The Missing Half: Revisiting Monetary Remedies To Redress Racial Segregation

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Abstract

This Essay[1] considers whether courts should have awarded monetary remedies in housing desegregation cases. By examining the relief awarded in public housing desegregation cases brought in United States federal courts between 1966 and 1994, this Essay reveals the limitations of the almost exclusive reliance on forward-looking integration relief as a remedy. The Essay argues that there is a "missing half" of remedies that courts never awarded: compensatory damages for the loss of wealth and opportunity caused by housing segregation. Forward-looking remedies that promised integration have often gone unfulfilled. Understanding these "missing" damages is crucial given recent Supreme Court rulings on race-conscious programs, as well as political and cultural debates about how to provide a remedy for the harms done by structural racism. The Essay encourages a greater focus on the role of monetary relief as compensation for racial harm going forward, while also urging that commentators and advocates move beyond calcified debates about integration versus equalization (or "place-based" approaches) as a remedy for housing segregation. As a legal and policy matter, redress for housing segregation should include a spectrum of remedies including individual compensatory damages, community-based compensation, and forward-looking injunctive relief. The Essay also has implications for the current discussions in the United States about how and whether to provide reparations for Black Americans. The Essay suggests that repair should include individual payments, given what we learn from the mixed success of injunctive relief remedies in litigation.

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[1] Perhaps what follows is far too long to be an essay, but in the spirit of cultural theorist Professor Jesse McCarthy, it might be an essay "in the French etymologic sense of *essais*, attempts": a "space not only for argument but for experimental writings that mix and chop the old ways into new ones." Jesse McCarthy, Who Will Pay Reparations on My Soul? XVII (2021).

Introduction

Should courts have awarded monetary relief in racial desegregation cases? The default remedy in desegregation cases has been injunctive relief: a set of changes to integrate school districts or develop new housing in majority-white, low-poverty communities going forward.[2] This approach is consistent with the black letter law default in institutional reform litigation: once a court finds a violation of constitutional rights, the remedy is not monetary but injunctive relief to prevent the continuing violation of that constitutional right. Awarding forward-looking injunctive relief was developed in the school desegregation cases to remedy both the material harm of a lack of quality education and the democratic harm of reinforcing caste and second-class citizenship by taking steps to create a unitary, integrated system.[3] To be sure, there was a debate among the lawyers and strategists who shaped the school litigation cases about whether to emphasize equalization of school funding. But once school desegregation lawyers committed to a school integration strategy, injunctive relief was the vehicle. Seeking monetary relief would seem to surrender *Brown*'s central constitutional principle, which aims to remedy the intangible (or not easily quantified) harms of lost social capital and unequal citizenship.

Does this same logic extend to housing desegregation cases? Remedies in systemic housing segregation cases against government actors mirrored the integration injunction in school desegregation cases by creating housing opportunities in white, low-poverty communities for residents living in

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[2] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

[3] *See infra* Part I.A.

segregated neighborhoods.[4] Yet, there are arguments for a different remedial approach in housing. Remedies in housing segregation could consist of integration into predominantly white communities, but they could also entail compensation for financial harms for the loss of the opportunity to live in desegregated communities. Part of the harm of housing segregation is that it results in lower-quality housing opportunity, less wealth for individuals, and disinvestment in Black communities; harm that litigation could conceivably remedy through monetary relief. To be sure, the integration injunction in housing also seeks to further democratic and social capital benefits that are not easily quantifiable. Just as there are social capital benefits to integration in schools, there is evidence of greater socio-economic mobility for Black children who reside in low-poverty, higher-opportunity neighborhoods as compared to their counterparts who remain in high-poverty neighborhoods.[5] Indeed, many social scientists understand residential segregation as the linchpin that explains a range of social ills including poor outcomes in the areas of education, health, criminalization, and mortality.[6] In addition, seeking *only* compensation for individuals or for segregated communities risks naturalizing spatial arrangements that were created by discriminatory housing policies. The argument for pursuing integration is compelling, but the argument for *not* pursuing compensation *as well* does not follow.

Why raise these questions now? It is unlikely that advocates will seek to reopen the public housing discrimination cases from several decades ago or bring new ones. And yet these questions are salient today. First, revisiting remedies for public housing desegregation cases makes visible that housing desegregation decrees only served as a partial remedy for segregation. White communities resisted and continue to resist the integration remedies of the major public housing desegregation cases. While many of these cases launched important housing desegregation initiatives — for instance,

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[4] *See, e.g.*, Gautreaux v. Romney, 304 F. Supp. 736, 741 (N.D. Ill. 1969) (ordering that "CHA shall affirmatively administer its public housing system in every respect (whether or not covered by specific provision of this judgment order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures.").

[5] *See generally* Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility II: County Level Estimates*, 133 Q. J. Econ. 1163 (2018) (finding that counties with less concentrated poverty, less income inequality, better schools, and a larger share of two-parent families tend to produce better outcomes for poor children); Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 Am. Econ. Rev. 855 (2016) (detailing income and educational gains of children who moved from high-poverty to low-poverty neighborhoods).

[6] *See, e.g.*, Douglas Massey, *Residential Segregation is the Linchpin of Racial Stratification*, 15 City & Cmty. 4, 6 (2016) ("The active, ongoing production of residential segregation today occurs within a context of sharply rising inequality and growing segregation on the basis of wealth and income…thereby creating a new and more complex urban ecology in which race and class interact powerfully to determine individual and family well-being."); Thomas Pettigrew, *Racial Change and Social Policy*, 441 Annals Am. Acad. Pol. & Soc. Sci. 114, 114, 122 (1979) (describing segregation as the "structural linchpin" of racial stratification in the United States).

housing mobility vouchers that provided low-income Black residents the possibility of living in low-poverty communities outside segregated urban cores — these programs did not provide benefits to all in the plaintiff class, nor did they provide compensation for those harmed by segregation and disinvestment who could not access integration remedies. Second, examining the limited success of integration remedies might help reshape remedies in future housing cases. The practical implication is that in cases such as exclusionary zoning and predatory redlining, monetary relief should play more of a role in order to provide assets to communities and individuals.

Recognizing a "both/and" of injunctive relief and compensatory damages could create a new discourse of redress that mediates between integration and place-based approaches that seek to improve services and housing in low-income communities of color. A standard critique of integration remedies in housing is that the focus on moving Black people into white spaces fails to consider appropriately the assets of Black communities. But the limitation of place-based approaches that center on investments in Black neighborhoods is that they naturalize existing boundaries that are themselves the result of segregation. In that way, the project connects to an emerging advocacy discourse about "redress" that advocates have begun to offer.[7] The redress approach seeks to remedy the harm of segregation by providing resources to historically segregated Black spaces while also expanding opportunity and access to low-poverty, integrated neighborhoods.

This Essay's examination of remedies and repair in public housing segregation lands at a time of contestation over remedy in political, legal, and cultural discourse. Cities and states are undertaking serious examinations over whether to grant reparations for slavery, segregation, and other racial harms.[8] At the same time, there are well-funded efforts battling against a public accounting of the United States' racial history that feature in battles over public monuments,[9] public school curriculum,[10] and workplace

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[7] Advocates and scholars have begun to design advocacy around the conception of redress. *See, e.g.*, The Redress Movement, https://redressmovement.org/history-mission/ ("We work to repair the harm caused by intentional policies that segregate communities by educating, mobilizing, shifting the narrative, and winning redress victories."); Melvin J. Kelley, *Trading Places or Changing Spaces? At The Crossroads of Defining and Redressing Segregation*, 54 Conn. L. Rev. 849 (2022) (employing the language of "redress" in exploring the Fair Housing Act's ("FHA") "segregative effect" liability theory).

[8] *See, e.g.*, Cal. Task Force to Study & Develop Reparation Proposals for African Americans, Executive Summary "The California Reparations Report" 4 (June 2023), https://www.oag.ca.gov/system/files/media/exec-summary-ca-reparations.pdf [https://perma.cc/P2A6-T2ZF].

[9] *See, e.g.*, Richard C. Schragger, *What is "Government" "Speech"? The Case of Confederate Monuments*, 108 Ky. L. J. 665, 669 (2020) ("More recently, and especially after the election of Donald J. Trump, Confederate symbols have become flashpoints in larger political and cultural struggles over race and religion, white and non-white America, diversity, immigration, exclusion, and inclusion. These debates have been accompanied by rising white supremacist violence and an increasingly divisive and racialized political discourse.").

[10] *See, e.g.*, LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 Yale L.J. 2139, 2145 (2023) (describing the emergence of efforts in 2020 and 2021 to ban

inclusion programs.[11] In the midst of this public debate, the Supreme Court in June 2023 held that the Equal Protection Clause no longer allows the consideration of race as a factor to advance diversity in higher education,[12] affirming an anti-classification understanding of the Fourteenth Amendment with a limited capacity for providing a remedy for racial harms.[13] Given the Court's emphasis on limiting race-conscious remedies to "specific, identified instances of past discrimination that violated the Constitution or a statute,"[14] and its criticism of the lack of end dates for race-conscious affirmative action programs, it becomes particularly important to attend to unfulfilled remedial promises such as those in the public housing desegregation cases.[15]

The "redress" framework advanced in this essay thus has broad implications for legal, policy, and public conversations about addressing the harms of racial segregation and subordination even beyond housing. A redress framework invites us to evaluate the design of any remedy for racial harm across a range of dimensions. One dimension is whether the remedy addresses citizenship harms as well as material harms (such as the effect of the wrong on mobility, income, and wealth). Another is whether the remedy is forward-looking or backward-looking. And a third is whether the remedy addresses individual or collective harms. These are distinct dimensions upon which to examine remedy, even as the typical judicial remedies of injunctive relief and monetary relief can serve multiple and overlapping functions.

This Essay proceeds in three Parts. Part I considers how the integration injunction came to serve as the default remedy in school and housing desegregation cases and outlines the doctrinal contours of that remedy. Part II

"critical race theory" from K-12 curricula and anti-racism training in schools and workplaces and recounting that "between January 1, 2021, and December 31, 2022, lawmakers at every level of government have introduced or adopted over 560 laws, regulations, policies, and other official actions to restrict CRT training, teaching, and curricula."); Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 Wm. & Mary J. Race, Gender & Soc. Just. 61, 73–78 (2021) (arguing that anti-critical race theory legislation and proposals emerged as backlash to the protests of 2020 and the ensuing racial reckoning).

[11] *See, e.g.*, Michael Z. Green, *(A)woke Workplaces*, 2023 Wis. L. Rev. 811, 815–16 (2023) (describing legislation to ban diversity and anti-racism training as part of a larger campaign to discredit DEI as "reverse discrimination" or counter the idea that racism is systemic).

[12] *See* Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175 (2023).

[13] *See id.* at 2161–62 (reading Fourteenth Amendment prohibitions against "racial discrimination" as interchangeable with a prohibition against "racial classification"); *id.* at 2173 ("Permitting 'past societal discrimination' to 'serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group.' (internal citation omitted.) Opening that door would shutter another—'[t]he dream of a Nation of equal citizens. . .would be lost,' we observed, 'in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.'" (quoting *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 505–06 (1989))).

[14] *Id.* at 2162.

[15] Nevertheless, this Essay does not recommend changes that require the use of racial classifications. Instead, it investigates compensation for those in the remedial class and for their descendants.

examines the success and limits of the integration injunction in three major housing desegregation cases spanning from the 1960s through the 1990s, arguing that the partial success of integration remedies counsels a greater role for compensatory monetary relief. Part III explores the implications of this analysis for litigation, as well as for the broader theory and practice of remedy and repair. Monetary relief should factor into contemporary and future fair housing litigation. This Part further argues that advocates and governments should advance a framework of "redress" to capture both the harms of segregation in housing as well as the possibilities created by integration and sustainable communities of color.

I. The Integration Injunction

Public housing remedies are based on school desegregation remedies that communities and commentators had begun to question in the decades after *Brown*. For instance, Professor Derrick Bell's 1976 article *Serving Two Masters: Integration Ideals & Client Interests in School Desegregation* offered what became a canonical critique of the remedies that lawyers sought in school desegregation litigation. Bell questioned whether the time had come to fulfill *Brown's* mandate of "equal educational opportunities" not through school integration but through strategies to improve Black schools.[16] For Bell, the motivation for the article was rising local and national opposition to desegregation, a decline in judicial support for desegregation, and increased discontent with desegregation efforts by Black families and communities: "[t]he great crusade to desegregate the public schools has faltered."[17] While this "crisis of events" motivated the inquiry, the article argued that it was "long overdue."[18] Bell's article represented an examination of the ethical duty as well as the political and moral obligation that civil rights lawyers owe to their clients who had begun to question whether pursuing integration was worth it. Bell's critique of integration remedies in school provided a point of departure for revisiting how the integration remedy, what I call the "integration injunction," came to be the standard remedy for school segregation, and ultimately shaped the remedy in housing discrimination cases.

Bell's 1976 critique of integration remedies and lawyering hearkened back to a longer standing discourse that emerged in the twentieth-century among civil rights leaders: whether to challenge the degradation of Black children and the underfunding of Black schools by advocating (politically

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[16] *See* Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 515–16 (1976) ("Political, economic, and social conditions have contributed to the loss of school desegregation momentum; but to the extent that civil rights lawyers have not recognized the shift of black parental priorities, they have sacrificed opportunities to negotiate with school boards and petition courts for the judicially enforceable educational improvements which all parents seek.").

[17] *Id.* at 471.

[18] *See id.*

and in courts) for integration or whether leaders should pursue a strategy of equalizing schools.[19] As the familiar story goes, leaders like W.E.B. Du Bois expressed pessimism about the prospect of meaningful integration, and given this uncertainty urged a focus on improving Black schools and institutions.[20] Du Bois would ultimately resign from leadership of the NAACP in part because of the organization's decision to press for integration. Once the NAACP settled on an integration strategy, efforts to provide greater resources to traditionally Black schools or pursue equalization strategies largely fell by the wayside. One of the lawsuits leading up to *Brown* included a claim demanding more resources for Black schools early in the litigation, but it was soon transformed, like similar claims in other suits leading to *Brown*, into an argument that separate could never be equal.[21] Providing greater funding for Black schools through compensatory educational resources and money was sometimes part of the remedy in later school desegregation cases, but it was less of a focus.

Bell's essay is thus elegiac: a reflection on an alternative path that lawyers might have taken to pursue equalization instead of school desegregation. It is also a lamentation about misplaced hope, brought on by the failure to implement integration remedies that had once seemed possible. This Part revisits how advocates chose to pursue integration in the schools through forward-looking injunctive remedies and the aspirations that choice embodies. Judicial decisions and political resistance would limit the practical effect of the integration injunction in school desegregation cases. And yet, the core idea of forward-looking injunctive relief to achieve integration would provide the model for remedying segregation in housing.

This Essay examines the consequences of that choice for housing desegregation cases. The argument that this Part introduces is that the choice to follow *Brown*'s emphasis on forward-looking injunctive relief yielded important gains for addressing housing desegregation. Indeed, the

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[19] *See* Tomiko Brown-Nagin, *An Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark*, 48 St. Louis Univ. L.J. 991, 997–98 (2004) (detailing pre-*Brown* campaigns and advocacy among Black leaders in Atlanta to increase teacher salaries and equalize resources for Black schools). For an in-depth exploration of the fight for civil rights from the perspective of the Black community in Atlanta, including the community's complex view about integration, see Tomiko Brown-Nagin, Courage to Dissent: Atlanta and The Long History of the Civil Rights Movement (2011).

[20] Du Bois wrote that the "Negro needs neither segregated schools nor mixed schools. What he needs is Education" and that segregated education was better than a humiliating education in which Black children were treated as inferior, as "doormats to be spit and trampled upon and lied to by ignorant social climbers. . ." W. E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 J. Negro Educ. 328, 335 (1935).

[21] *See* Doxey A. Wilkerson, *The Negro School Movement in Virginia: From "Equalization" to "Integration,"* 29 J. Negro Educ. 17 (1960) (detailing the NAACP's move in the late 1940s away from school equalization litigation despite having had some initial success with that strategy); *see also* Bell, *supra* note 16, at 476–77 n.21 (recounting that when Bell was a young LDF attorney in 1961 he informed Black community leaders in Mississippi that, though they had wanted a Black elementary school reopened, "both LDF and NAACP had abandoned efforts to make separate schools equal" in favor of desegregation).

injunction integration that emerges in housing was, from a remedies perspective, broader than the remedy in education cases. The Court allowed a metropolitan (beyond the boundaries of the city) remedy in the single major public housing case to reach the Supreme Court.[22] This was in effect a remedy that the Court denied the plaintiffs in *Milliken v. Bradley.*[23] This constitutional foundation — coupled with language in the Fair Housing Act ("FHA") requiring the federal government and its grantees to affirmatively further fair housing — meant that public housing desegregation cases proceeded with integration injunctions that were regional in scope.[24] The remedies in these cases thus had the power to cross the boundaries between cities and suburbs, providing hope for meaningful enduring desegregation.

To understand the importance of *Brown's* "integration injunction" and the origin of the idea that remedies for both school and housing cases would not entail compensatory damages, Section A revisits how the NAACP decided on integration as a remedy, and not compensatory monetary damages or equalization remedies. This Section highlights how the Supreme Court's adoption of structural injunctions in the school desegregation cases expanded conventional accounts of the remedial power of federal courts. Section B describes how this remedy for a time required the disestablishment of segregated school systems, but how the Supreme Court pulled back on the scope of integration remedies at a time of political opposition to school integration. Section C shows how the housing remedy built on school desegregation remedies, and in key aspects was broader because it required housing authorities to adopt inter-district remedies that were difficult to gain in school desegregation cases and that allowed the possibility of remedying segregation across urban-suburban boundaries.

A. Creating the Integration Remedy

The integration injunction in schools proceeded from two assumptions. The first is that integration (as opposed to individual monetary damages or resources for school equalization) is the correct remedy for segregation. The second is that this remedy will happen through an injunction and that this injunctive relief will be the sole remedy. Both assumptions flow from the standard understanding about the nature of injunctive relief for constitutional harms. First-year civil procedure students learn that permanent injunctive relief is available in those cases where "money damages would

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[22] *See infra* text accompanying notes 88–120 (detailing the *Gautreaux* litigation)

[23] *See* Milliken v. Bradley, 418 U.S. 717 (1974); *see infra* text accompanying notes 90–91 (describing the limited conception of remedy that emerges from *Milliken*).

[24] *See* 42 U.S.C. § 3608(e)(5) (requiring federal agencies and grantees to administer programs "in a manner affirmatively to further the policies" of the FHA); Thompson v. U.S. Dep't of Hous. & Urb. Dev., 348 F. Supp. 2d 398, 453 n.109, 462, 508 (D. Md. 2005) (requiring HUD to create housing opportunities for Black residents in the metropolitan area surrounding Baltimore).

not be adequate."[25] This implicitly leads to a bifurcated understanding of cases — those with claims that can be remedied through equitable relief and those that require damages. In this binary, cases claiming a violation of a constitutional right are best suited for injunctive relief. As a leading casebook asks students to ponder, "[D]o you think it would be possible or desirable to imagine money damages as an alternative to an injunctive order directing officials to improve prison conditions."[26] The first-year student will soon learn that the picture is more complicated. Many cases involve both equitable relief and money damages; a single plaintiff or group of plaintiffs may suffer a range of harms, including some that require forward-looking injunctive relief and some that require compensation for past harms. Yet returning to the prison conditions question raised in the casebook, as in school desegregation cases, one would likely *not* want the remedy to be money damages as an alternative to an injunctive order. If this is our answer, however, it comes not from the law of equity or limitations on the scope of remedies in constitutional cases, but from the political economy of the integration remedy in particular. The argument for the integration injunction depends on an assumption that *only* integration, and not monetary relief as a supplement or replacement, could provide full relief for the harms of segregated schools.

The commitment to the integration injunction as providing complete relief embodies both practical and democratic aspirations. When the NAACP decided on school integration as a strategy as opposed to equalization strategies, it did so for pragmatic and democratic reasons. While the pragmatic aspects are arguably replaceable by providing monetary relief, the democratic aspects are not.

One of the practical reasons for the integration injunction is sometimes crudely summarized as the "green follows white" argument:[27] the notion that equal educational resources would only flow to Black children if they went to school with white children. As the former NAACP Legal Defense Fund ("LDF") attorney and late Judge Robert Carter put it, "Integration was viewed as the means to our ultimate objective, not the objective itself."[28]

A sub-component of this more pragmatic argument centers not just on money and resources flowing to Black schools, but on the less tangible "social capital" features of historically white institutions. Even as to this pragmatic strand, forward-looking injunctive relief to achieve integration is a crucial part of the remedy. While monetary remedies such as increased funding to

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[25] *See, e.g.*, Subrin et al., Civil Procedure: Doctrine, Practice & Context 129 (6th ed. 2020) (describing standard for granting permanent injunctions in federal court, including citing language from the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)).

[26] *See id.* at 133.

[27] *See* Martha Minow, In Brown's Wake 9–10 (2010).

[28] Robert L. Carter, *The Unending Struggle for Equal Educational Opportunity*, 96 Teachs. Coll. Rec. 621 (1995).

Black institutions or monetary grants to individuals to compensate for the lack of access to networks might in theory provide compensation, these remedies are necessarily incomplete. If social capital is also about increasing social mobility by connecting students to professional and social networks so that they can work in an integrated society,[29] it could not be replaced by a remedy other than one that provides integration and social contact.

