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URBAN RENEWAL IN THE CRUCIBLE OF JUDICIAL REVIEW*

Henry W. McGee, Jr.**

An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the "common law," and the ultimate guarantees associated with the Constitution.¹

INTRODUCTION

MR. Justice Douglas' ringing affirmation of the "well-nigh conclusive"² nature of legislative determination of public use in urban renewal programs is undergoing the process of qualification that has characterized subsequent judicial application of a more famous Supreme Court phrase of the following year—"with all deliberate speed."³ The older notion that "urban renewal planning generally is not reviewable"⁴ is rapidly eroding. There has emerged a public and judicial consciousness that for billions of dollars "the Urban Renewal Agency has succeeded in materially reducing the supply of low-cost housing in American cities. Like highways and streets, the program has ripped through the neighborhoods of the poor, powered by the right of eminent domain."⁵ As Professor Frank Michelman has written:

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¹ L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 590 (1965).

² *Berman v. Parker*, 348 U.S. 26, 32 (1954).

³ *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

⁴ Note, *Family Relocation in Urban Renewal*, 82 HARV. L. REV. 864, 892 (1969).

⁵ S. GREER, *URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION* 1 (1965).

The national program has resulted in the destruction of four dwelling units for each unit built. This is, to be sure, based on projects in being and not projects completed. But even when only the latter are considered, the cost is two destroyed for one built—and these completed projects probably reflect disproportionately the earlier program that allowed only 10 percent nonresidential. The new housing built usually cannot be available to the population that lived there

[T]he violent unfairness of many such [urban renewal] operations is manifest. The social gains hoped for from some urban redevelopment programs, while plausible enough to override any "public purpose" objection, nevertheless depend on a still controversial conception. Easily identified, relatively small numbers of people are being handed a distinctly disproportionate and frequently excruciating share of the cost of whatever social gain is involved. . . . Altogether, the spectacle of uncompensated dislocations under these circumstances is an oppressive one.⁶

Professor Michelman's protest stands in vivid and ironic contrast with the assurances and prophecies of an earlier year that slum clearance programs were the panacea for urban ills.⁷

The results of urban renewal programs challenged the traditional liberal assumptions that "social readjustment through legislation"⁸ could best be achieved if judicial review of these projects was kept at a minimum. The resulting debate over the efficacy of judicial activism in this area cut more deeply than merely an academic analysis of constitutional and jurisprudential issues. While commentators noted the discriminatory aspects of most projects,⁹ the political, social and economic realities of

before. It must rent at higher prices. Thus, old inhabitants are unable to return to the redeveloped or upgraded areas.

Id. at 56.

⁶ Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1255 (1967).

⁷ Early advocates of urban renewal claimed

that slum clearance and the provision of sanitary, low-rent housing [would] decrease danger of epidemics, raise general public health, reduce crime, cut juvenile delinquency, reduce immorality, lower economic waste by reducing health, police and fire protection costs, make better citizens, eliminate fire hazards, increase general land values in the vicinity, cut the accident rate, and prevent the cancerous spread of the slums to uninfected areas.

McDougal & Mueller, *Public Purpose in Public Housing*, 52 YALE L.J. 42, 47-48 (1942).

⁸ F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 72 (Atheneum ed. 1965).

⁹ The coalition among liberals, planners, mayors, businessmen, and real estate interests which originally made renewal politically so irresistible has begun to fall apart. Liberals, who still see the rehabilitation of the central city as a prime goal for government, have begun to have doubts, particularly about redevelopment that involves wholesale clearance by bulldozers. They are disturbed by charges from many Negro leaders—whom liberals are accustomed to regarding as their natural allies—that liberals have aided and abetted a program which under the guise of slum clearance is really a program of Negro clearance.

Wilson, *Planning and Politics: Citizen Participation in Urban Renewal*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 407-08 (J. Wilson ed. 1966). See also M. MEYERSON & E. BANFIELD, POLITICS, PLANNING AND THE PUBLIC INTEREST 23 (1968):

As some conservatives backed public housing, some liberals who had fought for it for many years lost interest and went into other activities; their places in the

programs that have been a significant factor in fundamentally altering the traditional relationships between local, state and federal governments¹⁰ (with implications for rich and poor alike) were sooner or later bound to sweep the judiciary into the vortex of public controversy.¹¹

As in the jurisprudential development of other momentous issues, it is difficult to fix the precise point at which the rising tide of public dissatisfaction spills over into judicial pronouncement. A case that appears to be a bold new breakthrough is often but the "logical culmination of a gradual process of erosion."¹² It is thus important to consider the context, legislative as well as political, in which the shifts in judicial atti-

housing agencies were taken by bureaucrats whose concern was not to win acceptance for controversial goals, but merely to attain goals that had been agreed upon.

