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GAUTREAUX AND INSTITUTIONAL LITIGATION

ALEXANDER POLIKOFF*

In his book¹ and, more recently, in the *Duke Law Journal*,² Professor Donald L. Horowitz has written thoughtfully on the involvement of the courts in restructuring large institutions through litigation orders. The essential issue posed by so-called institutional reform litigation is the capacity of courts to deal responsibly with remedial requests that in effect require them to reorganize significant institutions of government. Can courts assess and weigh the budgetary consequences of their decisions? Can they obtain and absorb the relevant social science materials? Can they supervise, and often administer, the remedial steps they order to be taken?

Of course, such questions will never be definitely answered; trends or fashions in thinking about them will change from time to time. Moreover, the particulars of any litigation will always be an important factor in dictating the "right" answers in each individual case. Yet, the questions are good ones to be kept in mind, not only by scholars, but also by all who are interested in the functioning of American democracy. One way to do so is to look from time to time at particular cases through the lens of judicial capacity.

Gautreaux v. Chicago Housing Authority—a case that has lasted over two decades and has involved two of our major housing institutions, a large, central city public housing authority and the U.S. Department of Housing and Urban Development—would seem to be a suitable object upon which to focus the lens. This article will sketch the contours of the *Gautreaux* litigation³ as a backdrop for the examination of "Horowitz-type" questions to be addressed by others in this Symposium.

I. THE CASE AGAINST CHICAGO HOUSING AUTHORITY

During the hot summer of 1966, Dr. Martin Luther King, Jr.

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1. D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

2. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265.

3. *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) (hereinafter *Gautreaux II*).

marched for open housing in Chicago. Each day King was met by crowds of hecklers, sometimes with bricks and rocks. One day a mob of 4000 whites overturned marchers' cars into the Marquette Park Lagoon. On another, Dr. King was knocked to the ground by a rock thrown from a mob. As he stood up and regained his bearings, King was said to have remarked: "The people of Mississippi ought to come to Chicago to learn how to hate."

The threat that Chicago would be turned into a battlefield led to the so-called "Summit Meeting" held in Chicago's Episcopal Cathedral of St. James in August of that year.⁴ Participants included Mayor Richard J. Daley, Dr. King and leaders of Chicago's civic and business establishments and of the Chicago Freedom Movement. After heated, on-again, off-again discussions, an agreement was reached that ended the marches and created a new organization, the Leadership Council for Metropolitan Open Communities, to oversee implementation of the Summit Meeting promises. One of those promises was that the Chicago Housing Authority ("CHA") would no longer build public housing exclusively in black neighborhoods.⁵

The Summit Agreement's CHA plank derived from a long history. Before World War II, public housing had been rigidly segregated. In black neighborhoods, projects were for blacks; in white neighborhoods, for whites. After the war, the Housing Act of 1949 authorized a huge new public housing construction program. Because the black population of the central cities had grown enormously during the war years and had continued to increase in the 50s and early 60s, in the larger cities the new public housing would serve a heavily black clientele. In the mores of the times it was therefore put in black neighborhoods. Also in the mores of the times, many of the newer projects were high-rises; costs were to be kept low by putting more and more apartments into taller and taller buildings.

By the early 1960s this prescription for social disaster had been written in a number of Chicago neighborhoods. Thousands of high-rise public housing apartments were built in black communities, and tens of thousands of people, mostly blacks, moved in. The nine towers of Robert

4. For an interesting account of the events leading up to the Summit, as well as some glimpses of what went on behind the Summit's closed doors, see Joravsky, *A Moment of Truth*, CHI. MAG., Aug. 1986, at 97.

5. "The Chicago Housing Authority will take every action within its power to promote the objectives of fair housing. It recognizes that heavy concentrations of public housing should not again be built in the City of Chicago. . . . In the future, it will seek scattered sites for public housing" CHICAGO CONF. ON RELIGION AND RACE, REPORT OF THE SUBCOMMITTEE TO THE CONFERENCE ON FAIR HOUSING, THE SUMMIT AGREEMENT ¶ 3 (Aug. 26, 1966).

Taylor Homes, sixteen stories high, housing 20,000 people, were only the most noticeable.

Not surprisingly, there was considerable opposition to such a housing program. For example, civic leader John Baird, speaking for the Metropolitan Housing and Planning Council, argued that the CHA's actions represented a dangerous policy of extending the existing ghettos, and he called instead for small scattered-site housing developments throughout the city.⁶ CHA's response was to announce plans for the construction of 1300 additional high-rise units exclusively in black neighborhoods.⁷

Thus it was that in 1965 the Chicago Urban League and an umbrella group for black organizations, the West Side Federation, asked the American Civil Liberties Union if there were not some legal way to try to stop CHA. It appeared that there might be. Two lawsuits—called ever since after Dorothy Gautreaux, the first named plaintiff—were filed on behalf of all CHA tenants and applicants in the Federal District Court for the Northern District of Illinois in the very month that Mayor Daley and Dr. King were meeting in St. James Cathedral.

The first suit, filed against CHA, asserted a violation of the fourteenth amendment and set out CHA's historical site selection pattern. An "intent" claim alleged that CHA had deliberately chosen its sites to avoid placing black families in white neighborhoods. An "effect" count, otherwise identical, omitted the allegation of purposeful discrimination.⁸

The companion suit was filed against CHA's funding agency, the U.S. Department of Housing and Urban Development ("HUD"). It charged that HUD had violated the fifth amendment by approving and funding CHA's discriminatorily selected sites.⁹ The HUD complaint was otherwise essentially similar to the CHA complaint with similar "intent" and "effect" counts.

One basis for the charge against HUD lay in HUD's earlier rejection of a letter of complaint about CHA's practices from the West Side Federation.¹⁰ HUD's response to the Federation had argued that CHA's loca-

6. Author's recollection.

7. On June 28, 1966, CHA approved the planned construction of 1312 units of public housing on twelve sites. *Chi. Sun-Times*, June 29, 1966, at 6, col. 1.

8. Complaint at 11, 16, *Gautreaux I*, *supra* note 3 (filed Aug. 9, 1966).

9. Complaint, *Gautreaux II*, *supra* note 3 (filed Aug. 9, 1966).

10. On August 26, 1965, Reverend S. Jerome Hall, Chairman of the West Side Federation, sent a letter to HUD complaining of CHA's discriminatory site-selection practices dating back to the 1950s. It requested HUD to reject eight sites recently approved by the Authority for construction of public housing. Plaintiff's Brief in Opposition to the Motion of Defendant to Dismiss the Action, Affidavit of L. Krienberg, Exhibit A, *Gautreaux II*, *supra* note 3 (filed May 9, 1967). HUD re-

tional policy was forced upon it by the Chicago City Council.¹¹ Because state law gave the Council a veto power over CHA's real estate purchases, CHA could buy and build only where the City Council would approve.¹² It was well known, of course, that the overwhelmingly white council would not approve the placement of public housing in white neighborhoods.¹³ Under those circumstances, said HUD's letter, its hands were tied. HUD might lament the City Council's actions but its job was to provide housing, and it would continue to do so.

Both cases were assigned to Judge Richard B. Austin, a former prosecutor with a direct manner. When the theory of the suits was first explained to him, Judge Austin immediately asked, "Where do you want them to put 'em [CHA projects]? On Lake Shore Drive?"¹⁴

One of the tried and true ways of avoiding institutional reform litigation is to find a reason not to open the court house door. CHA promptly offered Judge Austin that option through a motion asserting that the plaintiffs lacked standing because none of the named plaintiffs had asked for and been refused housing in a project located in a white neighborhood.¹⁵ Therefore, said CHA, none of the plaintiffs could assert that the alleged discriminatory site selection policy had affected them personally.¹⁶

When the plaintiffs offered the facts in this regard,¹⁷ that CHA em-

sponded to that letter on October 14, 1965. *Id.*, Affidavit of L. Krienberg, Exhibit B, *Gautreaux II*, *supra* note 3 (filed May 9, 1967).

11. Plaintiff's Brief in Opposition to the Motion of Defendant to Dismiss the Action, Affidavit of L. Krienberg, Exhibit B at 6, *Gautreaux II*, *supra* note 3 (filed May 9, 1967).