A second central rationale for integration, however, would be even more difficult to achieve through monetary compensation. Integration is meant to vindicate a democratic principle — the notion that equal and integrated education is necessary for equal citizenship and the elimination of caste.[30] This equal citizenship and anti-caste principle grounded the pre-*Brown* late-nineteenth-century challenges to segregated education and would become central to the mid-twentieth-century challenges to segregated education.[31] The NAACP would argue in *Sweatt v. Painter* that "separate but equal" education denied Black students "their opportunity to fully participate in our democratic way of life"[32] and that "segregation took African Americans out of the mainstream of American life."[33] And this principle of equal citizenship served as the foundation for the Court's holding in *Brown* that separate educational facilities are "inherently unequal" and deprived Black children of the "equal protection of the laws guaranteed by the Fourteenth Amendment."[34]

In theory, LDF lawyers could have pursued monetary compensation for the harms of school segregation alongside an integration remedy.[35] In fact,

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[29] *See* Jomills Henry Braddock II, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, 53 Socio. Educ. 178, 179, 181 (1980) (describing school integration as a counter to "perpetuation theory" under which African Americans raised in segregated settings avoid integrated settings); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Educ. Rsch. 531, 552 (1994) (reviewing studies of the long-term benefits of school desegregation and finding that controlling for variables such as test scores and incomes, African American graduates of desegregated high schools earned higher degrees — and experienced more social mobility and higher incomes than graduates of segregated schools).

[30] *See, e.g.*, Erika K. Wilson, *Monopolizing Whiteness*, 134 Harv. L. Rev. 2382, 2404 (2021) (detailing the "democratic equality" rationales that stem from *Brown* and continue to be recognized as a basis for school integration). For classic explorations of the equal citizenship justification for *Brown*, see Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 429–30 (1960); Paul Brest, *The Supreme Court 1975 Term Foreword: In Defense of the Antidiscrimination Principle,* 90 Harv. L. Rev. 1–2, 6–7, 34–36, 42 (1976); Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 5–6 (1977).

[31] *See* Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850).

[32] Brief for Petitioner, *Sweatt*, 339 U.S. 629 (1950) No. 44, 1950 WL 78681, at *75.

[33] *See* Minow, *supra* note 27, at 18 (citing Benjamin F. Hornsby, Jr., Stepping Stone to the Supreme Court: Clarendon County 17 (1992)).

[34] *See* Brown v. Bd. of Educ. of Topeka (*Brown I*), 347 U.S. 483, 495 (1954) (stating "[s]eparate educational facilities are inherently unequal [; t]herefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are … deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

[35] Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and The Supreme Court, 1936–61, at 156 (1994). Other lawyers continued to bring equalization suits after the NAACP committed to integration, and indeed *Bolling v. Sharpe* — the litigation

money was not altogether absent as a remedy sought for educational inequity in the *pre-Brown* era. NAACP lawyers brought lawsuits seeking to raise the salaries of African American teachers, and money was the explicit goal of these cases: lawyers pursued this strategy "because if they were successful[,] they would provide an immediate financial benefit to African American teachers" and "bring more money into the community as a whole."[36] But the NAACP lawyers abandoned these lawsuits once they began to focus on school integration. Parallel lawsuits would have diverted NAACP's financial resources, as well as its political capital and time already spent convincing the Black community to invest in an integration strategy.[37] Indeed, when some local chapters of the NAACP continued to press for equalization suits for K-12 schools, the NAACP disavowed that approach ("it is our policy . . . not [to] undertake any case or cooperate in any case" which recognized "the validity of segregation statutes") and directed lawyers to include in their prayer for relief the "admission of blacks to white schools."[38] By 1950, the NAACP had committed to an "all out" attack on segregated education.[39] The organization issued a board resolution stating that pleadings in all educational cases should be aimed at obtaining "education on a non-segregated basis and … no other relief other than that will be acceptable."[40]

LDF lawyers had to navigate the pull of both equalization and desegregation strategies in the higher education cases that preceded *Brown*. They ultimately abandoned desegregation arguments based on tangible inequities between Black and white higher education institutions in order to avoid being bogged down by a case-by-case examination of concrete inequities in libraries, floor space, faculty, and so on. Instead, Thurgood Marshall and his associates "placed—primary emphasis—on arguments which exhibited a grander sweep."[41] In addition, adding money damages to a not-yet-achieved integration remedy might have sent the message that money was the true aim

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challenging segregation in the District of Columbia — did not begin as a direct attack on segregation but as a challenge to unequal conditions in the city's schools. *Id.* at 165.

[36] *Id.* at 13. *See also id.* at 20–21 (Thurgood Marshall encouraged the salary cases as they would provide "'a material benefit to Negroes in general,' since the teachers spent their money buying goods and services from African American 'physicians, dentists, lawyers and other professional and business men.'"). The cases were a mixed success. Marshall won important victories that resulted in increases in Black teachers' salaries, but as school systems moved to merit pay systems in the mid-1940s, "the potential for further equalization was limited" and the "strategy of 'compelling local school officials . . . to pay for continued maintenance of the 'luxury' of segregation' in elementary and secondary schools appeared to have reached its limit." *Id.* at 121. Dismantling segregated schools became the main focus of the NAACP's litigation. *Id.*

[37] Up until the late 1940s, the NAACP was willing to devote resources to equalization suits: "Attacking segregation directly was a bold step, and not all [its] constituents were ready for it." *Id.* at 151.

[38] *See* Mark Tushnet, The NAACP's Legal Strategy Against Segregated Education 1925–1950 115 (1987); *see also* Tushnet, *supra* note 35, at 155.

[39] *See* Tushnet, *supra* note 38, at 136.

[40] *Id.*

[41] *See* Removing a Badge of Slavery: The Record of Brown v. Board of Education xxiv (Mark Whitman ed., 1993).

of the lawyers or the communities, or that achieving integrated schools was somehow impossible. Going for damages alongside school desegregation would have muddied the message, conceding much of the basis on which the *Brown* principle would come to be established: that the harm facing Black students subject to segregation was not just in the *tangible* (quantifiable) loss of educational opportunity, but also the intangible harms — the loss of social capital, the psychic harm, and the citizenship harms to Black children.[42]

B. The Rise and Fall of the Integration Injunction in Education

In many respects, it disserves the integration remedy to imagine it as the less bold choice than damages or equalization, as Derrick Bell's frustration in the mid-1970s suggests. In the context of the litigation of the time, the integration injunction was a potentially transformative remedy, one more far-reaching in a practical and jurisprudential sense than *just* ordering individual damages. The integration injunction recognizes that the harm of segregation is societal and communal. It expands on the bipolar remedy that is the paradigm of private law litigation, requiring the coordination of many districts and individuals and engaging courts in long-term supervision of a dispute.[43] Once the Supreme Court articulated a specific duty to integrate, the integration injunction converted courts for a significant time into central players in securing integration — by some accounts the Court was "the most important" player, more critical than the executive and legislative branches.[44] Ultimately, the Supreme Court and lower courts pulled back from the integration injunction, releasing school districts from court decisions whether they had in fact achieved school integration or not.[45]

This integration injunction happened only after considerable equivocation by federal courts about the remedy. In holding that segregated schools were unconstitutional, the initial decision in *Brown* famously did not announce a remedy. Its absence hovered over the merits decision, and by some accounts the Court only achieved agreement in *Brown* "because most justices had a vague idea that they could avoid difficulty by allowing

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[42] *See* Jennifer L. Hochschild & Nathan Scorvronick, The American Dream and the Public Schools 29 (2003) ("supporters of desegregation have also consistently argued that it was essential to the realization of the collective goals of the American dream, that it would benefit all of us, that it would remove an unforgivable barrier to equal opportunity and full participatory citizenship for all Americans.").

[43] *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1292–96 (1976) (describing the emergence of the structural injunction); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 397 (1978) (advancing the notion that "polycentric problems" involving many affected parties render adjudication difficult).

[44] *See* Myron Orfield, Milliken*,* Meredith *& Metropolitan Segregation*, 62 UCLA L. Rev. 364, 373 (2015).

[45] *See infra* notes 76–85 and accompanying text.

desegregation to occur gradually."[46] The justices disagreed and waffled on whether to leave the decision to lower courts, concerned about potential political and even violent resistance to the *Brown* decision in Southern states and also cognizant, it seems, of the lack of presidential commitment to implement desegregation at that time.[47] In lieu of deciding the remedy question, the Court asked the lawyers in the case to return to the Supreme Court to argue what would be known as *Brown II*,[48] which brought to the fore debates about the scope of a court's equitable powers and the proper role of a court in a democracy as well as the racial politics of the country.[49]

The legal question in *Brown II* was whether *Brown* required the simple admission of the named plaintiffs to white schools or a broader dismantling of the dual education system, and whether the decision to take either course should be left to the lower courts.[50] After another oral argument, the Supreme Court in *Brown II* directed lower courts to "enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[51] Thurgood Marshall and the lawyers in the case interpreted this mandate as a rejection of their appeal for urgency: "When asked to explain his view of 'all deliberate speed,' Thurgood Marshall frequently told anyone who would listen that the term meant S-L-O-W."[52]

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[46] *See* Tushnet, *supra* note 35, at 229.

[47] *See* Michael J. Klarman, Unfinished Business: Racial Equality in American History 151–57 (2007); Norman J. Silber, With All Deliberate Speed: The Life of Philip Elman an Oral History Memoir 196–208 (2004). Later, President Dwight D. Eisenhower would put the force of the federal government behind the courts, sending in federal troops to Little Rock, Arkansas when the state governor used the Arkansas National Guard to prevent Black students from enrolling in the public high school. *See* Robert J. Cottrol, Raymond T. Diamond, & Leland B. Ware, Brown v. Board of Education: Caste, Culture, and The Constitution 192–94 (2003).

[48] The *Brown* case was argued three times before the Supreme Court, with the second and third arguments devoted to remedy. *See* Tushnet, *supra* note 35, at 214–16.

[49] Justin Driver, The Schoolhouse Gate: Public Education, The Supreme Court, and the Battle for the American Mind 245–49 (2018) (detailing criticism after *Brown* that the Supreme Court had overstepped its power).

[50] *Brown v. Bd. of Educ. of Topeka* (*Brown II*), 349 U.S. 294, 298–99 (1955); Charles J. Ogletree, Jr., All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education 125–27 (2005); Gerald N. Rosenberg, *Tilting at Windmills:* Brown II *and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation*, 24 Minn. J. Law & Ineq. 31, 35 (2006); Tushnet, *supra* note 35, at 219–22 ("The justices differed on several questions: whether the remedy should merely order the admission of the named plaintiffs to the schools to which they already sought entry; whether, if the Court chose a broader remedy, it could craft a decree giving guidance to lower court judges sufficient to minimize the risk of violent resistance; and whether the Court's opinion should indicate whether lower courts could take into account not only the administrative difficulties of merging two systems but also the white South's attitudes towards desegregation.").

[51] Brown v. Bd. of Educ. of Topeka (Brown II), 349 U.S. 294, 301 (1955). Professor Charles Ogletree later argued that this phrase was a "palliative" to southern school districts worried about rapid integration. Ogletree, Jr., *supra* note 50, at 10.

[52] I*d.*; *See also* Tushnet, *supra* note 35, at 230 (recounting that Frankfurter prevailed upon Chief Justice Warren to employ the "all deliberate speed" formulation that had been drawn from

While Marshall at times optimistically predicted that desegregation would take "up to five years,"[53] even before the oral arguments in *Brown*, "the NAACP staff understood that desegregation was likely to be a long-drawn-out process" spanning more than five years.[54]

And so it would be.[55] While a few school districts followed the mandate of *Brown II* to begin immediate desegregation and move towards integration,[56] most Southern school districts actively resisted, often with the full support of federal district courts.[57] It would not be until the mid-1960s — more than a decade after *Brown II* — that there would be significant movement on school integration. A key impetus was the passage of Title VI of the 1964 Civil Rights Act, which permitted the federal government to terminate funds for school districts that did not desegregate.[58] Passage of the Act led to some increased compliance with court orders to integrate, particularly in border states.[59] A second key factor in the eventual integration was the Supreme Court's strengthening of the remedy in subsequent cases,

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a "case arising from the separation of West Virginia from Virginia during the Civil War," an analogy to a situation in which the Court had tried to "get obedience from a state for a decision highly unpalatable to it" (quoting Conference Notes Earl Warren Papers, Apr. 16, 1955 Library of Congress, Box 574, *Brown II*)).

[53] *See* HOCHSCHILD & SCORVRONICK, *supra* note 42, at 32.

[54] *See* TUSHNET, *supra* note 35, at 218–19.

[55] Professor Justin Driver, however, argues that it was not immediately apparent that the phrase would signal weak remedial implementation: "Proponents of racial equality did not immediately shower *Brown II* with condemnation, in large part because the opinion had not yet been distilled into the 'all deliberate speed' axiom, which eventually became shorthand for the Court's desultory approach to desegregation. But it was not yet clear in 1955 that the Court would effectively retreat from this field for more than a decade." DRIVER, *supra* note 49, at 256–57. Driver also notes that *Brown II* contained forgotten language requiring a "'prompt and reasonable start toward full compliance'" and that "'the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.'" *Id.* at 257.

[56] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 97–100 (1st ed. 1991). And some school districts had started desegregating even prior to the reargument of *Brown*. *See* TUSHNET, *supra* note 35, at 218 ("In both Delaware and Washington, substantial desegregation occurred before reargument.").

[57] *See* HOCHSCHILD & SCORVRONICK, *supra* note 42, at 32–33; TUSHNET, *supra* note 35, at 240–41 (describing the "Southern Manifesto" signed by many representatives in the Deep South that claimed that *Brown* was an abuse of judicial power and that they would "use all lawful means" to reverse *Brown*); *see id.* at 242 (describing the decision by Judge John Parker in the South Carolina case, *Briggs v. Elliott*, on remand, holding that *Brown* did not require integration but merely forbade discrimination); *id.* at 247–53 (describing the rise and fall of "massive resistance" to *Brown* from 1955 through 1959 in which Southern school districts and legislatures enacted a range of statutes and undertook administrative actions to maintain segregated schools); *id.* at 257–59 (describing violent resistance to *Brown*). Resistance was not limited to the South. *See generally* ELIZABETH GILLESPIE MCRAE, MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY 217–40 (2018) (documenting how white women in Boston organized in the twentieth-century to resist desegregation remedies such as "school busing").

[58] *See* Title VI of the Civil Rights Act of 1964, Pub. L. 88-352, 42 U.S.C §§ 2000d, 2000d-1 (authorizing termination of federal financial assistance after a hearing and an express finding on the record).

[59] *See* ROSENBERG, *supra* note 56, at 42–54, 99 (arguing that the threat of fund termination under Title VI spurred many school districts to move forward with desegregation).

moving away from the incremental desegregation approach to a more robust integration mandate. In 1968, in *Green v. County School Board*, the Court held that "freedom of choice" plans — lower court orders that effectively left desegregation to the individual choice of parents — were not an effective remedy for school segregation.[60] According to the Court, the remedial goal must be a "unitary," integrated school system free from segregation.[61] School boards had an "affirmative duty" to eliminate racial discrimination by "root and branch."[62] School districts would need to alter student assignment and zoning, as well as take steps to achieve integration in faculty, staff, facilities, transportation, and extracurricular activities to remove the vestiges of segregation.[63]

Three years later in *Swann v. Charlotte Mecklenburg Board of Education*, seeing limited progress in desegregating schools, the Court issued a holding that articulated "broad" equitable powers for the district courts.[64] As *Swann* outlined, "desegregation remedies could include relatively far-reaching solutions that included busing and redrawing attendance boundaries."[65] Specifically, the decision held that courts could take actions such as redrawing school boundaries and other measures to eliminate segregation "root and branch" and achieve unitary status.[66] Under *Swann,* plans that did not in fact achieve integration were insufficient — they had to

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[60] Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 439–41 (1968).

[61] *See id.* at 440–42.

[62] *Id.* at 437–48.

[63] *See id.* The Court articulated a set of factors for judging when segregation was "completely removed" that would become known as the "*Green* factors." The Department of Housing, Education and Welfare (HEW) incorporated these factors into federal regulations implementing Title VI of the 1964 Civil Rights Act. *See generally* Gary Orfield, The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act 1–47 (1969). There is substantial debate among academics and observers about whether courts or the federal government were the key impetus for the initial success in desegregating schools. Gerald Rosenberg has argued that limited integration of schools after *Brown* and before the passage of Title VI shows that courts have limited power to produce social change. *See generally* Rosenberg, *supra* note 56, at 42–54; *see generally,* Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 32–63 (2004). Myron Orfield has argued that in the context of school integration, this view is too "simplistic." M. Orfield, *supra* note 44, at 373. According to Professor Orfield, Title VI, which gave the federal government the power to withhold federal funds for failure to comply with *Brown II*, provided a powerful set of incentives for school desegregation, but the specific guidelines under Title VI became clearer only after the Supreme Court issued *Green* and other desegregation cases. *See id.* at 373, 375–76 (noting that Congressional members initially pushed back on HEW when it attempted to provide strong desegregation rules under Title VI, but after the decision in *Green,* the case's more specific factors were then incorporated into the new regulations implementing Title VI).

[64] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 7 (1971) (two-thirds of the Black students in Charlotte-Mecklenburg county in North Carolina attended schools that were overwhelmingly (99 percent) Black); *see generally* Owen M. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 Phil. & Publ. Affs. 3 (1974).

[65] Christopher A. Suarez, *Democratic School Desegregation: Lessons from Election Law*, 119 Penn State L. Rev. 747, 765 (2015).

[66] *Swann*, 402 U.S. at 15.

eradicate the "condition that offends the constitution."[67] As that case established, "the scope of a district court's equitable powers to remedy the wrong is broad, for breadth and flexibility are inherent in equitable remedies."[68]

In addition to the opinion's expansive articulation of a court's equitable power, the facts of *Swann* made it a potentially powerful decision. *Swann* involved the Charlotte-Mecklenburg school district, a single large county system, making *Swann* "in effect, the Court's first and only metropolitan-wide desegregation decision."[69] The Court would significantly curtail this remedial path in *Milliken*, as discussed in the next section.[70] Yet in *Swann*, the Court in striking down the County's "freedom of choice" plan and reliance on neighborhood assignments recognized the connections between housing and school segregation.[71] *Swann* is also the zenith of the Court's articulation of integration, rather than formal desegregation, as the ultimate remedy for the Equal Protection violation. If schools could still be identified as Black or white, the district would continue to be in violation of the Equal Protection Clause unless it could meet the burden of showing that this skewed racial composition was not the vestige of the school's own past discrimination.[72] The remedial equivocation present in *Brown I* and *II* was gone, and the role of equity in bridging the "right-remedy" gap was recognized: "Once a right and a violation have been shown," the *Swann* Court pronounced, "the scope of the district court's equitable powers to remedy the wrong is broad, for breadth and flexibility are inherent in equitable remedies."[73]

As commentators have recognized, together "*Swann* and *Green* dramatically expanded the meaning of *Brown* and the Civil Rights Act in the face of a hostile executive and divided Congress."[74] For at least some period,

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[67] *Id.* at 16.

[68] *Id.* at 15.

[69] M. Orfield, *supra* note 44, at 381 (explaining how *Swann* effectively created a remedy that crossed local boundaries reaching both cities and suburbs); *see also* Owen M. Fiss, *The Charlotte-Mecklenburg Case: Its Significance for Northern School Desegregation*, 38 U. Chi. L. Rev. 697, 699–703 (1981); Matthew D. Lassiter, The Silent Majority: Suburban Politics in the Sunbelt South 121–223 (1st ed. 2006). Not all members of the Black community endorsed the Court's opinion in *Swann*. As Professor Brown-Nagin has detailed, key members of Atlanta's Black community were not in support of *Swann*'s busing remedy. *See* Brown-Nagin, *An Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark*, *supra* note 19, at 1004 ("[T]he local NAACP president, along with distinguished leaders of Atlanta's African-American community such as Dr. Benjamin Mays, former president of Morehouse College and the newly elected president of the Atlanta Board of Education, rejected busing as a remedy for racial segregation in the public schools except on a voluntary and very limited basis.").

[70] *See infra* notes 88–91 and accompanying text.

[71] *See Swann,* 402 U.S. at 18.

[72] *See id.* at 15–18, 25; Fiss, *supra* note 69, at 701.

[73] *Swann*, 402 U.S. at 14.

[74] *See, e.g.*, M. Orfield, *supra* note 44, at 384. For other Supreme Court cases emphasizing the goal of a unitary school system, see Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458–59 (1979); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435 (1976); Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 200 n.11 (1973); McDaniel v. Barresi, 402 U.S. 39, 41 (1971).

the Supreme Court (and lower court) support for the integration injunction seemed strong. The late 1960s and early 1970s are often seen as a high-water mark for school desegregation and progress — when the combination of court orders, government pressure through the vehicle of the 1964 Civil Rights Act, and Title VI's role in allowing enforcement through the threat of curbing federal funding led to some meaningful integration.[75]

By the late 1980s and early 1990s, the Supreme Court, as well as the political branches, would retreat from the implementing *Swann* mandate.[76] Doctrinally, the Supreme Court and lower courts would move away from notions of broad equitable power, affirmative duties, recognition of the housing-school link, and the emphasis on removing vestiges of discrimination.[77] In *Swann*'s place emerged another set of doctrines, framed in neutral terms emphasizing the need to return schools to "local control," the disappearing causal link between current conditions of segregation and past unconstitutional acts, and the narrowness of the courts' equitable powers.[78] The courts effectively turned away from consideration of the ways in which housing discrimination shaped access to schools: white parents, unrestricted by housing discrimination, often moved away from districts with schools under desegregation orders and governments altered boundaries and assignments to maintain racial segregation.[79] As discussed below, after the *Milliken* Court imposed limitations on inter-district remedies, school desegregation became effectively impossible.[80] In addition, white community resistance to desegregation thwarted even the most stringent court-ordered processes. But the ability of white families to physically move to other neighborhoods and out of the school district entirely to avoid school integration would give them a trump card that would prevent effective school integration in many

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[75] *See* M. Orfield, *supra* note 44, at 373, 375–76 (describing role of Title VI guidelines in desegregation); Rosenberg, *supra* note 56, at 97–100 (introducing role of Title VI in advancing some degree of desegregation through the threat of federal fund withdrawal).

