] These too may be candidates for equitable relief.

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urban-development [perma.cc/PEP6-AXM7]. While the case settled, HUD noted in its Letter of Findings that the community had historically been treated as a metaphorical dumping ground for industrial businesses, which community members said caused health harms.

JACY GAIGE, LETTER OF FINDINGS OF NONCOMPLIANCE WITH TITLE VI AND SECTION 109 5 (Jul. 19, 2022), www.hud.gov/sites/dfiles/Main/documents/Letter_of_Finding_05-20-0419_City_of_Chicago.pdf [perma.cc/WW97-U28A]. While the impetus for that matter was Chicago's decision to move a recycling plant from a predominantly white neighborhood to one that is predominantly Black and Hispanic, *Id.* at 2, the question this Article poses is why the complainants could not bring a case even if Chicago never planned to move the recycling factory in the first place? It would appear that contemporary government inaction to rezone or otherwise address the existence of environmental harms is related to prior government decisions to allow these entities to be in that community, and there are no doubt present-day harms flowing from those prior decisions.

199. *Cf.* Mike Ives, *L.A. County to Pay $20 Million for Land Once Seized From Black Family*, N.Y. TIMES (Jan. 4, 2023), www.nytimes.com/2023/01/04/us/bruces-beach-la-county.html [perma.cc/RB2C-7R7L] ("The great-grandchildren of a Black couple whose beachfront property in Southern California was seized by local officials in 1924, and returned to the family last year, will sell it back to Los Angeles County for nearly $20 million, an official said on Tuesday.").

200. Take as another example, historic atrocities like the Tulsa Race Massacre. *See generally Tulsa Race Massacre*, THE ENCYCLOPEDIA OF OKLA. HIST. AND CULTURE, www.okhistory.org/publications/enc/entry.php?entry=TU013 [perma.cc/V538-SK7D] (last visited Dec. 8, 2023). While the atrocities may have been largely committed by private citizens, the police and government officials turned a blind eye, resulting not only in death, but the destruction of a neighborhood and homes. *Id.* Recently, plaintiffs brought such a lawsuit under a public nuisance theory. Second Amended Petition, Randle v. Tulsa, Case No. CV-2020-1179, Sept. 2, 2022. They alleged, for example, that Tulsa has thwarted efforts to rebuild and instead redirected resources to white communities. *Id.* ¶ 4. The Petition further alleges that members of the communities "continue to experience insecurity in their lives and property." *Id.* The question this article poses is: Is this not also an Equal Protection violation, which can still be litigated based on local government's failure to properly reinvest in the community or otherwise make amends for the past harms that continue to impact the Greenwood community? Interestingly, while the case was dismissed by the trial level court, the Oklahoma Supreme Court has agreed to hear the appeal. Lauren McCarthy, *Court Ruling Revives Reparations Claim Filed by Tulsa Massacre Survivors*, N.Y. TIMES (Aug. 16, 2023), www.nytimes.com/2023/08/16/us/tulsa-race-massacre-lawsuit-appeal.html [perma.cc/BXB9-MKN4].

There are almost certainly other examples, but the intention is not to provide an exhaustive list of potentially relevant situations. Rather, the hope is that this Article will encourage others to think critically about present-day structural harms and reject the proposition that our powerful federal courts lack any ability to right the wrongs of the past. As Justice Ketanji Brown Jackson recently stated—albeit in dissent and the higher-education context—

> Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal.[201]

I am hopeful this Article can encourage in some way shape or form to actualize that foundational principle.

201. *Students for Fair Admissions, Inc.*, 600 U.S. at 384 (Jackson, J., dissenting).