12. *Id.*

13. In his opinion finding CHA liable, United States District Judge Austin describes how this worked: "CHA follows an unvarying policy . . . of informally clearing each [potential public housing] site with the Alderman in whose Ward the site is located and eliminat[es] each site opposed by an Alderman." *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 913 (N.D. Ill. 1969). *See also* G. SQUIRES, L. BENNETT, K. MCCOURT & P. NYDEN, CHICAGO: RACE, CLASS, AND THE RESPONSE TO URBAN DECLINE 102-05 (1987) (hereinafter URBAN DECLINE). In *Urban Decline*, the authors recount that Chicago politicians had managed to gain control of the CHA's site selection in 1948 after then CHA Chairperson, Elizabeth Woods, had caused some consternation with her integrationist policies. The authors concluded that "the intention of City Council members from the moment they wrested control of sites from the CHA was to do whatever was necessary to keep public housing out of white neighborhoods." *Id.* at 103.

14. A. POLIKOFF, HOUSING THE POOR: THE CASE FOR HEROISM 149 (1978).

15. Memorandum in Support of Motion of Chicago Housing Authority to Dismiss the Complaint or, in the Alternative, for Summary Judgment at 4-7, *Gautreaux I*, *supra* note 3 (filed Oct. 14, 1966). In support of this argument, CHA produced the named plaintiffs' individual housing application forms demonstrating that each of them expressed a preference for public housing in black neighborhoods rather than for the few projects operated by CHA in white neighborhoods.

16. Reply Memorandum in Support of Motion of Chicago Housing Authority to Dismiss the Complaint or, in the Alternative, for Summary Judgment at 11, *Gautreaux I*, *supra* note 3 (filed Jan. 24, 1967).

17. Brief of Plaintiffs in Opposition to Motion of Defendants to Dismiss the Complaint or, in the Alternative, for Summary Judgment, *Gautreaux I*, *supra* note 3 (filed Dec. 15, 1966).

ployees were instructed to tell black applicants about the long waiting time for the few CHA projects in white neighborhoods, and in this and other ways to "steer" them to the black projects to which CHA wanted them to go,¹⁸ CHA's standing argument was rejected.¹⁹ However, while recognizing plaintiffs' standing to sue, Judge Austin ruled that allegations of purposeful discrimination were required to sustain a cause of action under the fourteenth amendment. He therefore dismissed the "effect" counts of the complaint.²⁰

HUD also tried to close the courthouse door, contending, among other things, that the plaintiffs had no claim against the federal government because CHA, not HUD, had selected the sites about which the plaintiffs were complaining.²¹ After extensive briefing and many affidavits, Judge Austin apparently concluded that one such complicated case at a time was enough. In June 1967, on its own motion, the court stayed all proceedings against HUD until disposition of the CHA case.²²

Discovery proceeded through the remainder of 1967 and early 1968. When the plaintiffs' lawyers then announced they were ready for trial, CHA moved for summary judgment, contending that the discovery materials showed that CHA had had no discriminatory intent.²³ If anyone was discriminating, claimed CHA, it was the City Council of Chicago which—with final say under its state law veto power over CHA's acquisition of real estate—had effective control over the location of CHA

18. Numerous affidavits of former CHA employees as well as internal CHA documents submitted by plaintiffs demonstrated that CHA systematically "steered" black public housing applicants to projects in black neighborhoods. See *id.* at 19-25. See also *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 909 (N.D. Ill. 1969) (Judge Austin's decision finding CHA liable for discriminatory practices).

19. *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967). The court stated:

[The issue of] whether the site selection policy of the CHA . . . is being administered without regard to . . . race . . . transcends any particular individual's relationship to the system . . . [CHA Tenants], as . . . users of the system, have the right under the Fourteenth Amendment to have sites selected . . . without regard to the racial composition of either the surrounding neighborhood or of the projects themselves. Possessing this right and being of the opinion that it is being denied them, plaintiffs may maintain this action to determine whether their opinion is correct, and if it is, to secure an appropriate remedy to insure protection of their right.

Id. at 583. Rejecting CHA's motion for summary judgment, Judge Austin held that summary judgment was inappropriate at that time because the factual issues of CHA's motive and intent were important to resolution of the issues. *Id.* at 584.

20. *Id.*

21. Defendant's Motion to Dismiss, *Gautreaux II*, *supra* note 3 (filed Dec. 20, 1966); Memorandum and Affidavits in Support of Defendant's Motion to Dismiss, *Gautreaux II*, *supra* note 3 (filed Jan. 3, 1967).

22. Order, *Gautreaux II*, *supra* note 3 (filed June 9, 1967).

23. Motion for Summary Judgment and Affidavit of C.E. Humphrey in Support of Defendant's Motion for Summary Judgment, *Gautreaux I*, *supra* note 3 (filed Mar. 20, 1968); Initial Brief of Defendants in Support of Motion for Partial Summary Judgment in Their Favor, *Gautreaux I*, *supra* note 3 (filed Sept. 20, 1968).

projects.²⁴ The plaintiffs responded with their own summary judgment motion.²⁵

In February 1969, Judge Austin ruled that the essential facts truly were not in dispute and that CHA's own documents and testimony showed that the Authority had deliberately chosen public housing sites in a discriminatory fashion.²⁶ Accordingly, he held that the equal protection clause of the fourteenth amendment had been violated.²⁷

Judge Austin found that the statistics alone proved a deliberate intention to discriminate, for "[n]o criterion, other than race, [could] plausibly explain" the location of CHA's projects.²⁸ The testimony of CHA officials corroborated this conclusion, demonstrating that "CHA follows an unvarying policy . . . of informally [pre-]clearing each [potential] site with the Alderman in whose Ward the site is located and eliminating each site opposed by an Alderman."²⁹ Judge Austin added that neither the laudable goal of providing needed housing, nor the possibility that the aldermen were not themselves racists but were simply reflecting constituency sentiments, could justify a governmental policy of keeping blacks out of white neighborhoods.³⁰

Judge Austin specifically held that CHA could not escape liability on the ground that "practical politics . . . compelled CHA to adopt the pre-clearance [policy] which was known by [it] to incorporate a racial veto."³¹ He ruled that the evidence showed that CHA had made the policies of the aldermen its own and, by bowing to what it viewed as the realities of City Council sentiment in selecting sites for submission to the Council, had deprived opponents of the opportunity for public debate.³² The judge added, however, that even if CHA had not participated in this informal elimination of white-area sites, CHA officials were bound by the Constitution not to build on sites chosen by some other state agency on

24. The Affidavit of C.E. Humphrey, CHA's Executive Director, stated that the CHA "does not have, and has never had, any site selection policy, written or unwritten . . . intended or designed to keep Negroes out of white neighborhoods." Affidavit of C.E. Humphrey in Support of Defendant's Motion for Summary Judgment at 2, *Gautreaux I*, *supra* note 3 (filed Mar. 20, 1968). Further, stated Humphrey, City Council approval since 1949 has been "a condition precedent to acquisition by CHA of any sites for development of public housing." *Id.*

25. Plaintiff's Motion for Summary Decree, *Gautreaux I*, *supra* note 3 (filed July 22, 1968).

26. *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 909 (N.D. Ill. 1969).

27. *Id.* at 914. Judge Austin denied both parties' motions for summary judgment on plaintiffs' Title VI claim.

28. *Id.* at 912. The Court found that close to 100% of potential public housing sites in white neighborhoods were vetoed by the City Council compared with 10% of potential sites in black neighborhoods. *Id.*

29. *Id.* at 912-13; see also *supra* note 13 and accompanying text.

30. *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. at 914.

31. *Id.*

32. *Id.*

the basis of race.³³

The closing paragraph of his opinion conveyed Judge Austin's sense of the urgency of the problem that had been presented to him, and contrasted sharply with his initial "Lake Shore Drive" reaction: "[E]xisting patterns of racial separation must be reversed if there is to be a chance of averting the desperately intensifying division of Whites and Negroes in Chicago."³⁴

Now, however, Judge Austin had to face the question of what to do about the discrimination he had found to exist. It would have been easy merely to issue a declaratory judgment and an injunction prohibiting CHA from future discrimination. Stopping CHA from building public housing solely in black neighborhoods would have been an important, tangible accomplishment. And there would have been little question about effectiveness. Courts usually do quite well in prohibiting parties, including government agencies, from doing things they are not supposed to do. A simple injunction would have put the CHA case "successfully" to rest without all of the ensuing difficulties.

But there is another side to the argument. From an instinct of justice, our system seeks to *remedy* wrongs, not merely to terminate them. Thousands of families who would have had a chance to live in white as well as black neighborhoods under a non-discriminatory public housing system had been denied that opportunity. No doubt a negative injunction alone would simply have ended all public housing construction in Chicago, leaving those families without any prospect of relief. Would that have been a principled result?