[76] *See* Minow, *supra* note 27, at 23–24 (describing school desegregation decisions and policies of the early 1970s as the "high-water mark" which "lasted only briefly"). *See* M. Orfield, *supra* note 44, at 380–85, 420 (describing political and doctrinal contestation and ultimate retreat from desegregation from mid-1970s through the mid-1990s).

[77] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995); *see* Justin Driver, *The* Keyes *of Constitutional Law*, 106 Calif. L. Rev. 1931, 1937 (2018) (describing *Keyes* as a "pivotal moment" in which the Court clung onto the *de facto/de jure* distinction instead of making it "incumbent upon educators" to take "'cumulative responsibility' for the isolation of racial minorities."). *But see* Rachel F. Moran, *Untoward Consequences: The Ironic Legacy of* Keyes v. School District No. 1, 90 Denv. L. Rev. 1209, 1215 (2013) (noting important aspect of *Keyes* is its "conclus[ion] that the plaintiff's showing of discriminatory motive in one area of the district created a presumption that the entire school system was affected" and that "[a]s a consequence, the desegregation remedy had to cover the whole district.").

[78] *See* Minow, *supra* note 27, at 8 ("Courts since *Brown* declare that enough time has passed since the elimination of intentional and explicit segregation to stop using judicial measures to remedy patterns of racial separation within public schools.").

[79] *See* Wilson, *supra* note 30, at 2397–98 (describing how manipulation of housing and school district boundary lines operates as an "apparent race-neutral mechanism[]" of racialized opportunity hoarding and social closure).

[80] *See infra* Part I.C.1.

jurisdictions.[81] And by the early 1990s, the Supreme Court in a series of cases began to release schools from school desegregation orders. In 1991, the Supreme Court announced that the vestiges of segregation must only be "eliminated to the extent practicable"[82] and in 1992, the Court asserted that school districts could be released from court orders before full compliance in order to serve the ultimate objective of "[r]eturning schools to the control of local authorities at the earliest practicable date."[83]

The resistance by white communities, government leaders,[84] and the federal and lower courts[85] all contributed to the demise of the integration injunction in schools. Indeed, even those aspiring to *Brown*'s robust vision of integration would come to be weary of the battle. This political and judicial resistance wore on Black communities, setting up Derrick Bell's 1976 inquiry about whether it was ethical for school desegregation lawyers to still consider integration a goal. While LDF and other civil rights lawyers would not give up, and continued to find new ways to bring important suits in state

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[81] *See* Gary Orfield & Chungmei Lee, Brown *at 50: King's Dream or* Plessy's *Nightmare?*, The Civ. Rts. Project (Jan. 1, 2004), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-plessy2019s-nightmare/orfield-brown-50-2004.pdf [https://perma.cc/CLY2-JV9H].

[82] Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1991).

[83] Freeman v. Pitts, 503 U.S. 467, 490 (1992). The Supreme Court in *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) made it more difficult for school districts to pursue voluntary locally designed integration efforts.

[84] *See* M. Orfield, *supra* note 44, at 380 (In coming into office just after *Green*, President Nixon "skillfully rode Middle America's backlash to civil rights law, urban riots, crime, social permissiveness, and the Vietnam War into the White House" and moved away from executive enforcement of school desegregation orders, arguing that the "court was right on *Brown* and wrong on *Green.*" (quoting William Safire, Before the Fall: An Inside View of the Pre-Watergate White House 232 (1975))); *see generally* Kevin J. McMahon, Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences 83–113 (2012) (providing an account of Nixon's promise to appoint Supreme Court justices that would stop integration remedies). As Jennifer Hochschild and Nathan Scorvronick have written, school desegregation was in many respects an educational success but a "political failure." *See* Hochschild & Scorvronick, *supra* note 42, at 29.

[85] *See* M. Orfield, *supra* note 44, at 380–81; Moran, *supra* note 77, at 1217–18 (describing how the lower court came to declare the Denver school district unitary in September 1995: "Because of ongoing demographic shifts in the Denver Public Schools, many believed that busing was an increasingly costly remedy with steadily declining benefits."); David S. Tatel, *Judicial Methodology, Southern School Desegregation and the Rule of Law*, 79 N.Y.U. L. Rev. 1071, 1097 (2004) (Nixon nominee Clement Haynsworth had ruled that Virginia education officials could close schools to avoid desegregation orders and nominee Harold Carswell had indicated support for white supremacy while running for state legislature). Two of Nixon's nominees, Lewis Powell and William Rehnquist — who had played key roles in opposing school desegregation remedies as lawyers — would help the Court move away from the *Green* and *Swann* framework. According to evidence from tapes of Nixon, the President made clear what he wanted from a Supreme Court nominee: "I want you to have a specific talk with whatever man we consider and I have to have an absolute commitment from him on busing and integration. I really have to." *Id.* at 1099 (quoting Audiotape: Conversation between Richard Nixon and John Mitchell and others, Oval Office of the White House, Washington, D.C. (Sept. 18, 1971) (Nat'l Archives Nixon White House Tape Conversation 576-006)).

courts,[86] by the 1990s the iconic federal court school integration injunction had receded.

C. Housing's Integration Injunction

The key public housing desegregation cases after *Brown* would adopt the same remedy as in school desegregation cases. The question is whether they should have at the inception, and certainly later as the cases dragged on, and when monetary remedies might have been beneficial to the plaintiffs. Before addressing the latter point, which I discuss more extensively in Part III, this subsection begins by considering the ways in which the integration injunction in housing mirrored those in education, and the ways in which they diverged. The public housing cases which began after *Brown*, in the 1960s and 70s, built on the integration and citizenship principle of *Brown*, and like the school cases sought to disestablish segregation. Lawyers in these public housing desegregation cases would seek remedies that mirrored the injunctive relief standard of the school integration cases.[87] It is logical that when facing government-created segregation in public housing, civil rights lawyers would seek the same remedies — access to white communities — that were sought in school desegregation cases. Hearkening to the lawyers' arguments in *Brown II*: the remedy for violation of the constitutional or statutory harm of segregation should be a court-ordered desegregation remedy. And for a time, that remedy certainly seemed possible. Indeed, as explained below, housing integration's injunction is in key ways more expansive than in education, and had design features that gave it the potential to evade some of the limitations of the integration injunction. Two aspects of these public housing cases provided a basis for a broader integration remedy. First was that Court's acceptance of a version of a metropolitan remedy in *Gautreaux* that the Court denied plaintiffs in *Milliken.* The second — particularly prominent in the later public housing desegregation cases — was the language of the Fair Housing Act ("FHA") that authorizes a regional approach to fair housing (developing subsidized housing in both cities and suburbs) in order to further integration.

1. Milliken and Gautreaux

The first major public housing case, *Gautreaux,* achieved the inter-district remedy that the Court had denied plaintiffs in *Milliken v. Bradley*. *Milliken* challenged the racial segregation of schools in Detroit and

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[86] *See, e.g.*, Sheff v. O'Neill, 238 Conn. 1 (1996).

[87] *See* Alexander Polikoff, Waiting for Gautreaux 55 (2006) (stating that *Gautreaux* lawyers modeled the remedies followed in school desegregation cases); *id.* at 291 (describing how *Gautreaux* lawyers sought to implement the disestablishment remedy order in school desegregation); *see also id.* at 47 (showing how *Gautreaux* lawyers drew on *Brown* to develop the theory of liability for challenging housing segregation).

the surrounding metropolitan area. Recognizing that a school integration remedy would not be possible without including the majority-white suburbs that surrounded Detroit, the district court in the case ordered an inter-district transportation and rezoning remedy that spanned the Detroit metropolitan area.[88] The court did so after making findings that federal, state, and local actors had — together and sometimes in concert with private parties such as realtors — engaged in a set of interconnected school and housing practices that led to the racial isolation of Black children in Detroit.[89] However on review, the Supreme Court ignored the evidence of housing segregation in the record, and focused on what it saw as the lack of evidence of intentional efforts by suburban school districts to maintain segregation.[90] *Milliken's* holding begins with the simple premise that the remedy must be limited to the violation. But the majority found the violation to be confined to the boundaries of Detroit, and thus an inter-district remedy exceeded the remedial power of a court.

Contrast that with *Hills v. Gautreaux,* the only public housing desegregation case to be heard by the Supreme Court. Unlike *Milliken*, *Gautreaux* is not part of our public law canon, but the case engages similar questions regarding the scope of injunctive relief. In *Gautreaux*, the Court unanimously distinguished *Milliken,* decided the year prior, and upheld a limited metropolitan remedy.[91]

Gautreaux began in 1966 as an Equal Protection and Title VI claim against the Chicago Housing Authority for engaging in a set of site selection and tenant assignment practices that led to the concentration of public housing in Chicago and the denial of public housing opportunities for Black people outside the Chicago city limits or in whiter (and lower-poverty) neighborhoods.[92] They also filed a separate lawsuit against the Department

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[88] *See* Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Mich. 1971) ("For many years FHA and VA openly advised and advocated the maintenance of "harmonious" neighborhoods, i. e., racially and economically harmonious."), *rev'd*, 418 U.S. 717 (1974). *See also* M. Orfield, *supra* note 44, at 399 n.225 ("The court noted that, while racially restricted covenants and the Federal Housing Administration and Veteran's Administration (FHA/VA) loan discrimination had ended, both had a continuing and present effect on segregation." (citing *Milliken*, 338 F. Supp. at 587)).

[89] *See, e.g.*, *id.* at 593 (discussing evidence about the role of federal housing policies in creating segregation in the Detroit metropolitan area). As Myron Orfield has pointed out, the plaintiffs had put on an extensive record on housing segregation in the case. *See* M. Orfield, *supra* note 44, at 399.

[90] The Sixth Circuit did not "rel[y] at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation." *See* Bradley v. Milliken, 484 F.2d 215, 242 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974); Suarez, *supra* note 65, at 770 (showing how the Sixth Circuit's failure to credit the testimony on segregated housing and the Supreme Court's declining to address the housing question reinforced the "local control" arguments in *Milliken*).

[91] Hills v. Gautreaux, 425 U.S. 284, 306 (1976).

[92] *See* Gautreaux v. Chicago Hous. Auth., CA No. 66 C 1459 (N.D. Ill. filed Aug. 9, 1966) (hereinafter Gautreaux I); Gautreaux v. United States Dep't of Hous. & Urban Dev., CA No. 66 C 1460 (N.D. Ill. filed Aug. 9, 1966); POLIKOFF, *supra* note 87, at 48–49 (describing allegations in the initial complaint).

of Housing and Urban Development ("HUD").[93] After the passage of the FHA in 1968, the plaintiffs added statutory claims. However, the plaintiffs did not join the surrounding suburban communities as defendants in the case.[94]

After finding for the plaintiffs, the district court in *Gautreaux* ordered HUD to work with the Chicago Housing Authority to develop a remedial plan. The plaintiffs pressed for metropolitan-wide relief, using HUD officials' prior statements to argue that only metropolitan-wide relief could address the problem of public housing segregation: "The impact of the concentration of the poor and minority in the central city extends beyond the city boundaries to include the surrounding communities"[95] and "there must be adopted in America a metropolitan approach to the city's problems."[96] The plaintiffs argued also that a metropolitan remedy was appropriate given how neighborhoods shape access to employment opportunities and to quality schools. According to the plaintiffs, only by connecting the city and the suburbs could the plaintiffs be made whole.[97]

Despite this evidence, the district court rejected the plaintiffs' request for a metropolitan-wide remedy that would create housing opportunities for the plaintiff class in low-poverty, majority-white neighborhoods in the region.[98] As if anticipating the approach that the Supreme Court would later adopt in *Milliken*,[99] the court ruled that metropolitan relief went "far beyond the issues of this case" since the violations were limited to the city of Chicago, took place against city residents, and did not involve discrimination in the suburbs.[100] On appeal, a divided Seventh Circuit reversed, ruling that metropolitan relief was indeed appropriate.[101] A key issue in the case

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[93] *See* POLIKOFF, *supra* note 87, at 84, 93, 100–01 (detailing that after the district court dismissed the complaint against HUD, the Sixth Circuit reversed in 1971 finding a basis for liability).

[94] *Id.* at 116 (recounting lawyers' strategy to secure metropolitan relief despite not having joined the suburbs as defendants).

[95] Alexander Polikoff, Gautreaux *and Institutional Litigation*, 64 CHI.-KENT L. REV. 451, 465 (1988); *see also* Memoranda in Support of Plaintiffs' Outline of Proposed Final Order Embodying Comprehensive Plan for Relief, Memorandum #2 at 2, Gautreaux v. Romney, Nos. 66 C 1459 (quoting Statement of G. Romney, Secretary of HUD, to the Subcommittee on Civil Rights Oversight of the Committee on the Judiciary (Dec. 9, 1971)).

[96] Memorandum in Support of Plaintiff's Outline, *supra* note 95, at 2 (quoting HUD's undersecretary Richard Van Dusen).

[97] *Id.*

[98] *See Gautreaux*, 363 F. Supp. at 690–91.

[99] At the time of the district court ruling, the Sixth Circuit had recently affirmed the trial court's ruling in *Milliken* that inter-district desegregation was appropriate. *See Milliken*, 484 F.2d at 258. The *Gautreaux* district court distinguished the Sixth Circuit's ruling in *Milliken* on the puzzling ground that the right to housing, unlike education, was not a "matter for the legislature" and was not constitutionally guaranteed. *See Gautreaux*, 363 F. Supp. at 691 (citing Lindsey v. Normet, 405 U.S. 56, 74 (1972)).

[100] *Gautreaux*, 363 F. Supp. at 691.

[101] *See* Gautreaux v. Chicago Hous. Auth., 503 F.2d 930, 936–39 (7th Cir. 1974), *aff'd sub nom.*, Hills v. Gautreaux, 425 U.S. 284 (1976).

was whether metropolitan relief was barred by the Supreme Court's ruling in *Milliken v. Bradley.*[102] The Seventh Circuit distinguished *Milliken*, reasoning that given the federal role in supervising public housing there was no serious issue of "local control" as in schools, and that a metropolitan remedy was necessary for providing comprehensive and effective relief.[103]

The Supreme Court affirmed in a unanimous decision, distinguishing *Milliken* largely because of the presence of HUD as a defendant.[104] According to the Court, the remedy in *Milliken* was impermissible because it involved "a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation."[105] In *Gautreaux*, however, the finding of constitutional and statutory violations against HUD permitted a metropolitan remedy that courts could grant without interfering with local governments and suburban housing authorities.[106] According to the Supreme Court, HUD's argument that there was no legal basis for a metropolitan remedy "underestimate[d] the ability of a federal court to formulate a decree that will grant the respondents the constitutional relief to which they may be entitled without overstepping the limits of judicial power established in the *Milliken* case."[107] In *Gautreaux,* the "relevant geographic area" of the constitutional ruling was the entire Chicago housing market, not the city limits; thus, the Court held that "remedial efforts" in the metropolitan area were permissible.[108]

The specific metropolitan remedy at issue in *Gautreaux* involved the 1974 Section 8 federal voucher program.[109] Using Section 8 certificates, HUD could either assist families in establishing a tenant-based rental subsidy (the rest being paid by the local housing authority) or help fund new construction and rehabilitation by private developers to produce Section 8 programs.[110] The program could operate without involving local suburban governments since HUD could contract directly with private developers.[111] After the Supreme Court's ruling, the plaintiffs were able to work with HUD to use the Section 8 program to design a metropolitan remedy allowing voucher holders to use the certificates in the metropolitan housing market.[112]

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[102] *See id.* at 936.

[103] *See id*.

[104] *See Gautreaux*, 425 U.S. at 305–06 (1976).

[105] *Id.* at 296.

[106] *See id.* at 300–06.

[107] *Id* at 301.

[108] *See id.* at 298–300.

[109] *See* 42 U.S.C. § 1437f.

[110] *See* Alexander Polikoff, *supra* note 87, at 138–39 ("Section 8's roots went back to 1965" but the program was expanded into a new private market-oriented program in 1974).

[111] *See id.* at 140.

[112] *See id.* at 226–27 (describing the 1975 court order that required "half of nonelderly Section 8 housing in Chicago to go to Gautreaux families" and negotiated settlement that allowed Gautreaux families to benefit from project-based Section 8 housing in majority-white

As the *Gautreaux* Court held: "Our determination that the District Court has the authority to direct HUD to engage in remedial efforts in the metropolitan area outside the limits of the city of Chicago should not be interpreted as requiring a metropolitan area order."[113] This "experiment"[114] with Section 8 vouchers would expand by the 1990s into a broader national experiment with a voucher program that would cross neighborhoods and urban-suburban boundaries.[115] Given the lack of new money for public housing and the mixed success of scattered site housing, to the extent that there is litigation success in housing desegregation, it stems from the housing mobility program allowed by *Hills v. Gautreaux*.[116]

Despite the unanimous victory, the decision was not exactly what *Gautreaux* lawyers had envisioned as an ideal remedy.[117] The opinion still applied the *Milliken* standard rather than overturning it or confining it to schools.[118] And Justice Stewart's opinion noted that metropolitan remedies should not interfere with local governments or "displace" their federal or state law rights.[119] This thus limited more expansive metropolitan-wide relief such as the requirement that new public housing development be sited in lower-poverty white neighborhoods in the suburbs. Still, the opinion did, in a practical sense, go further than *Milliken*. Comprehensive housing desegregation is in some ways harder to achieve than desegregation in schools. As the lead lawyer in the *Gautreaux* case later noted, "school desegregation can be effectuated quickly through pupil reassignments" but the housing authority's "buildings could not, like students, be loaded into buses and brought to different locations."[120]

But the public-private features of the Section 8 mobility remedy and HUD's role in public housing allowed for a distinct type of metropolitan

areas); *id.* at 231 (describing the initial Section 8 Demonstration program launched in 1976 that would help 400 families move to the suburbs).

[113] *Gautreaux*, 425 U.S. at 306.

[114] POLIKOFF, *supra* note 87, at 226.

[115] *See infra* notes 249–53.

[116] There are reasonable concerns about the implementation of Section 8 housing mobility programs. A key concern is "geographic clustering," but there is little evidence that this is a major problem. *See, e.g.*, MARGERY AUSTIN TURNER ET AL., SECTION 8 MOBILITY AND NEIGHBORHOOD HEALTH 11 (2000) ("There is no concrete evidence to indicate that the Section 8 program is undermining the health of large numbers of urban neighborhoods. Although significant levels of geographic clustering do appear to occur, neighborhood opposition to the program has been limited to a relatively small number of loudly publicized instances. Nevertheless, the potential for adverse neighborhood impacts should not be ignored."), http://webarchive.urban.org/publications/309465.html [https://perma.cc/4BYA-MXV7].

[117] *See infra* Part II.

[118] *See* POLIKOFF, *supra* note 87, at 142 (in oral argument to the Supreme Court, "We argued strongly that *Milliken* should be read only as a case about consolidating school districts.").

[119] *Gautreaux*, 425 U.S. at 306; *see* POLIKOFF, *supra* note 87, at 150 ("But over and over again, Stewart warned against 'impermissibly' interfering with local governments and housing authorities, against 'displacing' the rights and powers they possessed under either federal or state law, and against 'coercing uninvolved governmental units.'").

[120] POLIKOFF, *supra* note 95, at 458.

remedy that crossed city and suburban boundaries. The regional nature of HUD's public housing programs — that the agency had power and funding to develop housing not just in cities but in suburbs — allowed a remedy that went beyond existing segregated borders — a remedy typically unavailable in school cases.

2. Statutory Duty to Remedy

A second feature that shaped housing's integration injunction stems from important language in the FHA that requires HUD to "affirmatively further" fair housing.[121] While *Gautreaux v. Romney* began as a constitutional case in the image of the school integration cases, later cases employed the statute.[122] HUD's funding authority gave it discretion to encourage the siting of federal housing programs in predominantly white areas, meaning that HUD had a role in the production and siting of housing alongside local government.[123] The availability of the FHA claim to plaintiffs enabled them to argue not only that the federal government engaged in intentional discrimination through its tenant assignment and site selection policies, but also that it failed to "affirmatively further fair housing" ("AFFH").[124]

While the *Gautreaux* litigation did not specifically rely on the "affirmatively furthers" language, future cases would. A handful of cases in the 1970s involving public housing desegregation and urban renewal projects gave teeth to the duty to affirmatively further fair housing.[125] In a 1970 case, the Third Circuit found HUD liable for constructing low-income subsidized housing in Philadelphia in an area with already high concentrations of poor minorities, finding that doing so would violate HUD's duty to affirmatively

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[121] *See* Fair Housing Act, 42 U.S.C. § 3608(d) (requiring the Secretary of HUD to administer their programs and activities "affirmatively to further" the policies of the FHA); *see id.* at § 5304(b)(2) (requiring the same of federal community development grantees).

[122] *See infra* notes 231–69 (discussing Thompson v. U.S. Dep't of Hous. & Urb. Dev., 1995 WL 17209874 (D. Md. 1995)).

[123] *Gautreaux*, 425 U.S. at 301 ("HUD's discretion regarding the selection of housing proposals to assist with funding as well as its authority under a recent statute to contract for low-income housing directly with private owners and developers can clearly be directed toward providing relief to the respondents in the greater Chicago metropolitan area without preempting the power of local governments by undercutting the role of those governments in the federal housing assistance scheme.")

[124] *See* 42 U.S.C. § 3608(e)(5) (requiring federal agencies and grantees to administer programs "in a manner affirmatively to further the policies" of the FHA); *see* Thompson v. U.S. Dep't of Hous. & Urb. Dev., 348 F. Supp. 2d 398, 453 n.109, 462, 508 (D. Md. 2005) (building on NAACP v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149 (1st Cir. 1987)).

[125] For an account, *see* Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 Wake Forest L. Rev. 333, 364–65 (describing cases). I have previously written about the AFFH requirement. *See* Olatunde C. A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. Rev. 1339, 1387–91, 1398–99 (2012); Olatunde C. Johnson, *AFFH and the Challenge of Reparations in the Administrative State*, Reg. Rev. (2020), https://www.theregreview.org/2020/10/26/johnson-affh-challenge-reparations-administrative-state/ [https://perma.cc/V86S-9VPU].

further fair housing in "non-ghetto areas" with lower race and poverty concentrations.[126] Subsequently, the First Circuit, in a challenge to HUD's administration of various community development programs in Boston, held that the duty to affirmatively further fair housing required more than nondiscrimination and that "HUD [must] use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."[127]

Significantly, most of the major federal cases involving public housing segregation have relied on the affirmatively furthering standard rather than requiring plaintiffs to show intentional discrimination.[128] Indeed, in *Thompson v. HUD*, a significant public housing desegregation case alleging that HUD and local housing agencies perpetuated segregation in Baltimore, the court declined to hold HUD liable for intentional discrimination and instead relied on the affirmatively furthering standard.[129] Most relevant to the present analysis, these cases permit a regional remedy, interpreting the duty to affirmatively further fair housing to require the creation of housing opportunities in the metropolitan area.[130]

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In sum, the public housing desegregation cases were able to expand on the integration injunction. Distinct features of housing markets, as well as the terms of the FHA, allowed the housing injunction to evade some of the limitations of school desegregation injunctions. As Part II shows, the adoption of the remedy in *Gautreaux* into federal policy can lead us to see the public housing cases as having a "happy ending[]."[131] Examining these housing desegregation injunctions can lead to a more hopeful narrative about the potential efficacy of the integration injunction. In Part II, I examine three major public housing cases and find support for a positive assessment. Part II also argues, however, that the integration injunction remedied

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[126] Shannon v. U.S. Dep't of Hous. & Urb. Dev., 436 F.2d 809, 816, 819–20 (3rd Cir. 1970). *Shannon* involved the construction of Section 212 public housing, also known as project-based Section 8. The court read the affirmative duty to further fair housing in conjunction with Title VI.

[127] NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 154–55 (1st Cir. 1987). In the opinion authored by then-Judge Breyer, the court held that this duty required HUD to consider the effect of its housing programs on "the socio-economic composition of the surrounding area" and required HUD to use its "immense leverage . . . to provide adequate desegregated housing." *Id.* at 156.

[128] *See* Poverty & Race Research Action Council, An Analysis of the Thompson v. HUD Decision 3, http://www.prrac.org/pdf/ThompsonAnalysis.pdf [https://perma.cc/VU5D-RXPS] (noting series of public housing desegregation cases that rely on HUD's duty to affirmatively further fair housing).

[129] *See Thompson*, 348 F. Supp. 2d at 453, 456–58.

[130] *See infra* notes 256–58.

[131] Janet Koven Levit, *Rewriting Beginnings: The Lessons of* Gautreaux, 28 J. Marshall L. Rev. 57, 57 (1994) ("Can happy endings resuscitate murky beginnings? When the *Gautreaux* litigation began in 1966, few believed the courts could remedy the seemingly intractable racial discrimination plaguing Chicago's public housing system."); *see also* Olatunde C. A. Johnson, *"Social Engineering": Notes on the Law and Political Economy of Integration*, 40 Cardozo L. Rev. 1149, 1161–64 (2018) (describing *Gautreaux* as largely a success).

only part of the class-wide harm of segregation — both in its ambition and its implementation. I consider what has remained un-remedied, despite the apparent success of these cases.

II. A Partial Remedy

This Part provides an account of three major public housing cases that demonstrate the partial success of injunctive relief in housing segregation cases. It argues that public housing litigation typically gets too little credit (at least in the public law litigation literature) for the dimension along which it does succeed. To provide context for the role of public housing in the broader story of segregation, Section A presents a condensed version of this important history.[132] Through race-based site selection and tenant assignment practices and policies, public housing powerfully shaped economic and racial segregation in cities and the racialized boundaries between cities and suburbs.[133] Public law litigation made racialized housing segregation visible: countering the idea that racial segregation was simply the result of private choices, income, or private discrimination. The litigation then eventually led to the federal housing mobility program — a success on its own terms — and the incorporation of integration planning into federal-state-local housing programs.

To show what was achieved and what remains un-remedied in public housing litigation, this Part focuses on three major public housing desegregation cases. Section B begins with the Chicago *Gautreaux* litigation that is sometimes referred to as the *Brown* of housing. It then turns to the Dallas desegregation case of *Walker v. HUD*, brought in 1985. That case began as a suit addressing a suburb's non-participation in the Dallas Housing Authority ("DHA") Section 8 program and became a larger challenge to systemic housing segregation that included DHA and HUD as defendants.[134] The Dallas case involved years of contestation over the remedy. As the lawyers in that case have explained, "the existence of racial segregation was not seriously contested, nor could it have been contested. The litigation mainly involved the issues of who, if anyone, was responsible for a remedy and what, if anything, would be the required remedy. The proceedings show the resistance to ending racial segregation in publicly assisted housing."[135] Section C concludes with a discussion

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[132] For additional context and history, *see* Sheryll Cashin, White Space, Black Hood: Opportunity Hoarding and Segregation in the Age of Inequality (2021); Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017); Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass (1st ed. 1993).

[133] *See infra* notes 146–72 and accompanying text.

[134] *See* Walker v. U.S. Dep't of Hous. & Urb. Dev., 912 F.2d 819, 821–22 (5th Cir. 1990).

[135] *Walker v. HUD – Dallas Public Housing Desegregation*, Daniel & Beshara, P.C., https://www.danielbesharalawfirm.com/walker-v-hud-dallas-public-housing-desegregation [https://perma.cc/ZX96-77HZ].

of the remedial stage of the *Thompson v. HUD* litigation which began in 1994 when the City of Baltimore sought to demolish several public housing projects in Baltimore and, like *Walker* and *Gautreaux,* was successful in developing metropolitan voucher programs, less successful in building scattered site housing in the suburbs, and was plagued by years of remedial delays.[136]

In Section D, I discuss how the three cases were successful in using the integration injunction to establish increased opportunities for class plaintiffs and other public housing residents to use housing vouchers in low-poverty, majority-white suburbs.[137] The cases were also successful in turning the voucher remedy in *Gautreaux* into a more permanent feature of federal housing policy.[138] The practical dimension along which the cases were less successful were in building "scattered site" housing in low-poverty white communities, in part because the "receiving" communities vetoed or resisted the most transformative of these remedies.

This Essay is not the first to examine the public housing desegregation cases. *Gautreaux* in particular features quite prominently in scholarly examinations of the efficacy and limits of the structural injunction in addressing segregation.[139] However, what we should take away from *Gautreaux* is not always clear. *Gautreaux* is often cast as a successful counterpoint to overbroad assessments about the harms of structural litigation,[140] a "disappointment" in the mode of old-school school desegregation litigation,[141] or something in between.[142] As I explain, the "right-remedy gap"[143] was built

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[136] *See* Poverty & Race Research Action Council, *supra* note 128. An excellent recent article documents the history of the *Thompson v. HUD* litigation, arguing that the case represents a rare enforcement of the constitutional norm that government should not subsidize racial segregation. *See* Joy Milligan, *Remembering the Constitution and Federally Funded Apartheid,* 89 U. Chi. L. Rev. 65 (2021). That article does not delve into the remedial aftermath which I discuss in Section D. For an earlier treatment of *Thompson v. HUD*, see Roisman, *supra* note 125, at 340–46 (2007) (detailing the *Thompson* history of public housing litigation beginning with cases brought by the NAACP Legal Defense Fund in the 1950s, through the litigation beginning in 1966 in Chicago; Texarkana, Arkansas; East Texas; Dallas; Buffalo, New York; and most recently in 1996 in Baltimore).

[137] *See infra* Section II.D.

[138] *See infra* Sections II.C., II.D.

[139] *See* Peter H. Schuck, Diversity in America: Keeping Government at a Safe Distance 242 (2006) (evaluating the mixed success of desegregation litigation); Michelle Adams, *Radical Integration*, 94 Cal. L. Rev. 261, 287–90 (2006) (discussing housing mobility remedy as a successful legacy of the *Gautreaux* litigation).

[140] *See, e.g.*, Levit, *supra* note 131, at 59.

[141] *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1016, 1048 ("There has been some success. Some units have been built in neighborhoods from which public housing was once excluded. A service-intensive program that tries to help holders of 'Section 8' housing-assistance certificates find apartments in the suburbs appears to be working. On the whole, however, the experience has been disappointing.").

[142] *See* Schuck, *supra* note 139, at 242, 257–58 (concluding that courts and government are ill-suited to managing "diversity" but judging *Gautreaux* more successful than other housing litigation).

[143] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87 (1999) (describing and ultimately defending the "right-remedy gap" in constitutional law cases).

into the remedial design of the public housing desegregation cases from the start. The integration remedy (typically several thousand housing vouchers) does not cover the entire class, nor can it alone remedy the historical claim of segregation.[144] The remedies were necessarily partial. They were not designed to dismantle segregated housing: at most they could establish forward-looking policies that would not perpetuate segregation.[145] This might be unremarkable to note. Given potential community resistance, the judiciary's reluctance to order broad equitable remedies, and the political timidity of housing agencies and political actors, a further-reaching equitable remedy would have been difficult to design or implement. But I argue that political resistance and white vetoes should not have thwarted all additional forms of relief, and compensatory damages or reparative payments would have effectively supplemented the deficiencies of the ordered injunctive relief.

A. Public Housing in America's Segregation Story

The segregation of public housing is an important part of the larger story of our racialized geography. When federal and local governments created public housing in the twentieth-century, they did so on segregated terms.[146] Under the initial public housing program, the federal government purchased land and operated and oversaw the construction of public housing.[147] The Public Works Administration ("PWA") allowed public housing tenancy to mirror the existing "neighborhood composition," thereby ensuring that public housing would not change existing racial housing patterns.[148]

After an appellate court found the program's use of eminent domain to acquire private property unconstitutional,[149] Congress redesigned the program in the Wagner-Steagall Act of 1937 so that public housing was owned and operated by local public housing authorities ("PHA"), with the capital costs paid by the federal government.[150] The Wagner-Steagall Act

As I discuss in Part III, I draw a different conclusion about whether the right-remedy gap can be defended in the housing desegregation context.

[144] *See infra* Part II.E.

[145] *See infra* Part II.E.

[146] James Hanlon, *Fair Housing Policy & The Abandonment of Public Housing Desegregation*, 30 Hous. Stud. 78, 81 (2015) ("[M]ost public housing projects were racially exclusive and rarely contravened existing patterns of residential segregation."); *see generally* Arnold Hirsch, *Choosing Segregation: Federal Housing Policy Between* Shelly *and* Brown, *in* From Tenements to the Taylor Homes: In Search of Postwar Housing Policy in Twentieth-Century America 2006 (Bauman et al. eds., 2000) (detailing how federal and local policy created segregated public housing).

[147] *See* Nathaniel Schneider Keith, Politics and the Housing Crisis Since 1930 23, 28 (1973).

[148] *See* Alexander Polikoff, Housing The Poor: The Case for Heroism 9 (1978).

[149] *See* United States v. Certain Lands in Louisville, 78 F.2d 684, 688 (6th Cir. 1935).

[150] *See* Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban* America, 143 U. Pa. L. Rev. 1285, 1291 (1995); Keith, *supra* note 147, at 28. As Schill & Wachter explain, "Municipalities that wished to participate in the program would establish a PHA and enter into an Annual Contribution Contract

of 1937 allowed deference to localities in tenant and site-selection, requiring the development of projects through cooperation agreements between local PHAs and local municipal governments.[151] Local government and local communities had tremendous power in determining the location of public housing and indeed whether it should be built at all.[152] The result was that localities assigned tenants to public housing on a segregated basis, and PHAs built few low-income housing projects in middle-class and white communities.[153] As federal, state, and local governments began to create housing opportunities for working and middle-class people through subsidies of loans, tax policy, and direct aid, they made these subsidies unavailable to Black households.[154] Suburbs would effectively either allow only white-occupied projects or fail to develop public housing altogether.[155]

As public housing policies concentrated Black people in urban areas, the federal government's policies served to exacerbate Black exclusion from suburban housing markets. The federal Home Owner's Loan Corporation ("HOLC"), following patterns established by the private sector, institutionalized redlining, which was the practice of consistently undervaluing Black and integrated neighborhoods in making mortgage loans.[156] Redlining

(ACC) with the federal government. Under the ACC, the federal government funded the majority of the capital costs of public housing by paying the debt service on long-term bonds. The PHA, in turn, agreed to operate the housing over the life of the bonds, subject to federal statutes and regulations." Schill & Wachter, *supra*, at 1291.

[151] Federal public housing programs also lacked explicit protections against segregation. From its inception, public housing mandated the inclusion of Black residents, but HUD and Congress understood that those programs would be operated on a segregated basis. When Congress reenacted public housing after World War II in the Housing Act of 1949, it rejected attempts to prohibit segregation. *See* Rothstein, *supra* note 132, at 21; Polikoff, *supra* note 148, at 12; Arnold R. Hirsch, *"The Last And Most Difficult Barrier": Segregation and Federal Housing Policy in the Eisenhower Administration, 1953–1960*, C.R. Rsch., Mar. 2005 at 58 [hereinafter Hirsch, *"Last and Most Difficult Barrier"*]; Arnold R. Hirsch, Making The Second Ghetto: Race and Housing in Chicago 1940–1960 (2d ed. 1998) [hereinafter Hirsch, Making the Second Ghetto].

[152] *See* Polikoff, *supra* note 148, at 12.

[153] *See id.* at 12–13; Hirsch, Making The Second Ghetto, *supra* note 151. This short history does not cover the extensive history of how banks and federal, state, and local policy and practices maintained racial housing segregation and disinvestment in Black communities in the post-1968 period. *See, e.g.*, Keeanga-Yamahtta Taylor, Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership 3–5 (2019) (introducing how, beginning in the 1970s, the Federal Housing Administration "ended its long practice of redlining" and encouraged low-income African American homeownership contributing to "predatory inclusion" — unscrupulous financing practices by the banking and real estate industry).

[154] *See* Rothstein, *supra* note 132; Massey & Denton, *supra* note 132, at 50–55; Dolores Hayden, Building Suburbia: Green Fields and Urban Growth, 1820–2000, at 147–51 (2003); Gerald E. Frug, City Making: Building Communities Without Building Walls 154–55 (1st ed. 1999); *see also* Bernadette Hanlon, Once the American Dream: Inner-Ring Suburbs of the Metropolitan United States 3 (2010); Barbara M. Kelly, Expanding the American Dream: Building and Rebuilding Levittown 148 (1993) (providing accounts of white working-class families that were able to create the "American Dream" into newly built, racially exclusionary Levittown).

[155] *See* Polikoff, *supra* note 148, at 9–15.

[156] *See* Keith, *supra* note 147, at 51–52.

influenced the loan decisions of the Federal Housing Administration ("FHA"), the Veterans Administration ("VA") and private banks, and contributed to the deterioration of predominantly Black urban neighborhoods while providing opportunities for white people to purchase homes in the suburbs.[157] FHA and VA loans in particular were powerful forces behind the tremendous white suburbanization of the post-war period.[158]

Fearing that the flight of the middle class would lead cities into decline, Congress passed the Housing Acts of 1949 and 1954, which provided federal funds to localities to acquire and redevelop dilapidated properties.[159] These federally funded, locally implemented urban redevelopment and "slum clearance" programs further contributed to the solidification of "the ghetto."[160] White residents at the local level often blocked the creation of replacement housing outside Black neighborhoods[161] and localities

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[157] *See id.*

[158] *See* KEITH, *supra* note 147; *see also* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 115–16 (2006) (detailing how in the immediate post-war period Veterans Affairs' mortgages paid for nearly 5 million new homes and were especially important in high growth areas like California, where they accounted for half of home mortgages by 1950); *see also id.* at 116 ("Residential ownership became the key foundation of economic security for the burgeoning and overwhelmingly white middle class."); MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 90–94 (2017) (detailing how the public and private actions of homeowners, federal actors, and banks that created housing segregation function as a "racial cartel" that "not only reinforced white advantage [but also] created a negative feedback loop for black wealth creation."); BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA (2009) (detailing discrimination in loan mortgage industry).

[159] *See* MASSEY & DENTON, *supra* note 132, at 55–56. Universities, hospitals, libraries, and other elite institutions rooted in the city lobbied for federal intervention. *Id.* at 55. These elite institutions also often guided the implementation of the slum clearance programs. *See* HIRSCH, MAKING THE SECOND GHETTO, *supra* note 151, at 135–70 (describing involvement of the University of Chicago in shaping urban renewal in Chicago's Hyde Park neighborhood); *see also* MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949–1962, at 24–25 (1964) (describing how federal financial assistance was provided to local agencies through loans and grants).

[160] *See* KEITH, *supra* note 147, at 91. The primary aim of the 1949 Housing Act was to support homeownership. Housing Act of 1949, Pub. L. 81–171, 63 Stat. 413 (1949) (stating purpose as "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family"). *See also* CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS 68–69 (2006) (recounting the Federal Housing Administration's role in urban renewal and its effect on displacement and racial segregation).

[161] This Essay does not fully explore the attitudes, motivations, and incentives of communities that now come to be defined as white and that "defended" their boundaries to preserve, by some accounts, a dominant social status relative to Black people or the opportunity benefits that depend on access to "quality" neighborhoods. *See, e.g.*, JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING 139–43 (2013) (surveying literature on the political and economic motivations of anti-integration bias crimes in predominantly working-class white neighborhoods); *id.* at 140 ("A desire to protect these group interests makes whites worry about minorities moving to their neighborhood, especially when whites feel threats made to their dominance in a neighborhood."); *id.* at 141 ("In many cases, by the 1980s many white working-class neighborhoods were on the decline, with residents facing rising unemployment, increasing poverty, and problems from drugs. Residents also faced increased competition from in-migration of racial and ethnic minorities seeking both work

destroyed more housing than they created, leading to overcrowding and further decline of poor Black neighborhoods.[162] Federal public housing, built as replacement housing for urban renewal projects, became the location of an unprecedented level of concentrated poverty.[163] In cities such as Chicago and Philadelphia, high-density public housing projects rehoused the Black residents that urban renewal had pushed out of redeveloping areas.[164]

Segregated public housing, discrimination in the private housing markets, and urban renewal — as well as disinvestment in majority-Black communities — interacted to create the patterns of race and poverty concentration that we see today. Federal and state disinvestment in cities and in the physical structure of public housing in the post-war period served to worsen the conditions of public housing and of central cities.[165] Urban renewal and public housing policies institutionalized segregation, not only reinforcing existing racial living patterns, but "lending them a permanence never seen before."[166]

Even after *Brown* declared formal segregation unconstitutional, federal funds continued to maintain the racial geography established as a result of housing policy.[167] President Truman had begun small efforts to push for integration and nondiscrimination in federally supported housing programs,[168] but when the Eisenhower administration assumed office, they moved in the opposite direction. During the crucial period of urban renewal and expansion of public housing under Eisenhower, federal housing agencies declined to require states and localities to develop housing opportunities outside of segregated, central cities or to promulgate civil rights rules to guide federal housing programs.[169] The Eisenhower administration's hous-

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and housing. The disappearing manufacturing sector and the restructuring of many cities' economies hit many inner-city white working-class neighborhoods and their residents quite hard.").

[162] *See* KEITH, *supra* note 147, at 56.

[163] Federal public housing began in the mid-1930s as part of the Housing Act of 1937. *See* Schill & Wachter, *supra* note 150, at 1291. After a federal court found the initial program beyond the federal government's eminent domain power, Congress reenacted the program in the Housing Act of 1949, which also established the urban renewal program. *See id.* at 1292.

[164] *See* HIRSCH, MAKING THE SECOND GHETTO, *supra* note 151, at 68.

[165] *See* POLIKOFF, *supra* note 148, at 10–13 (describing battles over federal funding for public housing).

[166] *See* HIRSCH, MAKING THE SECOND GHETTO, *supra* note 151, at 254. These are not the only dynamics explaining the rise of twentieth-century segregation. Recent work has shown that segregation doubled nationally between 1880 and 1940, including in areas that did not experience Black migration. *See* Trevon D. Logan & John M. Parman, *The National Rise in Residential Segregation*, 77 J. ECON. HIST. 127, 127–29 (2017).

[167] *See* MASSEY & DENTON, *supra* note 132, at 49–57 (describing role of federal funding and federal policy in subsidizing and maintaining racial segregation in housing).

[168] *See* Hirsch, *"The Last and Most Difficult Barrier," supra* note 151, at 4 ("The last years of the Truman presidency . . . saw the [Racial Relations Service] staff work diligently through the Housing and Home Finance Agency (HHFA) and its constituent units to expand the realm of integration and non-discrimination.").