CHA argued strenuously that an injunction against future discrimination, coupled with a "best efforts" undertaking to do what it could to end the discriminatory conduct, was the only type of order that should be entered against it. It protested vehemently that the remedial scheme advanced by the plaintiffs was a terrible idea.³⁵

That scheme was to identify the predominantly white and predominantly black areas of the city and to direct CHA to build future public housing in both areas, in a ratio of three apartments in white neighborhoods to one in black.³⁶ The plaintiffs' goal was to redress, over time, the existing numerical imbalance in favor of public housing sites located in

33. *Id.*

34. *Id.* at 915.

35. Suggestions of the CHA Regarding Final Order at 2, *Gautreaux I*, *supra* note 3 (filed May 12, 1969). CHA argued for a "general guideline" as opposed to plaintiffs' proposed "fixed formula." *Id.* at 3.

36. Plaintiffs' Proposed Judgment Order at 4, *Gautreaux I*, *supra* note 3 (filed May 9, 1969).

black neighborhoods. In proposing this remedial arrangement, the plaintiffs were faced with the reality that Judge Austin could not create a unitary public housing system overnight. School desegregation can be effected quickly through pupil reassignments. CHA's buildings could not, like students, be loaded into buses and brought to different locations.

For four months Judge Austin heard arguments from both sides. He was obviously reluctant to involve himself in the details of running Chicago's public housing system. But he also had little faith in what CHA would do with a "best efforts" order. In the end, the Judge appeared to be swayed by a letter from John McKnight, Director of the Midwest Field Office of the United States Commission on Civil Rights. That letter remains today a succinct summary of the problem as the plaintiffs saw it:

In all regions of the United States, in cities of every size, where housing authorities have the most varied composition and constituencies, we have found a remarkably consistent pattern of racially distinct low-income housing projects. This pattern has been established, and perseveres today, in spite of State and local fair housing laws, Title 6 of the 1964 Civil Rights Act and its Federal administrative apparatus, and Title 8 of the 1968 Civil Rights Law. While we have been impressed with the good intentions of local housing authorities and their staffs, as well as the "good offices" of Federal Housing officials, the fact remains that the tax monies of all the people are largely being spent, even to this day, for low-income housing that bonds into brick and mortar, a nation that is racially separate and unequal.

Officials of the Chicago Housing Authority have suggested, in essence, that your decree rely on their best efforts once the City Council has been restrained from discriminatory control over site selection. Our national experience suggests, however, that neither local housing authorities nor the Department of Housing & Urban Development has been able to achieve non-discriminatory tenant and site selection in even those localities where the political process is racially neutral.

The essential reason for this failure to provide equal protection is the fact that the Federal low-income housing system has a clearly established operating priority: the production of the maximum number of units at the lowest price. The result has been to institutionalize a system of second class, high density housing that has become anathema to urban neighborhoods throughout the country. . . .

. . . You cannot rely on Federal requirements to produce this effect [insuring goals of equal protection] because they still present an array of options, alternatives, and generalized mandates that allow the system to achieve its priority goal—production of the maximum number of low priced units—by overriding the need for equal protection.³⁷

37. Letter from Howard Glickstein, Staff Director, U.S. Comm'n on Civil Rights, to Judge Austin (June 2, 1969) (writing for John McKnight; presenting Commission's view of possible elements of a decree).

Similar observations in less muted language were made by others at the time. For example, two respected observers of urban problems described the then current urban renewal and housing programs, including public housing, as a "concerted effort to maintain the ghetto."³⁸

In the end, Judge Austin opted for the plaintiffs' approach. On July 1, 1969, he substantially adopted their proposal and entered a judgment order requiring CHA to build three housing units in white neighborhoods for every unit built in a black neighborhood, and directing it to build as many units as it could as rapidly as possible under this formula.³⁹

The next fifteen years, from 1969 to 1984, provided a classic example of the frustration of court orders, or perhaps of the inability of a court to compel what amounted to political action. From 1969 to 1974, CHA built no new public housing at all. After dutifully choosing potential sites in white as well as black neighborhoods as Judge Austin had directed, CHA declined to submit the sites to the City Council for fear of the political consequences in the upcoming 1971 mayoral election. Judge Austin had to order CHA to deliver its selected sites to the Council.⁴⁰

Then, with the politically unpalatable locations now before it, the City Council simply refused to take action on CHA's proposed purchases. The plaintiffs had to bring an ancillary proceeding against the Council in which, after an evidentiary hearing, Judge Austin decided that the Council lacked good reasons for its refusal to act, that its inaction was frustrating the court's orders, and that it was therefore proper under the circumstances to take away the Council's veto power. In a 1972 order, eventually affirmed on appeal, he did just that.⁴¹ However, CHA secured a stay pending appeal, and it was 1974 before the Supreme Court finally denied certiorari,⁴² marking the end of a five-year period during which no public housing was built in Chicago.

There then ensued two more lengthy periods of frustration. During the first, from 1974 to 1979, CHA—now freed of City Council restraints, but still fortified by public opposition—found one excuse after another for not producing housing. During the entire five-year period, only 117 new public housing apartments were provided in accordance with the

38. Kain & Persky, *Alternatives to the Gilded Ghetto*, 1969 PUB. INTEREST 79.

39. *Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736, *enforcing* 296 F. Supp. 907 (N.D. Ill. 1969).

40. *Order, Gautreaux I*, *supra* note 3 (filed Mar. 1, 1971) (directing CHA to submit, by March 5, 1971, proposed sites for 1500 units to the Chicago Plan Commission).

41. *Gautreaux v. Chicago Hous. Auth.*, 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd*, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974).

42. *Id.*

court's 1969 order. Angered by this snail's pace, Judge Austin appointed a Special Master to "determine and identify the precise causes of the five-year delay in implementing my judgment orders, and to recommend a plan of action"⁴³ After several years of hearings, the Special Master issued a report that was strong on rhetoric lambasting CHA but lacking in specific enforcement recommendations.⁴⁴

In 1979, as part of an arrangement that changed the original three-to-one formula to a one-to-one ratio, Chicago's newly-elected Mayor Jane Byrne offered mayoral support for the scattered-site program. Nevertheless, despite this nominal support, little was accomplished during the next five years, thanks to continuing neighborhood opposition, a surreptitious mayoral go-slow policy, and incompetence at CHA. Purchase of new sites proceeded with agonizing slowness. When buildings earmarked for rehabilitation were acquired, the rehabilitation began slowly and was performed incompetently.

So unhappy was the situation that twice the plaintiffs' attorneys sought to have a receivership imposed upon the scattered-site program, once in 1979-80,⁴⁵ and again in 1983-84.⁴⁶ Though in each instance the judges roundly castigated CHA, a receivership was denied.⁴⁷ (By now Judge Austin had resigned because of a terminal illness and the case had been assigned first to Judge John Powers Crowley and, after his resignation from the bench, to Judge Marvin E. Aspen, with whom the case remains.) Only a few hundred additional units were added to the scattered-site program during this five-year period and, as it turned out, even these few units were accompanied by enormous waste because of CHA's bungling of the rehabilitation work.⁴⁸

In mid-1984, with a new executive director under a new mayoral

43. *Gautreaux v. Chicago Hous. Auth.*, 384 F. Supp. 37, 38 (N.D. Ill. 1974).

44. Final Report and Recommendations of Magistrate Olga Jurco, *Gautreaux I & II* (consolidated), *supra* note 3 (filed Aug. 31, 1979). Hearings were held before the Special Master for more than four years with 68 sessions being held in that time. *Id.* at 1. In a fetching grasp of the obvious, the Master found that "CHA site search and acquisition [practices] have neither been efficient nor vigorous and therefore not numerically productive." *Id.* at 16. The Special Master recommended that CHA "affirmatively expand its land acquisition and programs for development of public housing." *Id.* at 24.

45. Motion for Further Relief Against Chicago Housing Authority Through Appointment of Receiver, *Gautreaux I & II* (consolidated), *supra* note 3 (filed Dec. 17, 1979).

46. Plaintiffs' Renewed Motion for Further Relief Against Chicago Housing Authority Through Appointment of Receiver, *Gautreaux I & II* (consolidated), *supra* note 3 (filed Apr. 27, 1983).

47. *Gautreaux v. Landrieu*, 498 F. Supp. 1072, 1075 (N.D. Ill. 1980); Order (unpublished), *Gautreaux I & II* (consolidated), *supra* note 3 (filed Jan 13, 1984) (vacating earlier provisional appointment of a receiver).