[169] *See id.* at 32 (failure to require local officials to adopt a "workable plan" that would have, among other things, allowed Black families to be relocated in "outlying vacant land."); *id.* at 40

ing bureaucracy — quite consistent with President Eisenhower's personal dislike of the *Brown* decision[170] — resisted calls to reshape its policies and programs to satisfy *Brown's* requirements and instead took actions that reinforced the values of local deference.[171] Despite *Brown*, federal officials assumed that segregated government housing would remain the norm and ignored critics who warned of the poverty-entrenching effects of federal programs.[172]

B. Gautreaux's Experiment

There has never been a comprehensive litigation effort to address the long and now well-documented history of government-sponsored segregation. The public housing cases are an attempt to provide a remedy for one aspect of this interlocking story. The first public housing case was brought on behalf of Dorothy Gautreaux, a Chicago resident, in 1966. Throughout the next four decades, advocates brought similar cases in different regions in attempts to curb the harms of urban renewal projects or proposed demolitions of public housing.[173]

Gautreaux made visible the state's role in constructing segregation. By 1960, many of the Chicago region's poorest families — who were Black — lived in high-rise public housing, grouped together in the south side of the city. Sociologist Kenneth Clark described "an Invisible Wall" that separated these large public housing projects — which he termed the "dark ghetto" — from the rest of the city and the surrounding suburbs.[174] That poor Black

(describing adherence by housing agencies to pre-*Brown* policies and refusals which left "[t]he color line at the housing agencies . . . intact."); *id.* at 59 (urban renewal displaced inner-city residents and sent them to public housing, radically changing the racial demographics of public housing between 1948 and 1959); *id.* at 54–60 (Eisenhower administration's refusal to adopt executive order banning discrimination in federally supported programs). President Kennedy ultimately adopted the Executive Order in 1962. *See also* Massey & Denton, *supra* note 132, at 57 ("[T]his new segregation of blacks—in economic as well as social terms—was the direct result of an unprecedented collaboration between local and national government."). Former HUD secretary Robert Weaver's 1948 study of residential segregation in the North details the creation of segregation in wartime public housing (predating public housing) and identifies federal complicity even then. *See* Robert Clifton Weaver, The Negro Ghetto 165 (1948) ("It was, however, a matter of grave concern to Negroes and liberals when the rise in institutionalized residential segregation was accelerated by housing planned, financed, and sometimes owned and managed by the Federal government.").

[170] *See* Hirsch, *"The Last and Most Difficult Barrier," supra* note 151, at 20 ("After the ruling, not only did the President fail to endorse the Court's work, but — on repeated occasions — asserted his sympathy for the South, his belief in states' rights, his conclusion that the cause of integration had suffered a setback, and his determination to distance his administration and party from the decision ").

[171] *See id.* at 48–50.

[172] *See id.* at 48–49.

[173] *See* Poverty & Race Research Action Council, *supra* note 128, at 2.

[174] Kenneth Clark, Dark Ghetto: Dilemmas of Social Power (1965); Polikoff, *supra* note 87, at 22 (describing the "Invisible Wall" as referring to both the objective and subjective dimensions of the "ghetto"). I use the term "ghetto" in quotes as it explains the concentration

people would be isolated from white higher-income neighborhoods seemed natural to many at the time; as the first judge in the *Gautreaux* litigation would ask: "where do you expect to put public housing—on Lake Shore Drive?"[175] While thousands of African Americans migrated from the South to Chicago to work in stockyards and meat packing plants,[176] segregation in assignment and site selection for public housing prevented the "burgeoning black ghetto population from spilling into white neighborhoods."[177]

The immediate impetus for the lawsuit was an inquiry by the West Side Federation, a group of Black civic organizations in Chicago, to the Illinois Chapter of the American Civil Liberties Union ("ACLU") in 1966 regarding the construction practices of the Chicago Housing Authority ("CHA").[178] The concern was simple and drew on the logic of *Brown*: "All the new public housing … was going into black neighborhoods. If discrimination was prohibited in public schools, wasn't it also prohibited in public housing?"[179] Community groups had long objected to the practice with little effect, but the then-recent passage of the 1964 Civil Rights Act provided a new "legal tool to break the pattern."[180]

The government's initial response to complaints from community groups about the CHA's site selection practices was that "location preferences" showed that Black people wanted to live in majority-Black neighborhoods and that no sites were available for building in majority-white neighborhoods.[181] Illinois state law required approval by Chicago alderpeople before public housing was constructed, and these officials refused to agree to locations outside of low-income African American neighborhoods.[182] The case would ultimately show these "reasons" were not race-neutral — Black residents were limited in their housing choices and some white residents and leaders of majority-white communities resisted making land available in part because of racial animus.[183] Many books and articles recount the

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of race and poverty, but it also carries the weight of racial stigma and risks understating the assets of majority-Black low-income communities. *See generally* Lance Freeman, A Haven and A Hell: The Ghetto in Black America (2019).

[175] Polikoff, *supra* note 95, at 454.

[176] *See* Isabel Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration (2010); Nicholas Lemann, The Promised Land: The Great Black Migration and How it Changed America (1991).

[177] *See* Polikoff, *supra* note 87, at 29.

[178] *Id.* at 7.

[179] *Id*. Westside Association's framing is notable: it describes the harm of racial segregation as affecting both public housing residents and the working-class Black neighborhoods in which public housing buildings are placed. *See generally* Mary Pattillo-McCoy, Black Picket Fences (1999).

[180] Polikoff, *supra* note 87, at 7.

[181] *See id.* at 26.

[182] *See id.* at 27.

[183] *See, e.g.*, *id.* at 30 (recounting rejection of proposed public housing sites in Chicago after hearings in 1950 "attended by hundreds of whites in raucous opposition").

story of *Gautreaux* in more detail than recounted here.[184] The case speaks to the history of public housing, the politics of Chicago, the distinct trajectory of the civil rights movement in the North, and the open housing movement which played a key role in the passage of the FHA.[185]

For present purposes, *Gautreaux* is also a case about structural reform litigation and remedy. As described in Part I, the plaintiffs first brought claims under the Equal Protection Clause and Title VI, and after the passage of the FHA in 1968, they would later add claims under that statute.[186] The plaintiffs were a class of Black tenants and applicants for public housing suing the CHA, and shortly after the initial filing, they added separate claims against HUD for its role in funding the housing development and discriminatory site selection.[187] Only two years into the case, the district court ruled in favor of the plaintiffs and held that the CHA had intentionally limited the number of African American families living in predominantly white housing projects and for primarily building public housing in Black neighborhoods.[188] The Seventh Circuit also found HUD liable for knowingly funding these CHA practices.[189]

Like the lawyers in the school desegregation cases, the *Gautreaux* lawyers sought to "end a system-wide segregation policy."[190] In its 1969 remedial order, the district court seemingly gave the plaintiffs the broad remedy they wanted — it directed the CHA to "affirmatively administer its public housing system in every respect … to the end of disestablishing the segregated public housing which has resulted from CHA's unconstitutional site selection and tenant assignment procedures."[191] In retrospect, the liability phase was short; it was defining and implementing the remedy that would occupy the courts for the next thirty years.

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[184] *See generally* Polikoff, *supra* note 87.

[185] *See generally* Thomas J. Sugrue, Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North (2008).

[186] *See supra* note 92 and accompanying text.

[187] *See* Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907, 908 (N.D. Ill. 1969); Gautreaux v. Romney, 448 F.2d 731, 732 (7th Cir. 1971).

[188] *See Gautreaux*, 296 F. Supp. at 913–15.

[189] *See Gautreaux*, 448 F.2d at 737–39.

[190] Polikoff, *supra* note 87, at 55.

[191] Gautreaux v. Chi. Hous. Auth., 304 F. Supp. 736, 741 (N.D. Ill. 1969). The decision indicated:

"CHA shall affirmatively administer its public housing system in every respect (whether or not covered by specific provision of this judgment order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures. Without limiting the foregoing,

A. CHA shall use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end, including making applications for allocations of federal funds and carrying out all necessary planning and development; and

B. CHA is hereby permanently enjoined from invidious discrimination on the basis of race in the conduct or operation of its public housing system, including without limitation the 'preclearance procedure' described in the Court's Memorandum Opinion of February 10, 1969."

A key component of *Gautreaux*'s disestablishment remedy was the creation of a "scattered-site housing" plan, which required building three new units of public housing in predominantly white areas for each unit built in a Black neighborhood, a ratio later changed to one-to-one.[192] This aspect of the court's order would never be satisfied. Despite the broad liability ruling and remedy, concessions and limitations were built into the remedial design from the start. The order covered only future projects and excluded even approved CHA projects where construction had not yet begun.[193] However, because of delays in remedial implementation by the CHA, resistance by suburban communities, the federal government's movement away from funding public housing, and the shrinking availability of vacant land in the suburbs, this remedy would never be realized.[194] There was a "long period during which the CHA's scattered-site program produced virtually no relief at all."[195] And when some scattered site housing was finally built many years later, it was not in suburban communities.[196] The legacy of *Hills v. Gautreaux* and *Milliken* was that a court could not order broad-scale metropolitan relief involving suburbs.[197] Practically, this meant that the lawyers could not advance a concept such as "fair share" in which suburban communities would be required to take some share of affordable housing. Rather, suburban communities could object to receiving public housing.[198] After a long battle in the 1980s, the *Gautreaux* lawyers settled for some rehabilitated public housing being constructed in working-class Black communities under a new "revitalizing area" concept, over the objections of these communities.[199]

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[192] *See id.* at 738–39. In 1980, the parties agreed to a ratio of one-to-one. *See* Gautreaux v. Landrieu, 498 F. Supp. 1072, 1073 (N.D. Ill. 1980).

[193] *Gautreaux*, 304 F. Supp. at 738–39.

[194] POLIKOFF, *supra* note 87, at 153.

[195] Polikoff, *supra* note 95, at 476.

[196] Whet Moser, *Chicago Has Struggled to Build Mixed-Income Housing for 50 Years*, CHI. MAG. (Mar. 30, 2017), https://www.chicagomag.com/city-life/march-2017/chicago-has-struggled-to-build-mixed-income-housing-for-50-years/ [https://perma.cc/EBC8-E9AZ] (noting lack of development of scattered site housing in predominantly white neighborhoods and their relative overconcentration in Black neighborhoods).

[197] POLIKOFF, *supra* note 87, at 150 (After the Supreme Court's ruling in *Gautreaux*, "[fair share] was unattainable.").

[198] *See* Christopher Bonastia, *Housing Desegregation in the Era of Deregulation*, 1 KALFOU 138, 156 (2014).

[199] *See* Gautreaux v. Landrieu, 523 F. Supp. 665, 668–71 (N.D. Ill. 1981), *aff'd sub nom.*, Gautreaux v. Pierce, 690 F.2d 616 (7th Cir. 1982) ("[T]he proposed decree introduces the concept of Revitalizing Areas, —areas which have substantial minority population and are undergoing sufficient redevelopment to justify the assumption that these areas will become more integrated in a relatively short time."); POLIKOFF, *supra* note 87, at 241 ("At HUD's insistence, because of the intense pressure to allow more development in black neighborhoods, revitalizing areas permitted new Section 8 housing to be developed in selected black neighborhoods if sufficient redevelopment were taking place to permit a forecast of community 'revitalization.'"); *id.* at 241 ("[O]ur acceptance of the revitalizing area concept was a reluctant concession to frustrated black developers, strongly backed by HUD.").

The second component of the integration remedy was the Section 8 voucher program discussed in *Hills v. Gautreaux.* The program had a very slow start — largely because of difficulties finding landlords who would take the rental certificates and tenants who met the screening criteria and were willing to move to majority-white suburbs — and was not launched until the 1980s, thwarting relief for hundreds of children and families.[200] But by late the 1990s, the program was able to place 8,000 Black families into low-poverty neighborhoods.[201] While successful in very important ways discussed below,[202] advocates never intended the program to provide complete relief for the class. Alexander Polikoff, the lawyer who represented the plaintiffs, has explained that the remedy the litigants settled for in the 1990s specified that 7,100 occupancies would be afforded to *Gautreaux* families through scattered site and project-based Section 8 housing.[203] Polikoff concedes this was an "arbitrary, compromise number" since the *Gautreaux* families numbered 40,000.[204] HUD and CHA never developed significant amounts of scattered site and additional Section 8 project-based housing was effectively terminated by the Reagan administration before the *Gautreaux* plaintiffs could fully incorporate it into their remedy. This left the voucher remedy serving 8,000 families.[205] Polikoff has written that lawyers struggled with the inadequacy of the remedy: "… [w]e were plagued by doubts. Shouldn't we be getting more? Here we were, 'victors' in a unanimous Supreme Court decision on behalf of tens of thousands of families, playing around with a relief program for only a thousand of them."[206]

In addition, the harm that *Gautreaux* articulates is not limited to the certified class of Black public housing residents. Black working-class and middle-class communities were also affected by having a larger number of public housing units and poor families in their neighborhoods (relative to predominantly white neighborhoods),[207] a point made in subsequent disputes

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[200] *See* POLIKOFF, *supra* note 87, at 235, 244–45 (detailing delays and eventual growth of the mobility program in the 1980s).

[201] *See id.* at 245–48.

[202] *See infra* Section II.D.

[203] *See* POLIKOFF, *supra* note 87, at 240.

[204] *See id.* at 240 ("[I]t meant that we were settling for a 'relief' figure of about one-fifth the number of our Gautreaux families (8,000 as against 40,000)."); *see id.* at 248 (noting that this produced 25,000 assisted persons, assuming three persons per household, which was "a nonnegligible number even though it took over two decades to get there.").

[205] *See id.* at 248 ("The glass was half empty if the 8,000 assisted families are compared with the initial 40,000 families in the Gautreaux class…").

[206] *Id.* at 237. The lawyers compromised on the remedy in part because HUD impressed upon them that communities, including Black communities, would not accept Section 8 plaintiffs and because of their fear that the new judge in the case was unlikely to impose stricter conditions on HUD. *Id.* at 247; *see also id.* at 247 ("With thousands of Gautreaux families still living in segregated public housing, and the CHA possessed of a means—Section 8—for offering them relief (even though in a different form than scattered sites) didn't desegregation cases require the wrongdoer to use all available means to remedy its still persisting wrong?").

[207] *See* PATTILLO-MCCOY, *supra* note 179, at 208–10 (documenting this phenomenon in a

as to how much rehabilitated and scattered site public housing should be located in "revitalizing" Black working-class neighborhoods.[208] As sociologist professor Mary Pattillo has observed, suburban refusal to host a share of public housing also affects struggling African American communities by concentrating poverty, facilitating disinvestment in Black spaces, and widening wealth disparities between African American and white communities.[209]

The CHA and the plaintiffs settled the case in 2019,[210] and as part of that remedy, the CHA agreed to develop new mixed-income communities, a process that the legal group that brought the *Gautreaux* litigation continues to monitor.[211]

C. Walker v. HUD

In 1985, plaintiffs living in public housing developments in Dallas, Texas brought a class action suit against Mesquite, Texas — a Dallas suburb — for its nonparticipation in the DHA Section 8 program.[212] The plaintiffs would ultimately expand their case to include claims against other suburban counties for not accepting vouchers, and against DHA and HUD for concentrating Black public housing tenants in Dallas while failing to provide regional housing opportunities.[213] The case differed in important ways from *Gautreaux*, in that from the start, the case included suburban counties as defendants, and the remedy sought was a court order barring suburban jurisdictions from vetoing Section 8 projects.[214] The plaintiffs also sought remedies that would help revitalize existing public housing and the surrounding communities.[215]

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middle-class Black community in Chicago where high-poverty neighborhoods "are never so far off"); *see also id.* at 215 ("White middle-class families have been able to physically and socially distance themselves from the concentrated urban poverty of America's large cities, while the black middle class continues to struggle to maintain predominance in their neighborhoods, which border these areas.").

[208] *See Gautreaux*, 523 F. Supp. at 673–77, 680–81.

[209] *See generally* Mary Pattillo, Black on the Block: The Politics of Race & Class in the City (2007); *see also* Baradaran, *supra* note 158, at 5–8 (introducing the idea that the systemic and legal segregation of the Black community through "violence, zoning restrictions, and racial covenants" affects black banking and black prosperity and wealth today); Rothstein, *supra* note 132, at 203 ("About one-third of middle- and upper-income black families now live in neighborhoods bordering severely disadvantaged areas, while only 6 percent of income-similar white families do so.").

[210] *See* Settlement Agreement, *Gautreaux*, 304 F. Supp. 736 (N.D. Ill. Jan. 23, 2019) (No. 66 C 1459) [https://perma.cc/D9BZ-B2VX].

[211] *See* Lolly Bowean, *In Final Step Before the Gautreaux Housing Discrimination Case is Settled, Residents Testify Before Federal Judge*, Chi. Trib. (Jan. 17, 2019), https://www.chicagotribune.com/news/ct-met-gautreaux-settlement-public-testimony-20190117-story.html [https://perma.cc/76F2-NSWY].

[212] *See* Walker v. U.S. Dep't of Hous. & Urb. Dev., 912 F.2d 819, 821–22 (5th Cir. 1990).

[213] *Id.*

[214] *See infra*.

[215] *See infra.*

After twenty-three years of litigation involving contestations about liability and the remedy by each defendant and community opposition, the parties created an important and enduring voucher remedy enabling families living in public housing to move to census tracts that were classified as high opportunity areas.[216] In addition, the settlement agreement required the creation of scattered site housing in the suburbs — though some of that still remains to be built — as well as significant funds to revitalize public housing units in the city and spur economic development.[217]

As with the other public housing desegregation suits, government delays in building housing and community opposition led this litigation to drag on. At first, it seemed that the plaintiffs could obtain at least a partial remedy without much delay. On January 20, 1987 — less than two years after the plaintiffs initiated the litigation — the plaintiffs, DHA, and HUD entered into a voluntary consent decree[218] requiring DHA to provide Section 8 vouchers in the Dallas suburbs without the consent of the suburbs themselves, modernize about 800–900 units in the City, demolish about 2,600 units that were deemed uninhabitable upon relocating the occupants, and, with funding from HUD, create 1,000 new public housing units in the City.[219] However, progress stalled in actually building the units,[220] resulting in a return to litigation and the court's eventual issuance of a liability finding against HUD and DHA.[221] In 1995 and 1997, the court entered remedial orders requiring the renovation of public housing units in Black communities, the creation of 3,200 public housing units, and the provision of Section 8 vouchers in low-poverty communities.[222] Here, again, the significant remedy ordered would only be partially realized. After the plaintiffs alleged that HUD was violating the remedial order by not developing low-income housing in low-poverty areas, the parties eventually brokered a 2001 settlement

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[216] *See* Agreed Settlement Voucher Implementation Plan 2019, Walker v. U.S. Dep't of Hous. & Urb. Dev., No. 3:85-CV-1210-O (N.D. Tex. Nov. 13, 2019), ECF No. 2820 [https://perma.cc/6VMD-JW9S]; Amended Agreed Final Judgment, *Walker*, No. 3:85-CV-01210-O (N.D. Tex. Nov. 13, 2019), ECF 2821 [https://perma.cc/98V4-F5VH]; Supplemental Consent Decree (DHA) ¶ 1, Walker v. U.S. Dep't Hous. & Urb. Dev., No. CA-3-85-1210-R (N.D. Tex. Sept. 24, 1990) [https://perma.cc/8B4G-TW52].

[217] *See id.*

[218] *See* Consent Decree at 1248, *Walker*, No. CA-3-85-1210-R (N.D. Tex. Jan. 15, 1987) [https://perma.cc/E8BU-56RL] ("[N]othing contained herein [the Decree] shall constitute any admission of liability or basis of a claim against DHA by any other party, person or class. HUD denies any liability with respect to any matter alleged in the First and Second Amended Complaints.").

[219] *See* Findings and Conclusions: Vacation of the 1987 Consent Decree, *Walker v. HUD*, No. 3:85-CV-1210-R, ¶¶ 3–4 (N.D. Tex. Apr. 16, 1996) [https://perma.cc/AS7V-8QGS].

[220] Daniel & Beshara, P.C., *supra* note 135.

[221] *See also Walker v. HUD*, 734 F. Supp. 1289 (N.D. Tex. 1989) (finding liability on the City of Dallas).

[222] *See* Remedial Order Affecting DHA, *Walker v. HUD*, No. 3:85-CV-1210-R (N.D. Tex. Feb. 7, 1995) [https://perma.cc/6K7L-5BAB]; Modified Remedial Order Affecting HUD, *Walker v. HUD*, No. 3:85-CV-1210-R, Docket No. 1218 (N.D. Tex. Dec. 5, 1997) [https://perma.cc/JXK7-Q73Y].

which allowed HUD, in lieu of developing 3,200 low-income housing units in predominantly white areas, to provide vouchers and mobility financial assistance instead.[223] Settlements with the City and DHA in 2003 and 2004 required the City to improve public housing in Black neighborhoods while administering a voucher program in low-poverty neighborhoods and providing mobility counseling.[224] In November 2019, DHA and the plaintiffs reached a final settlement under which DHA would continue the Settlement Voucher Program for future participants, provide $2.85 million for Mobility Financial Assistance, and re-issue 2,646 Settlement Vouchers to class members.[225]

These types of delays may seem typical of any complex litigation, but the failure of implementation was not the result of abstract litigiousness. It was primarily the result of community opposition to the placement of low-income housing for Black people in white communities. In their account of the litigation, the plaintiffs' lawyers document two decades of delay in implementing the scattered site housing remedy that was caused by local government, community, and homeowner opposition to the development of housing.[226] Initially, some Black public housing residents in West Dallas opposed the demolition of their housing without adequate replacement.[227] After that issue was addressed through the creation of a voluntary voucher program, the major opposition came from suburban residents.[228] This opposition took the form of community protests as well as litigation, though these litigation efforts were ultimately unsuccessful on the merits.[229]

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[223] *See* Order Approving Plan for DHA's Implementation of HUD Settlement as DHA's Section 8 Substitution Plan, *Walker v. HUD*, No. 3:85-CV-1210-R (N.D. Tex. Apr. 26, 2001) [https://perma.cc/EF2U-8XY6].