48. See, e.g., Order, *Gautreaux I & II* (consolidated), *supra* note 3 (filed Aug. 14, 1987) (order appointing a receiver to continue and complete the scattered-site program).

administration—Harold Washington's—which supported a scattered-site policy, CHA began for the first time to try in earnest to develop scattered-site housing. Now, however, incompetence replaced intransigence. Although a number of units were provided under the new administration, primarily through rehabilitation of acquired buildings, CHA failed to get adequate authority from HUD for the large amounts of money it began to expend on the rehabilitation work. When the expenditures had amounted to almost \$30 million, none of which HUD was willing to reimburse (primarily because of inadequate CHA documentation of its expenditures), CHA was forced to come to court and plead for permission to suspend the scattered-site work lest it bankrupt the agency.⁴⁹

This was the last straw. Acting against the background of the two previous receivership hearings, Judge Aspen now appointed a receiver to take over the development of CHA's scattered-site units.⁵⁰ The receivership became effective on December 2, 1987.⁵¹ At the present writing, this chapter in the saga of "Waiting for Gautreaux" is about to begin.

The nineteen years since Judge Austin first ruled that CHA had violated the Constitution make the *Gautreaux* remedial story a fertile one for the asking of "Horowitz-type" questions. Although the court had relatively little housing in place to show for its efforts, it had nonetheless taken away a power granted to the City Council by state law. In its frustration, the court had also appointed a Special Master who held hearings for over four years to little effect. Finally, the court had conducted three separate receivership hearings before finally appointing a receiver to take over work that CHA should have completed long ago.

Did the *Gautreaux* court attempt too much? Or did it merely perform poorly a task it properly undertook? How great was the cost to society of the spectacle of nearly two decades of frustration of court orders? How great would the cost have been had the court, having found a wrong, not tried to provide an effective remedy?

II. THE CASE AGAINST THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Before addressing those questions, the reader may wish to look at

49. Emergency Motion of Defendant Chicago Housing Authority (1) To Report on Its Present Financial Condition, and (2) For Other Relief, *Gautreaux I & II* (consolidated), *supra* note 3 (filed May 5, 1987) ("In order for the CHA to resolve its current shortfall . . . it is imperative that CHA temporarily reduce its level of work on scattered site building projects to the lowest possible level and use current operating funds to finance only essential and emergency [services]. . . ." *Id.* at 3.).

50. Order, *Gautreaux I & II* (consolidated), *supra* note 3 (filed May 13, 1987) (allowing appointment of a receiver for the scattered-site project).

51. Notice of Effective Date, *Gautreaux I & II* (consolidated), *supra* note 3 (filed Dec. 2, 1987).

the other part of the *Gautreaux* remedial story, which is considerably different. For that we must return to the case against HUD which had been stayed in 1967 on Judge Austin's own motion.

Following entry of the judgment order against CHA in July 1969, the plaintiffs sought to take the HUD case out of the deep freeze into which Judge Austin's stay order had placed it. In October 1969, they moved for summary judgment against HUD.⁵² As to HUD's argument that it was not responsible for the selection of CHA public housing sites,⁵³ the plaintiffs responded that "HUD . . . set[] the site selection standards and criteria with which CHA [was required to] comply, and ha[d] and exercise[d] the power to approve or disapprove every site selected by CHA,"⁵⁴ making HUD as well as CHA responsible for the established discrimination.

In response, HUD argued that plaintiffs' theory of liability would have "disastrous consequences" for the low-rent program throughout the country, and for the administration of the Civil Rights Acts of 1964 and 1968 as well. HUD's plea that the Court should not "wrest control" from it concluded:

The formulation and the achievement of fair housing goals is in competent hands. [The Secretary of HUD] was in no way responsible for the shortcomings of the low-rent housing program in Chicago, and there is no sound reason why he should be denied a free hand in encouraging and assisting the proper State and local officials to come to grips with those shortcomings.

The decree already entered in the companion case against the Authority provides the plaintiffs with a full measure of effective relief. The incentives and the financial leverage that the plaintiffs seek to command by a judicial decree . . . can best be exercised by this defendant without judicial oversight or control.⁵⁵

Replying, the plaintiffs quoted one of HUD's own officials who had made a point of considerable relevance to the issues posed by this Symposium:

During the latter part of the nineteenth century and the early decades of this century, Federal and state legislation to promote health

52. Motion of Plaintiff for Summary Judgment and Brief in Support of Plaintiffs' Motion for Summary Judgment, *Gautreaux II*, *supra* note 3 (filed Oct. 31, 1969). Reflecting the widespread interest in the case, the plaintiffs' summary judgment motion was supported by amicus briefs from the Lawyers Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, the Metropolitan Housing & Planning Council of Chicago, the Illinois League of Women Voters, the Urban Affairs Committee of the Chicago Bar Association, and other groups.

53. Memorandum and Affidavits in Support of Defendants' Motion to Dismiss at 7a, *Gautreaux II*, *supra* note 3 (filed Jan. 3, 1967).

54. Brief in Support of Plaintiffs' Motion for Summary Judgment at 25, *Gautreaux II*, *supra* note 3 (filed Oct. 31, 1969).

55. Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 30, *Gautreaux II*, *supra* note 3 (filed Jan. 8, 1970).

and welfare was based principally on the Federal power over interstate commerce and the state police power, and was correspondingly directed more toward regulation than toward financial support. In recent decades, particularly the 1960s, we have witnessed increasing reliance by the Federal government, and to a lesser extent the states, on financial support through grants based upon the general welfare clauses of the Federal and state Constitutions.

The bench and bar have been slow, however, in reacting to the implications of this shift. Relatively little attention has been focused on the control of administrative discretion in grant programs⁵⁶

Noting the development of what the Supreme Court has called "administrative absolutism," the plaintiffs argued that "[c]ourts have begun to step into the no man's land [of the administration of grant programs] and apply the rule of law to the grant-making agencies," citing then recent lower court cases involving HUD itself.⁵⁷ They also cited a few strong sentences by Justice Douglas:

The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government, it is often the one and only place where effective relief can be obtained . . . [W]here wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.⁵⁸

The plaintiffs added:

It would be an ironic inversion of priorities if the demand of the administrator for unchecked discretion were to render the judiciary powerless with respect to so central a judicial function as remedying constitutional wrongs.⁵⁹

Unmoved by all this rhetoric, Judge Austin dismissed the case

56. Reply Brief in Support of Plaintiffs' Motion for Summary Judgment at 37, *Gautreaux II*, *supra* note 3 (filed Mar. 13, 1970) (quoting Pinsky & Kurzman, *Preface to National Institute on Federal Urban Grants: Policies and Procedures*, 22 ADMIN. L. REV. 113 (1970)) (David E. Pinsky was Associate General Counsel of HUD). Another participant in the Institute with long experience in the federal bureaucracy, Alanson W. Willcox, made similar observations:

The Federal grant-in-aid is only now beginning to get from the bench and the bar the attention that is its due as an instrument of government. . . . Operation of Government programs in isolation from any relevant profession is unhealthy, and without doubt the law is relevant to these programs.

Lulled perhaps by the resemblance to private gifts, lawyers have been too prone to consider public grants as being beyond the reach of legal demands, whether of substance or procedure, and to forget that the award or denial of a grant is as much a governmental act as any other.

Willcox, *The Function and Nature of Grants*, 22 ADMIN. L. REV. 125, 125 (1970).

57. Reply Brief in Support of Plaintiffs' Motion for Summary Judgment at 38-39, *Gautreaux II*, *supra* note 3 (filed Mar. 13 1970) (citing *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. Pa. 1969) (three lower court decisions which demonstrated a new judicial willingness to remedy constitutional wrongs perpetrated by administrators of grant programs); *Powelton Civic Home Owner's Ass'n v. Department of Hous. & Urban Dev.*, 284 F. Supp. 809 (E.D. Pa. 1968)).

58. *Id.* at 43-44 (quoting *Flast v. Cohen*, 392 U.S. 83, 111 (1968) (Douglas, J., concurring)).

59. *Id.* at 44.

against HUD.⁶⁰ Although he ruled that the plaintiffs did have standing to sue HUD,⁶¹ Judge Austin held—quite incorrectly—that he had no jurisdiction over a suit that rested not upon statutes but directly upon the Constitution.⁶² Perhaps the true ground of Judge Austin's thinking is captured in this paragraph of his opinion: "This Court does not have jurisdiction to direct and control the policies of the United States and the government must be permitted to carry out its functions unhampered by judicial intervention."⁶³

It took but one year for the Seventh Circuit Court of Appeals to reverse.⁶⁴ The appeals court concluded that "HUD's knowing acquiescence in CHA's admitted[ly] discriminatory housing program" violated the due process clause of the fifth amendment, and that suit could be brought "directly" under the Constitution to enforce constitutional rights. Echoing what Judge Austin himself had said of CHA, the court held that "HUD's approval and funding of segregated CHA housing sites [could] not be excused as an attempted accommodation of an admittedly urgent need for housing with community and City Council resistance."⁶⁵ HUD's actions therefore "constituted racially discriminatory conduct in their own right."⁶⁶

Nonetheless, the court of appeals said that its holding should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered federal agency. It may well be that the district judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple "best efforts" clause will be necessary to remedy the wrongs which have been found to have been committed.⁶⁷

On remand the plaintiffs pointed out that in administering federal housing programs HUD employed the concept—and geography—of a "housing market area" which was not confined to a single local political jurisdiction such as Chicago.⁶⁸ They argued that there were strong policy reasons, already articulated forcibly and repeatedly by HUD's own

60. *Gautreaux II*, *supra* note 3, slip op. (N.D. Ill. Sept. 1, 1970), *rev'd sub nom.* *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971).

61. *Id.* at 3-4.

62. *Id.* at 9.

63. *Id.* at 18-19.

64. *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971) (granting summary judgment on fifth amendment and Title VI claims alleging deliberate conduct).

65. *Id.* at 737.

66. *Id.* at 739.

67. *Id.* at 740-41.

68. HUD's housing market area for the Chicago region included the six counties of northeastern Illinois. Plaintiffs' Outline of Proposed Final Order Embodying Comprehensive Plan for Relief at 2, *Gautreaux I & II* (consolidated), *supra* note 3 (appended to letter to Judge Austin dated June 30, 1972).

top officials, for painting the *Gautreaux* remedial scheme on such a metropolitan canvas.

To support their thesis, the plaintiffs quoted from none other than the Secretary of HUD, George Romney:

[T]he impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding communities. The city and the suburbs together make up what I call the "real city." To solve problems of the "real city," only metropolitan-wide solutions will do.⁶⁹

These remarks were echoed by HUD's Undersecretary, Richard Van Dusen:

There must be adopted in America a truly metropolitan approach to the city's problems. . . . [T]he suburban resident who thinks he has fled the city's problems, but can still enjoy its benefits, must realize that if the city dies—if the core rots—then the whole apple goes. He can't intelligently take the attitude, "I've moved out; to hell with it."⁷⁰

The plaintiffs also argued that the predominantly suburban location of employment opportunities was an important factor an equity court had to take into account in determining the form of relief to be provided.⁷¹ Similarly, they argued, the district court could take into account educational and other considerations. Citing a report of the respected Advisory Commission on Intergovernmental Relations, the plaintiffs pointed out that children of the plaintiffs' class attended largely segregated Chicago schools while most suburban schools remained overwhelmingly white, noting that "on the educational front, the central

69. Memoranda in Support of Plaintiffs' Outline of Proposed Final Order Embodying Comprehensive Plan for Relief, Memorandum #2 at 2, *Gautreaux I & II* (consolidated), *supra* note 3 (filed June 30, 1972) (quoting Statement of G. Romney, Secretary of HUD, to the Subcommittee on Civil Rights Oversight of the Committee on the Judiciary (Dec. 9, 1971)).

70. *Id.* (quoting HUD News, Mar. 14, 1972, at 15-16).

71. Another HUD official, Assistant Secretary Samuel J. Simmons, and the President himself have stressed the importance of this factor:

As Whites have left the cities, jobs have left with them. After 1960, three-fifths of all new industrial plants constructed in this country were outside of central cities. In some cases as much as 85% of all new industrial plants located outside central cities were inaccessible to Blacks and other minorities who swelled ghetto populations. In the Chicago metropolitan area, for example, there were approximately 550,000 new jobs created in the period between 1959 and 1970. Of these, only 75,000 were in the City of Chicago. In other words nearly 87% of the area's new employment opportunities were suburban, not central city, opportunities.

Id. (quoting HUD News, Apr. 27, 1972, at 3-4).

Another price of racial segregation is being paid each day in dollars: in wages lost because minority Americans are unable to find housing near the suburban jobs for which they could qualify. Industry and jobs are leaving central cities for the surrounding areas. Unless minority workers can move along with the jobs, the jobs that go to the suburbs will be denied to the minorities—and more persons who want to work will be added to the cities' unemployment and welfare rolls.

President Nixon's Statement on Federal Policies Relative to Equal Housing Opportunity, 7 WEEKLY COMP. PRES. DOC. 892, 893 (June 11, 1971).

cities are falling further behind their suburban neighbors with each passing year . . . [and] urban children who need education the most are receiving the least."⁷²

For all of these reasons, the plaintiffs urged, prompt, complete and effective relief was not possible if the new housing to be supplied under the court's remedial order were confined to the city of Chicago.⁷³ The final judgment order, they said, should require that new housing be located throughout the metropolitan area.

While not opposing a metropolitan plan in principle, HUD argued that to effect metropolitan relief the plaintiffs would have to join suburban housing authorities and municipalities as defendants and prove that separate acts of discrimination by them had brought about or contributed to the segregation at the heart of the CHA case—almost certainly an impossible task.

In September 1973, Judge Austin ruled that metropolitan relief was "simply unwarranted here because it goes far beyond the issues of this case."⁷⁴ He added that "the wrongs [had been] committed within the limits of Chicago and solely against residents of the City"; that there had never been any allegations that CHA and HUD had discriminated or fostered racial discrimination in the suburbs; and that, after years of "seemingly interminable litigation," plaintiffs were suggesting that the court consider a plan which would involve relief "against political entities which have previously had nothing to do with this lawsuit."⁷⁵ While granting plaintiffs' motion for summary judgment pursuant to the Seventh Circuit's opinion, Judge Austin simply ordered HUD to use its best efforts to cooperate with CHA respecting his orders against that agency, and enjoined HUD from approving CHA development programs inconsistent with those orders.⁷⁶

As the *Gautreaux* case against HUD worked its way through the courts, litigation raising an analogous issue of metropolitan relief had been proceeding in the Federal District Court for the Eastern District of Michigan. Having found Detroit's public schools to be unlawfully segregated and the State of Michigan partly responsible, the district judge in

72. ADVISORY COMM'N ON INTERGOVERNMENTAL REL., FISCAL BALANCE IN THE AMERICAN FEDERAL SYSTEM, VOL. II, METROPOLITAN FISCAL DISPARITIES 5-6 (1967).

73. Motion and Memorandum in Support of Plaintiff's Motion for a Ruling on the Propriety of Considering Metropolitan Relief, *Gautreaux I & II* (consolidated), *supra* note 3 (filed Jan. 29, 1973).

74. *Gautreaux v. Romney*, 363 F. Supp. 690, 690-91 (N.D. Ill. 1973), *rev'd sub nom. Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974).

75. *Id.* at 691.

76. *Id.*

*Bradley v. Milliken*⁷⁷ ordered the participation of suburban school districts—as agencies of the defendant state—in remedying the segregation in Detroit schools. He did so by establishing a desegregation panel and ordering it to prepare a remedial plan consolidating the Detroit school system and fifty-three suburban school districts. Shortly before Judge Austin's 1973 judgment order against HUD, the Sixth Circuit Court of Appeals affirmed the district court decision in *Milliken* saying:

Like the District Judge, we see no validity to an argument which asserts that the constitutional right to equality before the law is hemmed in by the boundaries of a school district.⁷⁸

Milliken was to play a major role in the appeal from Judge Austin's 1973 order. Judge Austin's opinion accompanying his summary judgment order against HUD had distinguished *Milliken* on the obviously unsatisfactory ground that, unlike education, the right to adequate housing was not constitutionally guaranteed and "is a matter for the legislature."⁷⁹ In appealing Judge Austin's order, the plaintiffs argued that the power to bridge local political boundary lines to vindicate federal constitutional rights or implement federal constitutional remedies flowed directly from a fundamental constitutional principle: the United States Constitution recognized only two levels of government, federal and state, and the state and its agencies could not avoid their federal constitutional responsibilities by fragmentation of decision-making, or "carve-outs," of local governmental units.⁸⁰

This doctrine, it was argued, stemmed from *Ex parte Virginia*,⁸¹ in which the Supreme Court had said that whoever denied equal protection of the laws by use of a state governmental position, acting in the name of and for the state, was clothed with the state's power, and, therefore, "his act is that of the State."⁸² Were this not so, *Virginia* reasoned, the state would have "clothed one of its agents with power to annul or to evade

77. 345 F. Supp. 914 (E.D. Mich. 1972).