[224] *See* Agreed Final Judgment, Walker v. HUD, No. 3:85-CV-1210 (N.D. Tex. Aug. 12, 2003) (No. 2329); *see also* Agreed Final Judgment, Walker v. HUD, No. 3:85-CV-1210 (N.D. Tex. Dec. 21, 2004) (No. 2522 Tex.). According to the plaintiffs' lawyers, from 2011 to 2014, DHA defaulted on this obligation to pay a higher subsidy to class members receiving vouchers thus making it burdensome for some of these family members to access vouchers.. *See* Daniel & Beshara, P.C., *supra* note 135. *See also* Plaintiff's Rep. on the Final Resol. of the DHA Reimbursement of Walker Settlement Voucher Tenants' Payment Standard Claims, Walker v. HUD, No. 3:85-CV-1210 (N.D. Tex. Jan. 11, 2017) (No. 2779) (agreeing to reimburse $512,187.35 for 410 Walker Settlement Vouchers that have been incorrectly calculated by DHA).

[225] *See* Agreed Settlement Voucher Implementation Plan 2019, Walker v. HUD, No. 3:85-CV-1210 (N.D. Tex. Nov. 13, 2019) (No. 2820); Amended Agreed Final Judgment, Walker v. HUD, No. 3:85-CV-1210 (N.D. Tex. Nov. 13, 2019) (No. 2821).

[226] Daniel & Beshara, P.C., *supra* note 135.

[227] *Id.*

[228] *See id.* ("Once the 1987 consent decree began to be implemented, the first wave of neighborhood-based opposition to public housing development in outside of Black neighborhoods also arose. Similar opposition continued to arise throughout the remainder of the case and was directly responsible for the current Settlement Voucher program as a substitute for the development of 3,200 units of public housing in predominantly white areas.").

[229] *See* Walker v. HUD, 326 F. Supp. 2d 780, 781 (N.D. Tex. 2004); *see also* Agreed Ord. Concerning Revitalization of Roseland Homes, Walker v. HUD, No. CA-3-85-1210 (N.D. Tex. Mar. 10, 2000) (No. 1991).

However, these efforts *were* successful in delaying the court-ordered remedy, as a very small number of units (forty) were built sixteen years after HUD initially allocated funding.[230] This stands as but one example of how much litigation was required to achieve the construction of a modest amount of housing in low-poverty communities.

D. The Most Recent Best Chance: Thompson v. HUD

The most recent public housing desegregation case is *Thompson v. HUD*, a suit brought in 1994 by African American plaintiffs against the Baltimore City Public Housing Authority and HUD.[231] The trigger for the case was the demolition of public housing and the proposed redevelopment of public housing in the City, which would have kept public-housing tenants in high-poverty and racially segregated neighborhoods rather than providing them housing opportunities in the lower poverty region surrounding Baltimore.[232] As part of the case, the plaintiffs included a "larger historical claim that the city and housing authority, with HUD approval" had acted to create and maintain racial housing segregation.[233] The trial court's ultimate liability findings in 2003 mirrored prior public housing desegregation cases in finding that HUD had violated its duty under the FHA to affirmatively further fair housing by failing to create housing opportunities for low income residents outside of Baltimore City.[234] The court found no liability on the part of local defendants, who the court found had few realistic options to develop housing outside of the city and also made an "understandable" choice to develop housing inside the city.[235]

As in the prior public housing desegregation cases, the Thompson plaintiffs sought an integration injunction: the development of housing opportunities in low-poverty suburbs.[236] As in *Walker*, the plaintiffs sought both vouchers and the development of scattered site housing, as well as a regional approach to housing going forward. In a series of remedial orders, the plaintiffs were able to get the trial court to order much of what they sought. A 1996 partial consent decree settled a portion of the case related to the demolition and redevelopment of several Baltimore City public housing projects, by requiring "HUD to provide 1,342 vouchers under the Section 8 tenant-based program and 646 vouchers under the project-based program."

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[230] Daniel & Beshara, P.C., *supra* note 135.

[231] *See* Class Action Complaint, Thompson v. HUD, No. 95-309, 1995 WL 17209874 (D. Md. Jan. 31, 1995).

[232] *See id.*

[233] *See* PRRAC, An Analysis of the *Thompson v. HUD* litigation, *supra* note 135, at 1.

[234] *See* Thompson v. HUD, 348 F. Supp. 2d 398, 459–63 (D. Md. 2005); *see also* Milligan, *supra* note 136, at 70–71 (describing liability rulings and ultimate settlement in the litigation but also noting that the court skirted the constitutional dimensions of the case).

[235] *See* Milligan, *supra* note 136, at 70–71.

[236] *See* PRRAC, An Analysis of the *Thompson v. HUD* litigation, *supra* note 128, at 1.

[237] The consent decree also required the city to create the Baltimore Housing Mobility Program that would provide city residents not living in those high-rise developments vouchers to access to low-poverty suburbs and that "[l]ocal Defendants make available 911 'hard' housing units" in low-poverty neighborhoods in Baltimore.[238] After trial, the District Court on November 20, 2012 approved an additional settlement that required HUD to continue the Baltimore Housing Mobility Program and to support and incentivize programs to help create housing opportunities in low-poverty suburbs.[239]

But the remedy also had familiar limitations. As was the case in the *Gautreaux* and *Walker* public housing desegregation cases, almost a generation passed before remedies were even ordered, much less implemented.[240] The settlement enabled four thousand families to use vouchers to move to communities of opportunity.[241] On the other hand, the settlement did not cover the entire class, and took place "six thousand, five hundred and three days" after the plaintiffs had filed the complaint.[242] Journalist Lawrence Lanahan, who has written about *Thompson*, observes that over this period, the "the rate of residential segregation had changed little" and that despite the litigation "many more thousands… would still be penned into highly segregated communities that offered little opportunity."[243]

In addition, the main remedies related to the provision of vouchers, which are more palatable to residents of majority-white, low-poverty suburbs than the creation of scattered site housing in the suburbs.[244] The mobility remedies, while significant, did not purport to disestablish the dual housing system.[245] And, as in other cases, no monetary remedies were included to compensate for the harm to the broader class who could not take advantage of the mobility or other forward-looking remedies or to compensate for the delay pending the award of voucher relief.

E. Summing Up: The Mixed Success of Gautreaux, Walker, and Thompson

Before highlighting the ways in which the public housing lawsuits achieved only a partial remedy, it is important to emphasize what those cases

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[237] Thompson v. HUD, No. 95-309, 2006 WL 8456916, at *1 (D. Md. June 20, 2006); *see also Thompson*, 348 F. Supp. 2d at 411.

[238] *Thompson v. HUD*, 404 F.3d 821, 825 (2006).

[239] *See Case: Thompson v. HUD*, Legal Def. Fund, https://www.naacpldf.org/case-issue/thompson-v-hud/ [https://perma.cc/U8FS-V7MD].

[240] *See, e.g., supra* notes 193–98 (describing problems in building scattered site housing remedies in the *Gautreaux* litigation).

[241] *See* Lawrence Lanahan, The Lines Between Us: Two Families and a Quest to Cross Baltimore's Racial Divide 168 (2019).

[242] *Id.* at 169.

[243] *Id.*

[244] *See supra* text accompanying notes 226–30 (describing opposition to remedies in the Walker housing desegregation cases).

[245] *See supra* notes 203–06 (discussing the limitations of the *Gautreaux* voucher remedy).

were able to achieve. Legal scholarship typically emphasizes the limitations of civil rights institutional reform litigation.[246] Yet in some key and unexpected dimensions, the public housing cases were successful. They helped the families who benefited from the voucher program, provided a model for future housing mobility programs, and have (albeit incrementally) contributed to moving housing policy towards a regional, integration-oriented approach.

The families who moved to low-poverty neighborhoods outside of Chicago as a result of the *Gautreaux* program have been thoroughly studied.[247] Where residents moved to low-poverty, opportunity-rich areas with well-funded schools, studies have shown positive educational and employment outcomes for children as compared to their counterparts who remained in high-poverty neighborhoods.[248] Beyond the original Chicago voucher recipients, *Gautreaux* launched a broader set of housing mobility programs. In the 1990s, Congress funded a five-city demonstration program (known as Moving To Opportunity) modeled on the original *Gautreaux* mobility program[249] and expanded the program in the 2000s to create the current housing choice voucher program.[250] As Professor Florence Roisman has written, housing mobility programs are the "fruits" of the public housing desegregation litigation.[251] While advocates continue to recommend ways to improve and expand the program,[252] it has developed into an enduring part

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[246] *See infra* note 271 and accompanying text.

[247] *See* James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 Hous. Pol'y Debate 231 (1995); Leonard S. Rubinowitz & James E. Rosenbaum, Crossing the Class and Color Lines (2000) (finding that *Gautreaux* movers who moved to low-poverty suburban neighborhoods had better long-term outcomes than those moving to higher-poverty areas in the city, when measured on a range of dimensions including likelihood of attending college and mothers' employment).

[248] *See* Rosenbaum, *supra* note 247, at 232.

[249] For analyses of the *Gautreaux* mobility remedy, see Barbara Sard & Douglas Rice, Ctr. on Budget & Pol'y Priorities, Creating Opportunity for Children: How Housing Location Can Make a Difference (2014); Robert J. Sampson, Great American City: Chicago and the Enduring Neighborhood Effect (2012).

[250] *See* Poverty & Race Rsch. Action Council, Housing Mobility Programs in the U.S. 2020 (2020). Under the Obama Administration, HUD put in place the Small Area Fair Market Rent (SAFMR) rule. The rule determines rents for voucher systems within a zip code instead of the larger metropolitan area. The rule was put in place to provide more options for voucher recipients and to diminish segregation. According to a study by NYU's Furman Center, the SAFMR rule will lead to a decrease in affordable housing options for voucher recipients in a few metropolitan areas, but in twenty out of twenty-four metropolitan areas, voucher recipients would have more options. *See* N.Y.U. Furman Ctr., How Do Small Area Fair Market Rents Affect the Location and Number of Units Affordable to Voucher Holders? (2018).

[251] *See* Roisman, *supra* note 125, at 346.

[252] *See* Bruce J. Katz & Margery Austin Turner, *Who Should Run the Housing Choice Voucher Program? A Reform Proposal*, 12 Hous. Pol'y Debate 239 (2001) (recommending a move away from the current system that allows local Public Housing Authorities to operate the program); HUD, The Flexible Voucher Program: Why A New Approach to Housing Subsidy Is Needed: A White Paper (2004). For additional analyses of the success of housing mobility programs, see Stefanie DeLuca, *Ending Urban Poverty: Neighborhood Matters*, Bos.

of the federal policy landscape and an important remedy for state-enabled segregation that continues to produce positive outcomes for participating families.[253] More broadly, the public housing cases, alongside the work of academics and advocates,[254] destabilized the notion that housing and neighborhoods were formed simply by individual or market imperatives, and that government was a neutral player in our geography of race.

This litigation helped shift federal policy and, to a lesser extent, state and local housing policy. As one of the lawyers in *Thompson v. HUD* has stated, "People used to assume, 'Subsidized housing? You put it where all the poor people are…' We've gone beyond that superficial logic."[255] *Walker*'s and *Thompson*'s emphasis on a regional approach would show up in the expanded "affirmatively furthering fair housing" rule (which is also the result of litigation brought against a suburban county in the 2000s)[256] and, more controversially, in the Hope VI program.[257] These are incremental

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Rev. (Jan. 1, 2008), https://www.bostonreview.net/articles/ending-urban-poverty-neighborhood-matters/ [https://perma.cc/BP5K-4Q5N]; Margery Austin Turner & Susan J. Popkin, Why Housing Choice and Mobility Matter (2010); Deborah Thorpe, *Achieving Housing Choice and Mobility in the Voucher Program: Recommendations for the Administration*, 27 J. Affordable Hous. & Cmty. Dev. L. 145, 146 (2018).

[253] *See generally* Chetty & Hendren, *supra* note 5, at 1220 (including other factors like a larger middle class, greater social capital, and higher quality public schools). *See* Chetty et al., *supra* note 5, at 865 (finding negative or neutral effects for children who moved after the age of thirteen, and for adults).

[254] *See* Sheila Crowley & Danilo Pelletiere, Nat'l Low Income Hous. Coal., Affordable Housing Dilemma: The Preservation vs. Mobility Debate 9 (2012) ("The work of [William Julius] Wilson and [Douglas] Massey and [Nancy] Denton [to document the effects and origins of racial and economic segregation] had a tremendous effect on the policy debate and the academic literature").

[255] Lawrence Lanahan, *The Legacy of a Landmark Case for Housing Mobility*, Bloomberg (Jan. 31, 2020, 4:24 PM), https://www.bloomberg.com/news/articles/2020-01-31/the-legacy-of-a-landmark-case-for-housing-mobility [https://perma.cc/CH6Q-PA4W].

[256] *See* Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 26, 2021) (restoring the 2015 AFFH rule).

[257] The HOPE VI program was created by Congress in 1992 to transform public housing by demolishing more than 100,000 units of severely distressed public housing and replacing them with a combination of new, mixed-income housing and rental vouchers. The aspiration was that HOPE VI would help revitalize urban communities by bringing in middle-class residents and providing improved living situations for low-income residents, either in new developments or outside inner cities in low-poverty communities. *See* U.S. Gov't Accountability Off., RCED-98-187, HOPE VI: Progress and Problems in Revitalizing Distressed Public Housing 26 (1998); HUD, Office of Inspector General, 99-FW-101-0001, Nationwide Audit: HOPE VI Urban Revitalization Program 8 (1998), https://archives.hud.gov/offices/oig/reports/internal/ig960001.pdf [https://perma.cc/49UD-2BW7]. Yet, the reality proved more sobering: more low-income housing was demolished in inner cities than was created in low-poverty neighborhoods, and some studies showed that it left twenty percent of families in housing that was as bad or worse than their former public housing units, with less housing stability and diminished community support systems. *See* Nat'l Hous. L. Proj. et al, False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program 4–5, 24–26 (2002). (describing HUD's shift away from demolishing the most severely distressed public housing to demolishing public housing high-rises). For a discussion of the loss of community support systems as a result of HOPE VI, see Sudhir Venkatesh & Isil Celimli, *Tearing Down the Community*, 138 ShelterForce Online (2004).

moves given the continued reality of segregation and the federal-state-local funding and policy infrastructure that sustains it. But the modest housing integration policies that have been adopted may be responsible for some decreases in the prevalence of the most "hypersegregated" areas.[258]

However, even as we credit the success of these housing desegregation cases, they did not remedy the harms faced by the entire class, much less purport to address the needs of the broader Black community in those cities. First, by design, the remedies could only partially remedy the class-wide harm. The integration injunction could not, as conceived, provide a remedy to the entire class.[259] This is not a tendentious claim, but a descriptive one. There may be a range of reasons to design the remedy in this way. As a practical matter, it takes longer to construct housing than it does to reassign students in school desegregation cases.[260] Lawyers also designed some of the remedies to stabilize integration; for instance, designing the scattered site housing to allow within-building integration. The remedy was also partial because it relied on the housing mobility voucher — a program in which building owners voluntary participate, and for which there were not enough certificates to cover the class. Moreover, these limits were shaped both by what judges were willing to order as remedies, despite the liability finding,

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[258] *See* Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 Demography 373 (1989) (defining hypersegregation as a pattern of "extreme segregation on all [five spatial] dimensions" for African Americans in large urban areas); Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 Demography 1025, 1028 (2015) (finding that the number of areas in which African Americans were hypersegregated decreased from forty to twenty-one between 1970 and 2010, and that the percentage of African Americans living in hypersegregated neighborhoods declined by half). There is some evidence that decreases in hypersegregation have stalled since 2010. *See* Jacob S. Rugh & Douglas S. Massey, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century*, 11 DuBois Rev. 205 (2014) (analyzing 287 metropolitan areas and finding decreases in Black-white segregation from 1970 to 2010, and continued, though modest, progress (4.5 points per decade); *see also* Benjamin Elbers, *Trends in U.S. Residential Racial Segregation 1990-2020*, 7 Socius 1, 1, 3 (Jan.–Dec. 2021) (Despite declines in residential segregation between 2010 and 2020, "Blacks in particular remain highly segregated from whites and Asians in many U.S. metropolitan areas."). Neighborhoods of high poverty and high racial segregation persist. *See* Massey, *The Legacy of the 1968 Fair Housing Act*, at 8–9. While this Essay has focused on African Americans, given the historical approach, the trend for Latinos over the past several decades is not towards integration, and hypersegregation for Latinos emerged beginning in 2000 in two large metropolitan areas. *See* Massey, *The Legacy of the 1968 Fair Housing Act*, *supra*, at 580 (citing Rima Wilkes & John Iceland, *Hypersegregation in the Twenty-First Century, 41* Demography 23 (2004)) (the average Latino segregation increased slightly from 1970 to 2010, and by 2000, in New York and Los Angeles (the metropolitan areas with the largest Latino communities) had become hypersegregated); *see also* Margery Austin Turner, A Place-Conscious Approach Can Strengthen Integrated Strategies in Poor Neighborhoods, Brookings Inst. (2015), https://www.brookings.edu/articles/a-place-conscious-approach-can-strengthen-integrated-strategies-in-poor-neighborhoods/ [https://perma.cc/RG29-QYYK].

[259] *See, e.g.,* Polikoff, *supra* note 87, at 240 (noting that the Section 8 voucher remedy covered only one-fifth of the *Gautreaux* class members).

[260] *See supra* note 120 and accompanying text.

and by the fear of suburban resistance and lack of political support for more expansive solutions.[261]

Second, the remedy was partial because, in many cases, the housing agencies did not comply with court-ordered actions or the remedies were politically or practically difficult for the agencies to implement.[262] After a short liability phase, the remedial phase of the public housing litigation dragged on for years, resulting in "time lost" for a generation of children and families.[263] Remedies such as scattered site housing in suburbs were taken off the table in some lawsuits, or significantly reduced in scope because of the resistance of suburban communities and property owners.[264] Studies of public housing agencies facing desegregation decrees confirm these patterns of mixed success — insufficient as measured by overall desegregation, rehabilitation of existing units, or opportunities for Black residents to move into low-poverty areas.[265]

One might argue that slow implementation and settling for less than a full remedy is a constant feature in any structural reform litigation.[266] Even if courts had ordered all the injunctive relief that plaintiffs had asked for, the "polycentric" nature of the dispute — the need to corral city and regional governments, local homeowners, Black public housing residents, and Black working- and middle-class communities and homeowners — would have frustrated relief. [267] By some accounts, this counsels against courts engag-

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[261] There were also other explanations including the capacity and organization of HUD and state and local agencies. *See* Susan J. Popkin et al., *Obstacles to Desegregating Public Housing: Lessons Learned from Implementing Eight Consent Decrees*, 22 J. Pol. Anal. & Mgt. 179 (2003).

[262] *See supra* notes 195–96, 204–06, 226–30 and accompanying text (discussing administrative delays, political and community opposition and litigation challenges to the remedy in *Gautreaux* and *Walker*).

[263] *See supra* notes 220–30 and accompanying text (discussing delays in the *Walker v. HUD* litigation).

[264] And perhaps in *Gautreaux,* there are successes yet to come. The case was finally settled in 2018, and as part of that settlement, CHA is obligated to redevelop many of its large public housing projects as mixed-income communities under its Plan for Transformation. Additionally, CHA will "[d]evelop family public housing in opportunity areas until at least 50 percent of all CHA family units not in Plan for Transformation communities are in opportunity areas." Settlement Agreement, Gautreaux v. Chicago Hous. Auth., No. 66-cv-01459 (N.D. Ill. Jan. 16, 2019) (No. 815).

[265] *See* Susan J. Popkin et al, Baseline Assessment of Public Housing Desegregation Cases, xviii (2000) ("The most challenging has been the provision of adequate scattered-site or Section 8 replacement housing. At numerous sites, local politicians and homeowners' associations have objected to the acquisition or construction of scattered site units.").

[266] Chayes, *supra* note 43, at 1292–96 (discussing the difficulty of implementing remedies in structural reform litigation). *See generally* Donald Horowitz, The Courts and Social Policy (1978) (studying the limits on courts' capacity to effectuate social policy).

[267] *See*. Fuller, *supra* note 43, at 397 ("[I]n practice, polycentric problems of possible concern to adjudication will normally involve many affected parties and a somewhat fluid state of affairs"); *see id.* at 401 ("When an attempt is made to deal by adjudicative forms with a problem that is essentially polycentric…the adjudicative solution may fail."); Chayes, *supra* note 43, at 1292–96; Donald Horowitz, The Courts and Social Policy (1978).

ing in complex structural reform litigation.[268] Yet, in many other structural reform contexts — be it prisons or school reform — injunctive relief is the most reasonable remedy.[269] By contrast, if the harm of housing segregation also consists of its effects on economic mobility, opportunity, and wealth, monetary damages could compensate for at least part of that harm.

III. The Missing Half

The primary goal of the analysis thus far has been to make visible the limitations of remedies awarded in public housing desegregation cases. This Essay has not advanced a strategy to reopen the housing desegregation cases in order to obtain those remedies. And yet, it does not engage in this analysis of remedies as an abstract or elegiac exercise. Making the absence of monetary relief visible has practical implications for litigation going forward and for the broader discourse on remedy and repair of racial harm. In what follows, I examine these implications.

Beginning with the practical, section A makes the case that monetary damages should play a more prominent role in contemporary cases challenging government-created segregation and discrimination, along with other forms of compensation and prospective relief. Section B argues for the "redress" framework, which would emphasize that remedying segregation has both backward- and forward-looking dimensions. The redress framework understands remedy as consisting of two parts — one for the democratic/citizenship harms of segregation, and the other for its practical effects on mobility, income, and wealth. Redress also mediates between the age-old struggle between integration remedies and place-based intervention remedies and recognizes the harm of segregation while also valuing the assets of Black people and communities. Section C argues for the importance of including money in our spectrum of repair beyond this immediate context. This section connects compensation in the specific domain of housing segregation to the modern discourse and social movement of reparations that includes apology, accounting, remembering, redemption, recognition, and change.[270]

Focusing on money as a crucial part of relief in housing and discrimination cases against the government implicitly challenges the notion that the "right-remedy" gap in public law litigation might serve a social good. By some accounts, this right-remedy gap properly allows the shifting of constitutional adjudication from reparation toward reform.[271] Whatever logic that

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[268] *See* Sabel & Simon, *supra* note 141 (examining critiques of structural reform litigation but arguing for structural reform design in which courts set broad goals and targets and encourage government institutions to develop more specific remedies).

[269] *See supra* note 25 and accompanying text (discussing arguments for injunctive relief for violations of constitutional rights).

[270] *See infra* Part III.C.

[271] Jeffries, *supra* note 143, at 90 (defending the "right-remedy gap" in constitutional

argument holds in the constitutional tort context,[272] it is less persuasive in housing desegregation cases in which promised forward-looking relief has not occurred and in which money can help build the income, assets, and wealth that can benefit future generations. In addition, the argument offered in this Essay is to pursue both damages and forward-looking relief and is more concerned with damages as a form of compensation for victims rather than as a deterrent for government actors.[273]

This examination gives us tools for designing and evaluating judicial and policy remedies for racial harm and subordination even beyond housing. It invites to consider in all contexts how remedies address democratic and material harms; whether remedies are forward or backward looking; and whether they address both individual and collective harms.

A. Knowing Your Price[274]

The harm of segregation to Black lives is well-documented; it is important to note that it involves twin harms.[275] There is the denial of access (granted even to white poor people)[276] to low-poverty communities and to

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litigation as facilitative of "constitutional change by reducing the costs of innovation" and arguing that "[l]imitations on damages, together with modern expansions in injunctive relief, shift constitutional adjudication from reparation toward reform"); *see also* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and The Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000) (arguing that "making government pay" will not achieve optimal deterrence as government does not respond to financial outflows in the same way as a private firm).

[272] *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845 (2001) (arguing that awarding monetary damages in constitutional tort cases can alter the behavior of government officials in important ways).

[273] *Cf.* John C. Jeffries, *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 240 (2013) (noting that "the deterrent effect of money damages plus attorney's fees is sufficiently plausible" to make it worthy to investigate whether qualified and sovereign immunity doctrine should change).

[274] *See generally* Andre M. Perry, Know Your Price: Valuing Black Lives & Property in America's Cities (2020) (urging a greater focus on the "assets" of Black communities, "includ[ing] the material and nonmaterial . . . . People are the most important asset of all.").

[275] *See* Edward G. Goetz, The One-Way Street of Integration: Fair Housing and the Pursuit of Racial Justice in American Cities 58–60 (2018); *see also* Edward G. Goetz et al., *Racially Concentrated Areas of Affluence: A Preliminary Investigation*, 21 Cityscape 99, 100 (2019) ("The continued elision of White neighborhoods of concentrated affluence and social power within normative inquiry reinforces the decades-old tendency to problematize low-income communities of color, while at the same time sparing White neighborhoods and the advantages they embody from examination of any kind"); Sarah Mayorga-Gallo, *The White-Centering Logic of Diversity Ideology*, 13 Am. Beh. Sci. 1, 5 (2019).

[276] Housing discrimination and policies furthering segregation contribute to racial differences in the distribution of poverty. While half of poor white people live in high-poverty areas, over 80 percent of poor Black people and three-quarters of poor Latino or Hispanic and Native American people live in high-poverty areas. See Joanne Kim & Tracy Hadden Loh, How We Define 'Need' for Place-Based Policy Reveals Where Poverty and Race Intersect, Brookings Inst. (2020), https://www.brookings.edu/articles/how-we-define-need-for-place-based-policy-reveals-where-poverty-and-race-intersect/ [https://perma.cc/6QC4-2K7T].

the array of government spending and subsidies that permit opportunity and mobility in those spaces. On the other side are the disinvestments in the people and places in majority-Black high-poverty neighborhoods and even in working-class Black neighborhoods.[277] These twin mechanisms have concrete implications for income and wealth. Given that the remedies provided in the segregation cases were largely incomplete,[278] monetary damages can serve as partial compensation for these harms.

1. Establishing Monetary Harm

Some commentators have recognized the importance money damages can play in fair housing cases.[279] While fair housing lawyers have long sought damages for specific harms due to the higher cost of housing, lost income, and emotional distress, some commentators have made the case for increased use of damages that take account of the disparities in neighborhood opportunities.[280] In particular, seeking damages for "lost housing opportunity" accounts for the reality that "where one lives has a substantial impact on educational opportunities, work opportunities, the ability to own a home, the probability of becoming a victim of or witness to violent crime, and cumulatively the possibility of escaping poverty."[281] Existing discussions have centered on using this type of compensation in individual cases involving private defendants.[282] But the same compensation could be applied to class or group claims involving local government defendants.

Indeed, fair housing lawyers in recent years have increasingly sought compensatory damages in cases against local governments in addition to

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[277] *See* Mary Pattillo-McCoy, *It's the Neighborhoods, Silly: Black-White Achievement Gap*, Chi. Trib., Oct. 31, 1999, at 19.

[278] *See generally* Patrick Sharkey, Stuck in Place: Urban Neighborhoods and the End of Progress Toward Racial Equality (2013) (examining cumulative disadvantages of generations of urban poverty, as well as the lack of significant progress in these neighborhoods since the 1970s, and pessimistically pronouncing the end of "progress toward racial equality").

[279] *See* Christopher C. Ligatti, *Max Weber Meets the Fair Housing Act: "Life Chances" and the Need for Expanded Lost Housing Opportunity Damages*, 6 Bel. L. Rev. 78, 102–03 (2018); *but cf.* Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases,* 16 Harv. C.R.-C.L. L. Rev. 83 (1981) (making the case for presumed damages in fair housing anti-discrimination cases).

[280] *See* Kelley, *supra* note 7, at 859, 899–900 (examining the role of "lost housing opportunity damages" in FHA litigation involving private landlord).

[281] Ligatti, *supra* note 279, at 80. While the idea of "lost housing opportunity damages" appears to have originated with HUD administrative adjudications in the 1980s, *see id.* at 103–05 (chronicling HUD administrative adjudications awarding or discussing damages for "loss of housing opportunity"), the most extensive example of the award of such damages was in *United States v. Hylton*, in which the district court awarded damages "[b]ased on the extensive testimony of Professor Lance Freeman" that the denial of access to a neighborhood with lower poverty and crime rates, and better resourced schools denied the plaintiff and her family access to opportunity. 944 F. Supp. 2d 176, 197 (D. Conn. 2013).

[282] *See, e.g.*, Kelley, *supra* note 7, at 900.

injunctive relief.[283] Civil rights lawyers have also sought remedies for systemic government discrimination in other civil rights contexts, such as the case by Black farmers against the United States Department of Agriculture.[284] Of course, money cannot compensate for all the loss and trauma caused by segregation, including poor physical and mental health, the trauma of violence,[285] the health and other social effects of pollution and other environmental harms,[286] and the "root shock" from having one's communities destroyed by urban renewal.[287] Still, the difficulties inherent in compensating these harms should not mean that we compensate for none. Money allows for investments in neighborhoods, families, and personal development.[288] Money can be immediately transformative by helping individuals

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[283] *See* Judgment, Kennedy v. City of Zanesville, No. 2:03-cv-1047 (S.D. Ohio July 17, 2008) (No. 437) (jury verdict of $10.8 million awarded to sixty-seven African American plaintiffs against city, county, and Water Authority for failing to provide predominantly African American community water service for over fifty years); Complaint, Drayton v. McIntosh Cnty., No. 2:16-cv-00053 (S.D. Ga. Dec. 9, 2015) (alleging millions of dollars in damages for failure to provide municipal services to African American Sapelo Island community). The *Drayton* case was settled against state defendants, who in 2020 made an initial payment of $750,000. *News & Updates:* Relman Colfax Sapelo Island Descendants Settle Claims against Georgia for Broad Injunctive and Monetary Relief, Relman Colfax PLLC, https://www.relmanlaw.com/news-323 [https://perma.cc/SJA3-CS2B]; *see also* Gilead Cmty. Servs. v. Town of Cromwell, 604 F. Supp. 3d 1 (D. Conn. 2022) (jury award of $5 million in punitive damages and $181,000 in compensatory damages for violations of FHA and Americans with Disabilities of Act where town officials forced the closure of a group home for people with disabilities).

[284] *See generally In Re Black Farmers Discrimination Litigation Settlement*, https://www.blackfarmercase.com [https://perma.cc/7HSX-DBVL]; (providing background information on the litigation and settlement details for the class). *See also* 2008 Farm Bill, § 14012(c)(2) ("The total amount of payments and debt relief pursuant to actions commenced under [this Bill] shall not exceed $100,000,000."). For an account of the Black Farmers Litigation see generally Joy Milligan, *Animus and Its Distortion of the Past*, 74 Ala. L. Rev. 725 (2023); Joy Milligan, *Protecting Disfavored Minorities; Towards Institutional Realism*, 63 UCLA L. Rev. 894 (2016).

[285] *See generally* Susan J. Popkin et al., The Hidden War: Crime and the Tragedy of Public Housing (2000).

[286] Diane Alexander & Janet Currie, *Is It Who You Are or Where You Live? Residential Segregation and Racial Gaps in Childhood Asthma*, 55 J. Health Econ. 186 (2017) (finding higher rates of asthma among low-birth weight children who live in "Black" zip codes, which points to the "importance of residential segregation in neighborhoods in explaining persistent racial disparities.").

[287] *See generally* Mindy Fullilove, Root Shock: How Tearing Up City Neighborhoods Hurts America and What We Can Do About It 11–17 (2016) (detailing the "assault" of urban renewal and freeway projects that devastated poor Black neighborhoods and the traumatic stress and "root shock" that occurs when neighborhoods are demolished).

[288] *Cf.* Darrick Hamilton & William A. Darity, *The Political Economy of Education, Financial Literacy & the Racial Wealth Gap*, 99 Fed. Res. Bank St. Louis Rev. 59, 59–60 (2017) (arguing for reparations payments to reduce the Black-white wealth gap and noting that "[w]ealthier families are better positioned to finance elite, independent school and college educations, access capital to start a business, finance expensive medical procedures, reside in neighborhoods with higher amenities, exert political influence through campaign financing [and that] wealth gives individual and families choice; it provides economic security to take risks and shield against financial loss.").

attend school, get childcare, pay rent, save for a down payment, or buy into a limited equity cooperative or community land trust.[289]

Money should flow to individuals as well as to community groups that can invest in neighborhoods, rehabilitate housing, or purchase community land. An example of payment to individuals can be found in the claims brought by Black plaintiffs against the City of Zanesville, Ohio for failing to provide water services to Black residents. In addition to receiving injunctive relief requiring the provision of those services, a jury awarded the sixty-seven plaintiffs in the case eleven million dollars in monetary damages.[290] Similarly, in a case brought against a county in Georgia and the State of Georgia for failing to provide municipal services to the Gullah Geechee community of Sapelo Island, Georgia — including water, emergency medical services, fire protection, road maintenance, trash, and transit[291] — the settlement of the case included not just injunctive relief, but two million dollars in damages to the more than fifty plaintiffs in the case.[292] One of the organizational plaintiffs in the Pigford Black Farmers suit against the federal government for discriminatorily denying loans to Black farmers over the course of the twentieth-century used the twelve million dollars in damages they received in the settlement to purchase a 1,600 acre former slave plantation that they converted into a community land trust.[293]

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[289] *See generally* Thomas M. Hanna, *Revisiting Community Control of Land and Housing in the Wake of COVID*-19, Democracy Collaborative (2021); *Community Land Trusts*, Loc. Hous. Sols., https://localhousingsolutions.org/housing-policy-library/community-land-trusts/ [https://perma.cc/P45L-2JEA] (housing researchers and advocates have recognized that "asset-building strategies for individuals, as well as investments in black communities" are part of the strategy for repairing the harms of racial segregation).

[290] Dirk Johnson, *For a Recently Plumbed Neighborhood, Validation in a* Verdict, N.Y. Times (Aug. 11. 2008) (noting that "the individual plaintiffs will be eligible for payments of $15,000 to $300,000").

[291] *Case Profiles: Drayton, et al. v. McIntosh County, Georgia*, Relman Colfax PLLC, https://www.relmanlaw.com/cases-sapelo [https://perma.cc/SJA3-CS2B].

[292] [299] *See id.*; Settlement Agreement, Drayton v. McIntosh Cnty., No. 2:16-CV-0053 (N.D. Ga. Aug. 2, 2022).

[293] *Celebrating New Communities' 50th Anniversary*, Equity Tr., http://equitytrust.org/new-communities-50th-anniversary/ [https://perma.cc/J28C-DE6C] (describing how New Communities used the damage award to purchase a "former plantation near Albany [Georgia] once owned by the largest slaveholder and richest man in Georgia.").

2. Statutory Relief and Immunity

Compensatory damages are available as a remedy for violations of the FHA,[294] Title VI,[295] the Equal Credit and Opportunity Act ("ECOA"),[296] Section 1981,[297] Section 1982,[298] and many state fair housing laws.[299] Local governments — the most frequent defendants — are amenable to suit under all these statutes, except Title VI.[300] Sovereign immunity can limit remedies against state and federal governments in some statutes. For instance, Congress has explicitly waived state immunity to damages suits under Title VI[301] and federal agencies are not considered recipients of "federal financial assistance" under Title VI.[302] Compensatory damages are available

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[294] 42 U.S.C. § 3613 (allowing "actual and punitive damages" to successful plaintiffs).

[295] *See* Franklin v. Gwinnett Cnty. Pub. Schs, 503 U.S. 60, 65, 70 (1992) (finding that Title IX, which is modeled on Title VI, permits suits for "compensatory damages"); Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 602 (1983); Alexander v. Sandoval, 532 U.S. 275, 282–83 (2001) (finding *Guardians* to allow suits for compensatory damages under Title VI for claims of intentional discrimination).

[296] *See* 15 U.S.C. § 1691 ("(a) Activities constituting discrimination; It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract").

[297] *See* 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts…as is enjoyed by white citizens").

[298] *See* 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1968) (holding that compensatory damages are available under § 1982); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 553 (9th Cir. 1980) (holding that § 1982 authorizes punitive damages as well). Plaintiffs in public housing desegregation cases have included § 1981 and § 1982 claims in addition to FHA and constitutional challenges, though they have not sought compensatory damages. *See, e.g.*, Jaimes v. Toledo Metro. Hous. Auth., 758 F.2d 1086, 1107–08 (6th Cir. 1985); Young v. Pierce, 544 F. Supp. 1010, 1019 (E.D. Tex. 1983); Young v. Pierce, 628 F. Supp. 1037, 1057 (E.D. Tex. 1985).

[299] *See* Robert G. Schwemm, Housing Discrimination Law & Litigation § 12b:6 (2023) (collecting cases).

[300] *See, e.g.*, N. Ins. Co. of N.Y. v. Chatham Cnty., 547 U.S. 189, 193 (2002) ("[O]nly States and arms of the State possess immunity from suits authorized by federal law. Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties."); Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty Affs., 860 F. Supp. 2d 312, 331–32 (N.D. Tex. 2012), *remanded on other grounds*, 747 F.3d 275 (5th Cir.), *aff'd*, 576 U.S. 519 (2015) (denying Eleventh Amendment immunity to government housing agency that was "not an arm of the state"). The general principle might not always prevent successful immunity claims in practice. In the constitutional context, Professor Fred Smith has noted that federal courts often draw on sovereignty and federalism principles to "provide broad protection to local governments and their agents." Fred Smith, *Local Sovereign Immunity*, 116. Col. L. Rev. 409, 411 (2016). As for Title VI, courts have held that the language of the statute defining covered "program or activity" excludes municipalities. *See, e.g.*, Knowlton v. City of Wauwatosa, No. 20-CV-1660, 2023 WL 2480353, at *8 (E.D. Wis. Mar. 13, 2023) (collecting cases).

[301] *See* 42 U.S.C. § 2000d-7(a) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of …. Title VI of the Civil Rights Act of 1964").

[302] *See, e.g.*, Soberal-Perez v. Heckler, 717 F.2d 36, 38 (2d Cir. 1983) ("[T]he conclusion we

against local governments under the FHA,[303] but as the statute does not contain an explicit waiver of immunity, some courts have held that damages are not available in successful claims brought against federal or state governments.[304] ECOA, which is an important tool in cases involving discriminatory lending, makes compensatory damages available to plaintiffs and waives the sovereign immunity of federal and state governments from suit, making damages against these governments as well as local governments possible.[305]

Even if local governments are the most likely defendants (due to the immunity of state and federal governments), the federal government can be instrumental in ensuring compensation given its role in housing segregation. If one were to seek compensation with regard to public housing in earnest, there is a strong argument that the federal government should pay the debt. The federal government created public housing, funded highways and urban development, and created the tax and loan subsidization structure that created a dual housing market.[306] It also created the particular legal infrastructure that allowed deference to state and local actors when it came to public housing matters. What is more, the federal government is also the unit of government most able to pay the debt as it has greater capacity to raise resources.[307] In housing litigation that does not involve the cumulative impact of decades of segregation and discrimination, the monetary payouts are smaller and states and localities should be able to pay.[308]

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draw from the case law interpreting Title VI is that the statute was meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary."). *See also* Gary v. F.T.C., 526 F. App'x 146, 149 (3d Cir. 2013) (finding that Title VI does not apply to federal agencies such as the FTC).

[303] Compensatory damages are available against municipalities and counties, and some courts have held that punitive damages are available as well. *See* Gilead Cmty. Servs. Inc. v. Town of Cromwell, 432 F.Supp.3d 46, 89 (2019).

[304] *See, e.g.*, City of Austin v. Paxton, 943 F.3d 993, 1004 (5th Cir. 2019) (holding that the Eleventh Amendment precludes suit under the FHA against state agency); McCardell v. HUD, 794 F.3d 510, 521–22 (5th Cir. 2015) (same).

[305] *See* 15 US.C. § 1691e(a)–(b) (2021); Authority of USDA to Award Monetary Relief for Discrimination, 18 Op. O.L.C. 52, 70 (1994); *see also* Williams v. Glickman, 936 F. Supp. 1 (D.D.C. 1996) (awarding compensatory damages in ECOA cases brought against the United States Department of Agriculture).

[306] *See supra* notes 146–72 and accompanying text.

[307] Arguing for reparations to the descendants of slavery, Darity and Mullen make the argument that the Federal Government must pay the debt as it is "both the culpable and capable party." William A. Darity Jr. & A. Kirsten Mullen, *Where Does Black Reparations in America Stand?*, *in* The Black Reparations Project: A Handbook for Racial Justice 19 (William A. Darity Jr., A. Kirsten Mullen, & Lucas Hubbard eds., 2023).

[308] State and local governments are generally insured against civil rights litigation. *Cf.* John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv. L. Rev. 1539 (2017) (examining the role of private insurance liability in regulating policing practices); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144, 1149 (2016) ("The vast majority of cities and counties across the country are small and rely on liability insurance.").

B. Redress as Normative Framework

This Essay advances a conceptualization of remedies for segregation as involving both forward-looking and compensatory relief that has implications beyond the domain of housing litigation. Understanding "redress" as having these two parts might help break through policy debates about whether to pursue racial integration or place-based investments to address segregation.[309]

There is a persistent critique of integration in both the school and housing contexts as understanding Black progress only in terms of assimilation to white spaces.[310] As this argument goes, integration offers a limited vision of Black freedom, in part because it depends on white people's acceptance of Black people, and gives up on building resources in the Black community. While there are attempts to reclaim the language of integration as potentially "radical,"[311] Professor Mary Pattillo has argued that integration rhetoric and politics often rests on the "unstated 'problem' of Blackness."[312] "Integration," Pattillo argues, "dwells on and is motivated by the relatively problematic nature of Black people and Black spaces and posits proximity to whiteness as the solution."[313]

In the housing policy context, the debate over whether to pursue integration or place-based remedies has both practical and normative components. The practical dimension is focused on mobility remedies that seek to dismantle or "deconcentrate" low-income Black communities by moving Black residents into low-poverty suburbs and demolishing aspects of public housing, such as through the federal Hope VI housing program (which funded demolition and renovation to create mixed-income housing).[314] Political scientist Edward Goetz, for instance, describes these strategies as a form of racial harm akin to urban renewal, as public housing is most likely to be targeted for destruction in cities in which that housing is predominantly Black-occupied, and the housing that is created is insufficient to replace the housing that was destroyed.[315] According to this account, the problem is

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[309] *See, e.g.*, Crowley & Pelletiere, *supra* note 254, at 8 ("The debate over the advantages and disadvantages of dispersing poor households and specifically over whether the government should take an active role to promote or force such moves, the so-called "preservation vs. mobility" debate . . . has a long history in the United States.").

[310] *See* Mary Pattillo, *The Problem of Integration*, *in* The Dream Revisited: Contemporary Debates About Housing, Segregation, & Opportunity 30 (Ingrid Gould Ellen & Justin Peter Steil eds., 2019).

[311] *See, e.g.*, Adams, *supra* note 139.

[312] *See* Pattillo, *The Problem of Integration*, *supra* note 310, at 30 (borrowing language from DuBois's "The Souls of Black Folk," which asks, "How does it feel to be a problem? I answer seldom a word.").

[313] *Id.* at 31.

[314] *See supra* note 257.