78. *Bradley v. Milliken*, 484 F.2d 215, 245 (6th Cir. 1973).

79. *Gautreaux v. Romney*, 363 F. Supp. at 691 (citing *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)).

80. Brief of Plaintiffs-Appellants at 13, 16-17, *Gautreaux I & II* (consolidated), *supra* note 3 (filed Mar. 11, 1974) (citing *Hall v. Saint Helena Parish School Bd.*, 197 F. Supp. 649, 658 (E.D. La. 1961), *aff'd*, 287 F.2d 376 (5th Cir. 1961), *aff'd per curiam*, 368 U.S. 515 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964)). In *Reynolds*, the Supreme Court said:

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.

Id. at 575.

81. 100 U.S. 339 (1879).

82. *Id.* at 347.

[the constitutional prohibition].”⁸³ More recently, in *Avery v. Midland County*,⁸⁴ the Supreme Court had reaffirmed this principle, stating that: “[A]lthough the forms and functions of local government and the relationships among the various units are matters of state concern. . . . actions of local government *are* the actions of the State.”⁸⁵

Placing heavy reliance on the Sixth Circuit opinion in *Milliken* affirming an interdistrict remedy on precisely these grounds, the *Gautreaux* lawyers urged that “[l]ocal political boundaries are a matter of convenience, not sovereignty, and they may be disregarded for the purpose of vindicating federal constitutional rights.”⁸⁶ HUD did not seriously contest these principles, but asserted in essence that the district court had not abused its discretion in deciding that metropolitan remedies were not needed in *Gautreaux*.⁸⁷

The appeal was argued in June 1974, before a panel that included Associate Justice Tom C. Clark of the Supreme Court (retired) sitting by designation. A few weeks later, before a *Gautreaux* opinion had been issued, the Supreme Court reversed the Sixth Circuit’s *Milliken* decision by a 5-4 vote.⁸⁸ Saying that school district lines could not be “casually ignored or treated as a mere administrative convenience” because they created separate independent governmental entities responsible for the operation of autonomous public school systems,⁸⁹ the Court held that there had to be either an “interdistrict violation” or “interdistrict effect” before a federal court could order the crossing of district boundary lines.⁹⁰

The *Gautreaux* litigants then filed supplemental memoranda to address *Milliken*. HUD argued that *Milliken* showed that a metropolitan

83. *Id.*

84. 390 U.S. 474 (1968).

85. *Id.* at 480 (emphasis in original) (citing *Cooper v. Aaron*, 358 U.S. 1, 16 (1958)). The cases which employed this principle, in one context or another, were almost without number. See, e.g., *Davis v. School Comm’rs*, 402 U.S. 33, 37-38 (1971); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 739 (1964); *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960); *Lee v. Macon County Bd. of Educ.*, 448 F.2d 746, 752 (5th Cir. 1971); *Stout v. United States*, 448 F.2d 403 (5th Cir. 1971); *United States v. Texas*, 447 F.2d 441, 443-44 (5th Cir. 1971), *aff’g orders reported at* 321 F. Supp. 1043 and 330 F. Supp. 235; *Haney v. County Bd. of Educ.*, 429 F.2d 364, 368-69 (8th Cir. 1970); *Haney v. County Bd. of Educ.*, 410 F.2d 920, 924-25 (8th Cir. 1969); *United States v. Indianola Mun. Separate School Dist.*, 410 F.2d 626, 630-31 (5th Cir. 1969); *Jenkins v. Township of Morris School Dist.*, 279 A.2d 619, 628 (N.J. 1971).

86. Brief of Plaintiffs-Appellants at 12, *Gautreaux I & II* (consolidated), *supra* note 3 (filed Mar. 11, 1974).

87. Brief for the [Defendant]-Appellee Secretary of Housing and Urban Development at 7, *Gautreaux I & II* (consolidated), *supra* note 3 (filed May 27, 1974).

88. *Milliken v. Bradley*, 418 U.S. 717 (1974).

89. *Id.* at 741.

90. *Id.* at 745.

remedy in *Gautreaux* was inappropriate and, therefore, that Judge Austin should be affirmed.⁹¹ The plaintiffs argued that *Milliken* did not bar “interdistrict relief” in non-school cases when the equitable factors that precluded such relief in the school context were absent.⁹² They pointed to the Supreme Court’s statements in *Milliken* relating to the administration of schools, e.g., that a metropolitan remedy in *Milliken* would interfere with the tradition of local school control and would pose serious problems in supervising the necessary restructuring of local school administrations.⁹³ The plaintiffs contended that these problems did not exist in the housing desegregation context, where there was no similar long-standing tradition of local control. They also argued that HUD, in administering housing programs, did so in a “housing market area” defined by HUD itself as extending beyond the borders of Chicago.⁹⁴

In August a divided court of appeals reversed Judge Austin’s *Gautreaux* decision.⁹⁵ Writing for the majority, Justice Clark distinguished *Milliken* and said that the “consolidation of 54 independent school districts would present overwhelming problems of logistics, finance, administration and political legitimacy.”⁹⁶ He also noted the Supreme Court’s deference to the “deeply rooted” and “essential” tradition of local control of public schools.⁹⁷ The housing situation, he said, was different. There were only a few housing authorities in addition to CHA in the metropolitan area, and there was no deeply-rooted tradition of local control of public housing—“rather, public housing is a federally supervised program”⁹⁸ Finding that metropolitan relief appeared to be a necessary ingredient of any effective remedial plan, Justice Clark concluded that Judge Austin’s ruling that the metropolitan area should not be included in a comprehensive plan of relief was clearly erroneous.⁹⁹ He therefore reversed Judge Austin’s September 1973 order and remanded for adoption of a comprehensive metropolitan-area remedial plan.

The federal government’s petition for certiorari posed the issue succinctly: “Whether, in light of *Milliken v. Bradley* . . . it is inappropriate for a federal court to order inter-district relief for discrimination in pub-

91. Supplemental Memorandum of the Secretary of Housing and Urban Development at 2, *Gautreaux I & II* (consolidated), *supra* note 3 (filed Aug. 19, 1974).

92. Memorandum, *Gautreaux I & II* (consolidated), *supra* note 3 (filed Aug. 14, 1974).

93. *Id.* at 2.

94. *Id.* at 6-14.

95. 503 F.2d 930 (7th Cir. 1974) (Tone, J., dissenting). Justice Clark wrote the majority opinion.

96. *Id.* at 935.

97. *Id.*

98. *Id.* at 936.

99. *Id.* at 936-39.

lic housing in the absence of a finding of an inter-district violation."¹⁰⁰ In the argument before the Supreme Court, then-Solicitor General Robert Bork said:

It is very dangerous to say that any time a federal agency does anything wrong in any locality, because the federal agency has jurisdiction over a very wide area, the federal agency can be asked to sweep in the residents of that entire area, although they were not involved in any wrongdoing in any shape or form.¹⁰¹

The plaintiffs argued that a metropolitan housing plan would present none of the administrative and equitable difficulties of consolidating fifty-four school districts, and that, in any event, given HUD jurisdiction and administration of its programs throughout "housing market areas," a metropolitan remedial order against HUD would not be "interdistrict" under *Milliken*.¹⁰²

In April of 1976, in an 8-0 decision, the Supreme Court decided that a remedial order against HUD that affected its conduct in the area beyond the geographic boundaries of Chicago but within the housing market area relevant to administration of HUD's programs would be a permissible form of *Gautreaux* relief.¹⁰³ The Court distinguished *Milliken* on the ground that the district court's school desegregation order had been held "to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation."¹⁰⁴ By contrast, the Court said, HUD—already found to have violated the Constitution—could be ordered as a remedial matter to exercise its administrative powers throughout the Chicago housing market area without "impermissibly interfer[ing] with local governments and suburban housing authorities that have not been implicated in HUD's unconstitutional conduct."¹⁰⁵

The Court's opinion, however, made clear that government agencies other than HUD and CHA—housing authorities as well as municipalities—could not be forced by such an order to participate in remedial arrangements:

[A] metropolitan relief order directed to HUD would not consolidate

100. Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at 2, *Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974). Certiorari was granted on May 12, 1975. *Hills v. Gautreaux*, 421 U.S. 962 (1975).

101. Transcript of Oral Argument at 45, *Hills v. Gautreaux*, 425 U.S. 284 (1976).

102. Brief for Respondents, *Hills v. Gautreaux*, 425 U.S. 284 (filed Sept. 1975).

103. *Hills v. Gautreaux*, 425 U.S. at 297-300.

104. *Id.* at 296.

105. *Id.* at 300.

or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land-use laws. The order would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system created by CHA and HUD.¹⁰⁶

Milliken, as explained in *Gautreaux*, may come to be regarded as a watershed decision not just in the history of federal remedial jurisprudence, but in the history of post-World War II America. Secretary Romney's view that the problems of the "real city" necessitated metropolitan solutions was undoubtedly correct. By precluding federal courts from addressing those problems in a realistic way, *Milliken* and (by virtue of its refusal to limit *Milliken* to its school district consolidation context) *Gautreaux* made a historic, limiting choice that has undoubtedly shaped the development of our metropolitan areas in a critical way. Or, rather, a choice was made that has precluded that development from being shaped in a different way.

The point may be illustrated by a fable about State "I" and State "S." Each state consists of a central city on a lake shore surrounded by a semi-circular suburb. Until World War II neither state had any black or other minority population. During the war an influx of defense workers brought many blacks into each city. Black ghettos formed in each, which then expanded at their edges in block-by-block fashion. After the war, some public housing was built in the black neighborhoods of each city. Schools in each city school district were deliberately segregated. Since no blacks lived in either suburb, neither of the separate suburban school districts had occasion to address the question of segregation.

Following the *Brown* decision in 1954, the people of State I perceived the need for change. The State Department of Schools required desegregation throughout the state; under the plan, through pupil transfers between city and suburban schools, the racial composition of each school in the city and in the suburb became approximately the same.¹⁰⁷ The plan was easily effectuated, with a minimum of busing, because of the small size of the city and the suburb. Public housing was built throughout the state, so that some blacks were able to move into State I's

106. *Id.* at 305-06.

107. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad . . ." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

suburb. After adoption of the Fair Housing Act in 1968, the state acted effectively to enforce the new anti-discrimination law. With no racially identifiable schools in either city or suburb, and with blacks beginning to live both in the suburb and in non-black neighborhoods of the city, there was little "white flight" from the city. The ghetto began to break up, and eventually State I became well integrated residentially. From the year after *Brown* and continuing to the present, all children in State I attended integrated schools.

The experience of State S was quite different. For some years after *Brown*, city schools remained segregated. The ghetto expanded, block by block. Whites began to leave the city for the suburb. High housing prices, private discrimination in the real estate market, and the reluctance of blacks to "pioneer" by moving into all-white areas conspired to keep the suburb all white. By the time a school desegregation case against the city school district reached its "successful" conclusion, the racial composition of City S was heavily black. The pupil population in the city's public schools was entirely black; the few remaining white children living in the city attended private or parochial schools.

Milliken apparently requires that the remedial desegregation plan ordered in the State S lawsuit be confined to the schools of the city school district and not include the suburban district which, never having had any black children, was "innocent" of any discrimination. The pointless plan would not, of course, provide a single black child with a desegregated educational experience, though the history of State I shows that State S could easily achieve that result. *Milliken* utterly fails to explain the principle of federal remedial jurisprudence that requires this result.¹⁰⁸

The stated rationale for *Milliken's* result is opaque. *Ex parte Virginia* and *Avery* said that the actions of local government are the actions of the state. The Supreme Court's affirmance (per curiam) of *Hall v. Saint Helena Parish School Board*¹⁰⁹ appeared to solidify the doctrine that the state could not avoid its federal constitutional responsibilities by fragmentation of decision-making, or "carve-outs" of local governmental units. Yet in *Milliken*, as explained in *Gautreaux*, the Court imposed limits "on the federal judicial power to interfere with the operation of state political entities that were not implicated in unconstitutional con-

108. See *Milliken*, 418 U.S. at 741-42.

109. 368 U.S. 515 (1962). That case invalidated on equal protection grounds a Louisiana statute that provided a way for public schools under desegregation orders to become "private" schools operated in public school buildings under the public school board's supervision and with public funds.

duct.”¹¹⁰ Prior cases defining such limits, according to *Milliken* and *Gautreaux*, “had established that such [constitutional] violations are to be dealt with in terms of ‘an established geographic and administrative school system’”¹¹¹ However, the “prior cases” referred to by the Court were school desegregation cases in which remedial measures were discussed without reaching the *Milliken* question concerning the propriety of involving “innocent” subordinate entities (e.g., school districts) of a “guilty” state.¹¹² It was of course true, as the *Milliken* opinion said, that each of these cases “addressed the issue of a Constitutional *wrong* in terms of an established geographic and administrative school system.”¹¹³ But it was distinctly not the case, as *Gautreaux* now implied, that these cases required the issue of constitutional *remedy* to be dealt with within that self-same system.¹¹⁴

Following the Supreme Court’s opinion, HUD and the plaintiffs agreed on a plan that forestalled further litigation in the district court. In June 1976, they entered into a written agreement, later extended and modified, under which HUD was to create and fund a demonstration program using the Section 8 rental subsidy program¹¹⁵ to provide “Gautreaux families” with subsidized housing opportunities throughout the metropolitan area.¹¹⁶ The essential framework of the understanding was that the Leadership Council for Metropolitan Open Communities (the very organization created by the Summit Meeting ten years earlier) would be funded by HUD to provide counseling and related assistance to Gautreaux families to enable them to take advantage of the Section 8 program, and to persuade landlords to make Section 8 housing opportunities available to Gautreaux families. An allocation of Section 8 certificates was to be provided for this purpose.¹¹⁷

In a subsequent modification of the agreed-upon arrangements, HUD took the important additional step of agreeing that all Section 8 funding in the Chicago metropolitan area for the construction or rehabilitation of apartments would be conditioned on the requirement that developers agree to make a percentage of the apartments in each proposed new development available to the Leadership Council for Gautreaux

110. *Hills v. Gautreaux*, 425 U.S. at 298.

111. *Id.* at 298 n.13.

112. *See id.* at 297-98 and cases cited.

113. *Milliken*, 418 U.S. at 746 (emphasis added).

114. *See Hills v. Gautreaux*, 425 U.S. at 298 n.13.

115. 42 U.S.C. § 1437F (Supp. 1988). Generally, Section 8 can be used for both low and moderate-income families in new, rehabilitated or existing housing.

116. Letter from Robert R. Elliot, then General Counsel of HUD, to Alexander Polikoff (June 7, 1976).

117. *Id.*

families.¹¹⁸ This had the important effect of opening up a "pipeline" of new units to Gautreaux families throughout the metropolitan area, for few developers were willing to forego federal funding even though to receive it they had to make apartments available to public housing families. Eventually, these arrangements matured into a consent decree with HUD, approved by the district court in June 1981, which formalized and somewhat expanded the informal arrangements.¹¹⁹ The consent decree was affirmed on appeal in September 1982, and has been in effect ever since.¹²⁰

Under the Gautreaux Demonstration Program, as it was initially called, and the consent decree arrangements which followed, the Section 8 Gautreaux program administered by the Leadership Council has now been in effect for almost twelve years. During that time over 3500 Gautreaux families have been placed in Section 8 apartments throughout the metropolitan area, slightly more than half of them in the suburbs. The experience of the families has been studied, first by HUD in 1979,¹²¹ then several years later by researchers from Northwestern University who focused upon the educational experiences of Gautreaux family children in their new suburban schools.¹²² The evaluations were surprisingly positive. HUD's study concluded that

most of the families (84 percent) who moved to the Chicago suburbs with rental assistance from HUD were satisfied with their moves, pleased with their new neighborhoods, their housing, public services, and particularly their schools, and felt the quality of their lives had improved.¹²³

HUD described the Gautreaux Demonstration Program as "one of the most significant and visible Federal efforts to explore ways of providing metropolitan-wide housing opportunities for low-income Americans."¹²⁴

In the more recent study by Northwestern University,¹²⁵ the researchers concluded that the children of Gautreaux families were by and

118. Letter from Ruth T. Prokop, then General Counsel of HUD, to Alexander Polikoff (July 29, 1977).

119. *Gautreaux v. Landrieu*, 523 F. Supp. 665 (N.D. Ill. 1981) (mem. and order granting Consent Decree).

120. *Gautreaux v. Pierce*, 690 F.2d 616 (7th Cir. 1982).

121. DIVISION OF POLICY STUDIES, DEPARTMENT OF HOUS. & URBAN DEV., *THE GAUTREUX HOUSING DEMONSTRATION: AN EVALUATION OF ITS IMPACT ON PARTICIPATING HOUSEHOLDS* (1979) [hereinafter HUD STUDY].