[315] *See* Edward G. Goetz, New Deal Ruins: Race, Economic Justice, and Public Housing Policy 178–79 (2013) ("[I]n cities where public housing is most associated with black tenants, it is most likely to be demolished") (emphasis added).

not just in the material harm of reducing the supply of housing; it is in the *destruction* of communities.[316] It is also reflected in decreased investments in government-provided social housing in favor of market-driven housing.[317] In addition, these types of remedies inevitably leave many behind, and by some accounts leave them worse off than before.[318]

Another objection is to the ideological underpinnings of deconcentration strategies. Professor Audrey McFarlane, though broadly sympathetic to integration strategies, argues that promoting economic mixing as a solution fails to properly interrogate the hierarchical assumptions that create "the problem" of racial segregation in the first place.[319] Professor McFarlane has explored market-based remedies for economic and racial segregation that require the creation of mixed-income housing or housing with some lower-income units as a type of "discriminatory management" in which housing is built on terms acceptable to white people.[320] McFarlane argues that the solution is limited because it "fails to honestly consider society's acceptance and incorporation of segregation." Further, it exhibits a tension in accepting "integrationist aspirations" while failing to destabilize the "segregated realities" of markets.[321]

On the other hand, those who support an increased focus on integration argue that investing in segregated places will not help improve the social and economic conditions of high-poverty segregated neighborhoods.[322] By this account, directing resources to try to improve racially segregated low-income areas is already the predominant policy approach, and this approach has largely been unsuccessful.[323]

At bottom, neither policy provides a completely effective remedy because neither, standing alone, confronts the causes of "the problem" — which is not the condition of Black people but the "political, economic,

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[316] *See id.*

[317] *Id.* at 178.

[318] *See, e.g.*, Crowley & Pelletiere, *supra* note 254, at 13 (explaining that those who oppose poverty deconcentration remedies that destroy public housing argue that implementation of programs "such as HOPE VI, like urban renewal before it, destroys supportive communities and is as likely to replace the isolation that poor and minority households experienced as an entire community, with the isolation of individual households, little integrated into the majority culture.").

[319] Pattillo, *supra* note 310, at 30; s*ee* Audrey McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. Rev. 1140, 1144 (2019).

[320] McFarlane, *supra* note 319, at 1147.

[321] *Id.* at 1148. Other scholars have noted the long origins of strategies to address poverty that focus on removing poor people from urban areas and encouraging their assimilation to American values in suburban or rural areas. *See, e.g.*, L.J. Vale, From the Puritans to the Projects: Public Housing Neighbors (2000) (describing social reform measures in the mid-1800s that sought to move poor people from the perceived vice and unhealthy conditions of urban neighborhoods to connect them with American values of "upward mobility").

[322] *See, e.g.*, Crowley & Pelletiere, *supra* note 254, at 11–12 (discussing education, employment, health, and social capital effects of the mobility approach).

[323] *See id.* at 17 (offering view of mobility advocate that "HUD is continuing to concentrate those resources in a way that perpetuates and increases segregation.").

and social institutions" that produced this condition.[324] The "place-based" approach risks the same failure to attend to the structural dimensions of segregation as does over-emphasis on integration. Place-based intervention depends on taking as fixed boundaries that are shaped by discriminatory public and private actions. If the limitation of the integration remedy is its potential stigmatization of Black spaces, the place-based response threatens to shift attention away from the policies of exclusion and disparate subsidization that built these spaces to be "white" and "high-opportunity" in the first place.

Consistent with this reality, many housing policy experts and contemporary observers now understand that the solutions require remedies that seek to both improve resources and conditions in high-poverty and racially segregated communities and to provide affordable housing in higher opportunity areas.[325] "Redress" can serve as a helpful conceptual framework for this dual policy approach. The term reflects an understanding of both place-based and integration strategies as necessary to challenging the underlying individual, political, economic, and social institutions that produce segregation. Redressing segregation requires a spectrum of remedies including mobility, integration stabilization, regionalism, and increasing resources in traditionally segregated communities. It also allows investment in the communities that segregation has constructed without naturalizing or locking in the racialized boundaries between places.

Pursuing a redress approach — which necessitates both integration and place-based investment — requires political work. Part of the reason that mobility versus place-based interventions are subject to debate is that limited funding makes the choices between the two approaches appear as a tradeoff.[326] The "scarcity"[327] approach to housing is a political project. But a redress framework might help guide that political work. It seeks to redress the harms of "concentrated poverty and social isolation" without pathologizing those who live in the affected spaces. The new framework instead understands that the "problem" is the response to racially and economically

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[324] Pattillo, *supra* note 310, at 32 (arguing that the "problem" lies not with Black people but with the features of American society that produced these conditions, a problem that "co-location" cannot itself solve").

[325] *See, e.g.*, Sharkey, Stuck in Place, *supra* note 278, at 12, 171–72 (advocating durable investments in low-income neighborhoods, connecting urban areas to metropolitan regions, programs that promote metropolitan prosperity, and mobility remedies); *id.* at 180 ("urban policy must shift away from the abandonment and dispersal approach toward an alternative approach that emphasizes investment and integration.").

[326] *See* Crowley & Pelletiere, *supra* note 254, at 14 ("Implicitly or explicitly there is a fiscal trade-off that debate participants are considering.").

[327] *Cf.* Mathew Desmond, Poverty By America (2023) (discussing how a "scarcity" approach dominates American political economy and shapes our failure to address poverty and inequality).

segregated areas: blame, disinvestment in the Black community, and investment in carceral solutions.[328]

C. The Possibility of Compensation/Connection to Reparations Debate

There is likely no way to reopen past public housing desegregation cases, nor does this Essay imagine that plaintiffs will file additional cases with an encompassing scope reminiscent of *Gautreaux* or *Thompson*. The practical goal of this exploration is to encourage greater pursuit of monetary remedies in housing discrimination cases going forward.

This Essay's examination of monetary remedies in housing also has implications for the contemporary political and cultural discourse around reparations in housing[329] and beyond.[330] Reparations for slavery and racial subordination include proposals for an array of monetary and non-monetary remedies.[331] The reparations movement does not typically involve courts — though there are ongoing efforts to get compensation through courts for the descendants of victims of particular racist atrocities such as the Tulsa massacre[332] and for Black farmers from the United States Department of Agriculture ("USDA").[333] But beyond these discrete judicial efforts is a growing call that governments at every level (including states and municipalities),[334] non-governmental entities, and private institutions

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[328] *See* Cashin, *supra* note 132, at 164 ("Poor Blacks are typecast as dangerous and unworthy of such inclusion"); Patrick Sharkey, Uneasy Peace: The Great Crime Decline, the Renewal of City Life, and the Next War on Violence 181–82 (2017) ("[T]he dominant approach to dealing with the challenges of urban poverty and violent crime has been to disinvest in low-income communities and to invest in the police and the criminal justice system —a strategy of abandonment and punishment.").

[329] *See* Ta-Nehisi Coates, *The Case For Reparations*, The Atl. (June 2014); Cashin, *supra* note 132, at 210–12 (arguing for abolition and repair in historically underfunded communities through universal basic income, targeted investments, and other initiatives); Lawrence Brown, The Black Butterfly; The Harmful Politics of Race and Space 231 (2021) (arguing for municipal reparations).

[330] *See generally* William A. Darity & A. Kirsten Mullen, From Here to Equality: Reparations for Black Americans in the 21st Century (2020); Katherine Franke, Repair: Redeeming the Promise of Abolition (2019).

[331] *See, e.g.*, *id.* at 2 (describing reparations as "a program of acknowledgment, redress, and closure for a grievous injustice" of which financial reparations is a part); H.R.40, 116th Cong. (2019); *See* Executive Summary: "The California Reparations Report", *supra* note 8, at 4 (In its study and proposal for reparations, the California Reparations Task Force drew on the international framework for reparations which involves: "restitution, compensation, rehabilitation, satisfaction, and non-repetition.").

[332] *See* Ords. on Defs.' Mots. to Dismiss, Randle v. City of Tulsa, No. CV-2020-1179 (D. Okla. Aug. 3, 2022) (No. BL-198) (dismissing public nuisance claim brought by three survivors of Tulsa Riots).

[333] *See generally* Darity & Mullen, *supra* note 330, at 265 (arguing that the issue of reparations should be removed from courts, and that the "invoice should go directly to the U.S. Congress").

[334] *See* Brooke Simone, *Municipal Reparations: Considerations and Constitutionality*, 120 Mich. L. Rev. 345 (2021) (examining the constitutionality of emerging municipal reparations plans); Rachel Treisman, *In Likely First, Chicago Suburb of Evanston Approves Reparations for*

provide an account of their racially discriminatory and subordinating actions and make reparative efforts. Currently, dozens of cities and states are exploring whether to grant some sort of reparations to African Americans affected by slavery and by racist twentieth-century policies.[335] Several private institutions have studied how their institutions benefited from slavery or excluded African Americans and have offered compensation to the direct descendants and investments in Black communities.[336] And there are federal proposals, though they have stalled in Congress.[337] There is no settled approach to these reparative plans and efforts, and this Essay leaves to others a full discussion of the goals of monetary and non-monetary reparations, how best to design serious efforts,[338] and how to ensure their legality.[339] What this Essay hopes

Black Residents, NPR (March 23, 2021, 2:36 PM), https://www.npr.org/2021/03/23/980277688/in-likely-first-chicago-suburb-of-evanston-approves-reparations-for-black-reside [https://perma.cc/V9TU-7JC6]; Madeleine List, *Providence Mayor Signs Order to Pursue Truth, Reparations for Black, Indigenous People*, The Prov. J. (July 16, 2020, 12:01 AM), https://www.providencejournal.com/story/news/2020/07/16/providence-mayor-signs-order-to-pursue-truth-reparations-for-black-indigenous-people/42496067/ [https://perma.cc/3DZ2-GM9W]; Thai Jones, *Slavery Reparations Seem Impossible. In Many Places, They're Already Happening*, Wash. Post (Jan. 31, 2020), https://www.washingtonpost.com/outlook/2020/01/31/slavery-reparations-seem-impossible-many-places-theyre-already-happening/ [https://perma.cc/7D-NY-QGYC]. Leading scholars of reparations Darity & Mullen argue that municipal and local policies are too fledgling to be termed "reparations": "Local reparations are an impossibility, a virtual oxymoron…These varied local and state acts of atonement will not eliminate the racial wealth gap and should not be labeled "reparations."). *See* William A. Darity Jr. & A. Kirsten Mullen, *On the Black Reparations Highway: Avoiding the Detours*, *in* The Black Reparations Project: A Handbook for Racial Justice 202 (William A. Darity Jr., A. Kirsten Mullen, & Lucas Hubbard eds., 2023).

[335] *See generally* California Task Force to Study and Develop Reparation Proposals for African Americans, Final Report, Cal. Att'y Gen. (2023). The Evanston program provides direct payments to victims and direct descendants of the city's discrimination and redlining practices. *See Evanston Local Reparations*, City of Evanston, https://www.cityofevanston.org/government/city-council/reparations [https://perma.cc/UD5N-ENGD]; Simone, *supra* note 339, at 361–62 (describing the origins and structure of the Evanston Reparations program).

[336] *See, e.g.*, *Georgetown Reflects on Slavery, Memory, and Reconciliation*, Geo. Univ., https://www.georgetown.edu/slavery/ [https://perma.cc/B4NU-87RK]; *Harvard & The Legacy of Slavery*, Harv. Coll. (2022), https://legacyofslavery.harvard.edu/ [https://perma.cc/5YVW-C6UW].

[337] *See* H.R.40; Andre M. Perry & David Harshbarger, America's Formerly Redlined Neighborhoods Have Changed, and So Must Solutions to Rectify Them, Brookings Inst. (Oct. 14, 2019), https://www.brookings.edu/articles/americas-formerly-redlines-areas-changed-so-must-solutions/ [https://perma.cc/N77E-45JH] (describing federal legislative proposals for targeted investments in formerly redlined areas).

[338] *Id.* at 259–63 (describing various efforts to calculate reparations to Black Americans and settling on the wealth gap as the "most robust indicator of the cumulative economic effects of white supremacy in the United States.").

[339] *See* Simone, *supra* note 339, at 345 (discussing how to structure reparations programs to ensure their legality); Alexis Karteron, *Reparations for Police Violence*, 45 N.Y.U. Rev. L. & Soc. Change 405, 420–25 (2021) (discussing legal pathways to reparations for police violence and hurdles to reparative justice); Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations*, 118 Penn. St. L. Rev. 339, 346–51, 355–56, 365–66 (2013) (discussing the legal barriers to reparations, potential strategies to avert those barriers, and possible modes of legal relief); Guha Krishnamurthi & Peter Salib, *Reparations, Constitutionality, and the Model of Civil Damages*, 57 Tulsa L. Rev. 303, 307–14 (2021) (discussing frameworks

to offer on the question of reparations is more modest: a set of resources for dealing with common objections to the role of monetary damages in repair. Exploring the notion of compensation in housing segregation cases may have something to offer to policymakers and communities grappling with reparations more broadly. In particular, reckoning with the missing monetary damages in the housing context might address two areas of discomfort with reparations efforts.

First, the argument often lodged against reparations for Jim Crow and slavery is that the debt to Black people has already been paid.[340] Within the context of housing, this Essay shows that the injunctive remedies resulting from public housing segregation litigation did not pay off that debt. The courts found liability, but the plaintiffs did not receive a full remedy.[341]

The second common objection to the contemporary reparations movement is a skepticism about the capacity of money to effectively pay the debt of past racism. On this view, money is too transactional, too finite; it assumes that the debt can be calculated and that once it has been paid, no further work to address racial disparities and inequality is necessary.[342] As Aimé Césaire, the late poet and politician from Martinique, put the matter: "Eh bien, voilà le billet ou le chèque, et on n'en parle plus!" [343] My translation: "Oh well, here is the bill or the check, and we won't speak about this anymore." This critique considers monetary compensation as giving up on the ongoing obligation necessary for a mutually constitutive vision of equal citizenship. In the United States context, Professor Jesse McCarthy advances pragmatic objections to monetary reparations and also echoes Césaire when he writes that an emphasis on money misunderstands the nature of the debt owed to Black descendants of Jim Crow and Slavery.[344] He recognizes it as a moral debt — the "broken promise of a social contract," that cannot be repaid

and challenges to legal reparations for the Tulsa Race Massacre); Susan S. Kuo & Benjamin Means, *A Corporate Law Rationale for Reparations*, 62 B.C. L. Rev. 799, 837–49 (2021) (proposing using DOJ's Charging Guidelines as a legal framework for reparations).

[340] *Cf.* Thomas Craemer & Trevor Smith, *Wealth Implications of Slavery and Racial Discrimination for African American Descendants of the Enslaved*, 47 Rev. Black Pol. Econ. 1, 30 (2020) (noting arguments that the "blood and treasure" of fighting the Civil War is part of the reparations that has already been paid).

[341] *See supra* Part II.E.

[342] Craemer & Smith, *supra* note 340, at 25 (quoting President Obama in 2008: "I fear that reparations would be an excuse for some to say 'we've paid our debt' and to avoid the much harder work of enforcing our anti-discrimination laws in employment and housing; the much harder work of making sure that our schools are not separate but unequal; the much harder work of lifting thirty-seven million Americans of all races out of poverty.")

[343] *See* Alain Louyot & Pierre Ganz, *Interview with Aime Cesaire*, L'Express (Sept. 13, 2001), https://www.lexpress.fr/culture/livre/aime-cesaire-je-ne-suis-pas-pour-la-repentance-ou-les-reparations_817538.html [https://perma.cc/66CV-FNV9].

[344] McCarthy, *supra* note 1, at 226 ("[N]o amount of monetary compensation can rectify a debt that consists in the broken promise of a social contract; this contract is a moral good, and therefore its abrogation a moral debt.").

simply by providing money.[345] McCarthy invokes Poet and Musician Gil Scott-Heron's song "Who Will Pay Reparations on my Soul?" which according to McCarthy questions the "pithy yoking of materialism and slave capitalism to logic that transcends the material."[346] Similarly, McCarthy asks: "What can reparations mean when the damage cannot be accounted for in the only system of accounting that a society recognizes?"[347]

This Essay's study of the litigation context may provide a helpful framework to address these critiques of monetary reparations. As advocates of reparations have noted, dismissing monetary compensation as simply a "check" trivializes the benefits of money in changing life outcomes.[348] And yet it is also true that the full harm of racism cannot be compensable by money. In addition, repair through money alone may fail to recognize that repair also includes an ongoing duty not just to acknowledge the past, but to shape the future. Those subject to discrimination and segregation in this country must share in the wealth that is America — prosperity that through their labor and sacrifice they helped to create. Redress, similar to relief in the litigation context, should therefore contain both forward- and backward-looking components. Making humans and communities whole for past harm requires *both* monetary compensation and forward-looking action, including full participation in governance structures that deliver housing and other social goods. Redress requires monetary payment and housing opportunities, but it also requires participatory governance and inclusive design of social and housing policy going forward.

Conclusion

This Essay honors the work of the public housing desegregation lawyers and activists who brought these cases while, in the spirit of Professor Derrick Bell, bringing attention to the ways in which the remedies in this litigation fell short and left federal, state, and local governments and American citizens with a collective responsibility to address the continued harm.[349]

Examining the missing relief in these cases should not distract from the myriad other problems in housing. These include the need to increase the supply of affordable housing; alleviate poverty; address displacement and homelessness; invest in multi-ethnic, high-poverty neighborhoods in

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[345] *Id.* at 226.

[346] *Id.* at 233.

[347] *Id.*

[348] *See, e.g.*, Darity & Mullen, *supra* note 334, at 206 ("The oft-made assertion that reparations should be 'more than a check' trivializes the life-changing effects of each black household having an additional $840,900 in resources measured in 2019 dollars (or each black individual claimant having an additional $357,000 in resources).").

[349] *See, e.g.*, *Redlining and Neighborhood Health*, Nat'l Cmty. Reinvestment Coal. (2022), https://ncrc.org/holc-health/ [https://perma.cc/F5VG-976X] (finding higher morbidity and mortality in previously redlined neighborhoods).

cities and inner-ring suburbs; promote economic integration;[350] and provide shared public goods in ways that decrease incentives for opportunity hoarding on the basis of race and income.[351] Even as this Essay brings attention to the specific history and continuing challenges of high-poverty African American neighborhoods, a complete remedy requires court action *in addition to* policy and administrative changes. Potential changes include regulatory and programmatic reform of HUD's programs,[352] inclusionary zoning,[353] and funding and land reform policies targeted toward previously redlined and high-poverty communities.[354] While much work remains, drawing attention to public housing desegregation cases allows us to understand the limits and potential of litigation in housing, and how compensation for past harm can advance inclusion and equal citizenship going forward.

Finally, considering the un-remedied harm of housing segregation is important at a moment in which the Supreme Court's jurisprudence has limited the grounds for pursuing race-conscious remedies. In *SFFA v. Harvard*, the Court emphasized its past jurisprudence holding that remedying general "societal discrimination" cannot be a basis for race-conscious action.[355] And it reaffirmed that racial classifications are permissible when "remediating specific, identified instances of past discrimination that violate the

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[350] *See generally* McFarlane, *supra* note 319, at 1159–61 (discussing the history of mixed-income neighborhoods as a "utopian ideal" and the challenges of implementing that ideal).

[351] *See* Richard Reeves, Dream Hoarders: How the American Upper Middle Class is Leaving Everyone Else in the Dust, Why That is a Problem and What to Do About It (2017) (arguing that the top 20 percent of Americans engage in public policy and private practices that allow them to hoard housing, wealth, and access to superior K-12 schools and selective higher education).

[352] *See, e.g.*, Megan Haberle et. al, *Reviving and Improving HUD's Affirmatively Furthering Fair Housing Regulation: A Practice-Based Roadmap*, Poverty & Race Rsch. & Action Council (2020), https://www.prrac.org/improving-affh-roadmap/ [https://perma.cc/RJ8W-HT75]; Justin P. Steil and Nicolas K. Kelly, *Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, Hous. Pol'y Debate (2019); Michael Allen, *HUD's New AFFH Rule: The Importance of the Ground Game*, *in* The Dream Revisited: Contemporary Debates about Housing, Segregation, & Opportunity 220 (Ingrid Gould Ellen & Justin Steil eds., 2019); *see also* Johnson, *supra* note 125.

[353] *See, e.g.*, Rothstein, *supra* note 132, at 204–05 (assessing recommendations including bans on single-family zoning, state and local level inclusionary zoning initiatives, and federal tax incentives to communities that take their "fair share" of low- and moderate-income housing).

[354] *See* Heather McGee, The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together 273–76 (2021) (describing need to strengthen investment in public goods while also investing in targeted programs for Black communities and in previously redlined areas); Cashin, *supra* note 132, at 210–12 (describing a strategy of investments in high-poverty segregated communities); Mark Roseland & Christopher Boone, *How Community Land Trusts Can Help Heal Segregated Cities*, The Next City (Sep. 14, 2020) (describing the potential of community land trusts that function as a "form of permanently affordable housing based on shared equity" to build wealth and provide housing for low-income communities of color).

[355] *SSFA v. Harvard*, 143 S. Ct. at 2163, 2173 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) and quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (plurality opinion)). The majority contends that "societal discrimination" is too "ageless" in its reach into the past and burdens those who bear no responsibility for past discrimination. *SFFA,* 143 S. Ct. at 2163.

Constitution or a statute."[356] But this essay's closer investigation of housing segregation makes clear that the harm that segregation engendered has not been adequately fixed or compensated. Contending with this reality can provide a basis for reopening the notion of "societal discrimination" dismissed by the Court in *SFFA* and in past cases, or — more narrowly — to support race-conscious actions as necessary to remediating "specific, identified" instances of housing discrimination and segregation.[357]

[356] *Id.*

[357] *See* Olatunde C.A. Johnson, *The Remedial Rationale After* SFFA, ___ SETON HALL L. REV. ___ (forthcoming 2024) (suggesting strategies for deploying residential segregation to design and doctrinally defend remedies for racial harm).