122. J. ROSENBAUM, L. RUBINOWITZ & M. KUKIEKE, *LOW-INCOME BLACK CHILDREN IN WHITE SUBURBAN SCHOOLS* (1986) (Report to the Spencer Found. of Chicago by Center for Urban Affairs and Policy Research, Northwestern University) [hereinafter ROSENBAUM].

123. HUD STUDY, *supra* note 121, at 1i.

124. *Id.* at 2ii.

125. ROSENBAUM, *supra* note 122.

large doing much better than would have been expected in their new educational environments.¹²⁶ Despite occasional bigotry, they were doing satisfactorily in academics and were well motivated.¹²⁷ A *Chicago Tribune* editorial on the Northwestern report said:

Not everything [is] rosy. And moving to the suburbs is not workable for large numbers of the underclass. But the program does show that if public and private resources join in providing better housing, better schools and better motivation for parent and child, they stand a good chance of lifting the millstone [of poverty].¹²⁸

As the *Tribune* editorial implied, providing metropolitan-wide housing opportunities for low-income Americans is easier to say than to do. In the typical case, the Gautreaux program involved a black mother on welfare, with two or three children, moving from, say, Robert Taylor Homes or Cabrini Green, to Schaumburg, Downers Grove, Highland Park, and the like, places where such families would never, but for the Gautreaux program, have had an opportunity to live.¹²⁹ Places where, critics said, such families could not live successfully. One opinion expressed at the outset of the Gautreaux program was that class differences would preclude welfare families from "making it" in white middle-class communities. Numerous reasons were advanced. The children would be the only black children in the schools. Young black mothers would encounter isolation, loneliness, hostility. Their institutional support system, such as it was, would be miles away in the inner city. In most of these suburban communities, green cards would not be well known, black churches and black men would not be present, public transportation would be inadequate, haircuts and familiar food would be daily difficulties, and so on.

A number of mothers did give up and returned to the city. But a very high percentage did not. By contrast with the stereotypical image of the welfare mother, many of these women have made incredible sacrifices

126. *Id.*

127. *Id.*

128. Chi. Trib., Dec. 22, 1985, § 3, at 12, col 1. A more recent *New York Times* editorial says, "The [Gautreaux] program's success . . . offers stirring lessons for all cities with isolated underclass communities." N.Y. Times, Nov. 1, 1988, at A3, col 1. A quotation from the Northwestern study may give the flavor of the real-life experiences of some of these families:

This school makes my child equal with others. . . . [In Chicago,] Victoria wanted to be white. . . . I caught her putting baby powder all over her body once. . . . Now that we are here [in a mixed school,] black or white, ugly is ugly.

ROSENBAUM, *supra* note 122, at 53-54.

129. The families in question are very poor and usually on welfare—81% of the Gautreaux families placed are unemployed. Some 91% are headed by a single female parent. Predominantly, of course, the families are black. ROSENBAUM, *supra* note 122.

so that their children would have opportunities they themselves had lacked.

Though a small number in relation to the size of the Gautreaux class, the 3500 families who have so far received Section 8 relief under *Gautreaux*, as many as 10,000 persons, constitute a non-negligible provision of effective relief to Gautreaux families. The experience of these families contrasts significantly with the long period during which the CHA scattered-site program produced virtually no relief at all, and complicates the *Gautreaux* remedial picture from a "Horowitz" point of view.

III. REFLECTION

The noted constitutional scholar, Phillip Kurland, has an interesting litmus test regarding whether courts should put their judicial toes into remedial waters. Professor Kurland suggests that two of the following three questions must be answered "yes" for a proposed decree to be workable:

- (1) Is the constitutional standard a simple one?
- (2) Does the court have adequate control over the means of enforcement?
- (3) Is there general public acquiescence, or at least an absence of opposition, in the principle and its application?¹³⁰

Gautreaux passes the first test—its constitutional standard is simple. But the scattered-site program miserably fails the other two. The Section 8 remedial program, on the other hand, seems to pass both the test of adequate control over the means of enforcement and the test of public acquiescence.

This grading experience is, of course, after the fact. How are judges to know in advance whether their control over enforcement is adequate and what the level of public acquiescence will be?

It is a prudential question for judges to decide in each case where to strike the balance between trying too much and trying too little. But it may come at some cost to the judiciary, and to society, if the decision is never to try at all. Though courts may preserve respect by not undertaking what they are ill-fitted to do, they may lose respect by appearing to be powerless to undertake any remedy of adjudicated wrongs. Democracy cannot thrive in a bed of cynicism, and a perception of powerlessness to undertake remedies may undermine respect for the judiciary just as

130. Kurland, *Public Policy, the Constitution, and the Supreme Court*, 12 N. KY. L. REV. 181 (1985).

much as a perception of inability to carry out remedial undertakings. The issues may be particularly acute in housing discrimination, an area that poses an especially challenging problem for America. We may close by putting the *Gautreaux* case into this somewhat larger frame.

Housing is the most intractable of our civil rights concerns. The segregated armed forces of World War II are but a distant memory. So, too, is segregation in public facilities and transportation. In the electoral process, in jury service, even in employment and education, the civil rights revolution of the post-World War II years has worked a sea-change in race relations.

Not so in housing. Residential segregation persists in virtually its former intensity, notwithstanding the Fair Housing Act of 1968. In Chicago, for example, over 80% of the census tracts have white or black populations of over 90%.¹³¹ In the six-county area surrounding Chicago, 177 of 258 municipalities have less than 1% black population, and most of the rest less than 10%.¹³² Nor do these figures take account of the segregation *within* community areas and municipalities. Even where the Fair Housing Act has led to residential openness, and minority families in more than token numbers have moved into neighborhoods that were previously all white, many of those neighborhoods have either resegregated or are threatened with the resegregation process.

These pervasive residential segregation patterns come at a fearsome price. Fewer and fewer of the pupils in the Chicago public school system are white. Middle-class families with children see themselves as having two options: leaving the city or using private schools. Roughly 90% of the Chicago metropolitan area's white students attend suburban schools, while 80% of metropolitan area black students attend Chicago schools. Over half of 308 suburban school districts have less than 1% black attendance.¹³³

Residential segregation also isolates minorities from jobs. The vast minority population on Chicago's south and west sides lacks realistic access to the northwest Cook and DuPage County areas, which provide the greatest number of new jobs in the Chicago metropolitan region. Pervasive poverty is the inevitable consequence for the generations locked into patterns of residential and school segregation, and isolation from jobs.

But more than poverty is involved. Ultimately, we are talking about

131. LEADERSHIP COUNCIL FOR METRO. OPEN COMMUNITIES, CHICAGO'S DUAL HOUSING MARKET: 1980 app. at x (1981).

132. *Id.* at 3.

133. LEADERSHIP COUNCIL FOR METRO. OPEN COMMUNITIES, RECENT DEVELOPMENTS IN HOUSING (XXIX) at 3 (July-Aug. 1985).

the orderly functioning of society. In the fall of 1985, a series of *Chicago Tribune* articles and editorials on the underclass in America presented a graphic picture of the growing number of Americans weighted down by the millstone of poverty.¹³⁴ Said the *Tribune*, "A new class of people has taken root in America's cities, a lost society dwelling in enclaves of despair and chaos that infect and threaten the communities at large. . . . Racial separation has transformed . . . urban life."¹³⁵

In a re-creation of the 1966 Summit Meeting, sponsored by the Leadership Council and held in 1987, James Compton of the Urban League said that the new form and scope of poverty in our society threatens the unity of America no less than the institution of slavery threatened our unity in the last century.¹³⁶

Thus, it is the kind of American society we bequeath to the next century that we are talking about. Must we not find ways to break down the rigid patterns of residential separatism that still persist with such intensity twenty years after the passage of the Fair Housing Act? If we do not come to grips with American apartheid, will it not come to grip us?

"Horowitz issues" surely need to be raised. But questions such as these are also relevant in considering how far courts should venture in dealing with American institutions that foster racial separatism in housing. The "right" answer is not to be found in a generalization about the institutional capacity of the judiciary. It lies in the particulars of the case, and includes consideration of the importance of the policy issues presented by the litigation and the consequences of refusing to address them.

134. These articles appeared in the *Chicago Tribune* from September 15, 1985 through December 1, 1985 under the series title *The American Millstone*. Subsequently, they were published as a collection in *THE AMERICAN MILLSTONE* (J. Squires ed. 1986).

135. McNulty, *The American Millstone*, Chi. Trib., Sept. 15, 1985, at 1, col. 3; McNulty, *The American Millstone*, in *THE AMERICAN MILLSTONE* 3 (J. Squires ed. 1986).

136. Author's recollection.