A recent article has called the collapse of the liberal coalition

a heart-breaking and mind-muddling experience. Now, any liberal politician is in a situation where he has to choose between the support of organized labor and the support of the black community. And, on traditional liberal principles, such a choice is simply impossible.

Kristol & Weaver, *Who Knows New York—and Other Notes on a Mixed-up City*, THE PUBLIC INTEREST 41, 59 (No. 16, Summer 1969).

- ¹⁰ Urban renewal occupies a unique place in American political experience in two senses: first, it has increasingly sought to involve the participation of citizens in affected neighborhoods (in addition to their representatives on city councils), and second, it has been one of the programs that have begun to change the shape of American federalism by emphasizing direct federal-city relations instead of the earlier pattern of federal-state relations.

Wilson, *Introduction to URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* at xviii (J. Wilson ed. 1966). For an extended discussion of the novel organizational demands on city administrations, see Duggar, *The Relation of Local Government Structure to Urban Renewal*, 28 LAW & CONTEMP. PROB. 49 (1961). See also C. ABRAMS, *THE CITY IS THE FRONTIER* 211-53 (1965).

- ¹¹ Counting both families and individual households,

there were approximately 1,665,000 American citizens involved in the federal urban renewal program at the end of 1962. This is approximately the same number of people that live in Detroit, Michigan, the fifth largest city in the United States.

M. ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962*, at 54 (1964). As of year's end 1962, 1,210 urban renewal projects had received final federal grant payments; by the end of 1968 final federal grant payments had been made to 2,038 approved projects. SUBCOMM. ON HOUSING AND URBAN AFFAIRS, SENATE COMM. ON BANKING AND CURRENCY, 91ST CONG., 1ST SESS., *PROGRESS REPORT ON FEDERAL HOUSING AND URBAN DEVELOPMENT PROGRAMS* 118 (Comm. Print 1969).

¹² Kadish, *Judicial Review in the United States Supreme Court and the High Court of Australia*, 37 TEXAS L. REV. 131, 155 (1958). Jerold H. Israel has explored the mechanics of judicial law change in Israel, *Gideon v. Wainwright: The "Art" of Overruling*, in THE SUPREME COURT AND THE CONSTITUTION 263 (P. Kurland ed. 1965). For thoughtful, even meditative discussions of judicial law-making, see Traynor, *The Judges and Law Reform*, 5 TRIAL 37 (No. 3, Apr.-May 1969); Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739 (1970).

tudes have occurred. Since the urban renewal story has been told in a voluminous literature, only some of its most essential aspects need be traced here. Many of the urgent and pressing issues raised by urban renewal programs have not been faced by the courts. A study of the decisions will therefore sketch in only a part of the process. The essential dynamics of the rebuilding of America's cities must be sought elsewhere—in legislation, public debate and political controversy.¹³

In order to assess properly the shift in judicial position on review of urban renewal and land use programs, some discussion of the once relatively solid front of the courts on the controlling issues is necessary. With this perspective, it will be possible to appreciate the emerging activism in judicial review of urban renewal¹⁴ and urban redevelopment¹⁵ problems represented by recent decisions such as *Norwalk CORE v. Norwalk Redevelopment Agency*.¹⁶

The study closes with a description and evaluation of current litigation designed to widen the perimeters of judicial review. Most of the suits to be discussed have not reached final disposition by appellate tribunals and some await lower court adjudication. The very fact of litigation is significant, however, because it represents an assessment of the judicial temper by those who are most sensitive to shifts in court attitudes—the lawyers who appear before judges in the trial courts. Though

¹³ Foard & Fefferman, *Federal Urban Renewal Legislation*, 25 LAW & CONTEMP. PROB. 635 (1960), is an excellent study of the legislative history and background of much of the currently operative urban renewal law. For an example of recent controversy over local participation in Model Cities programs, see N.Y. Times, May 22, 1969, § 1, at 1, col. 1.

¹⁴ An extensive discussion of some of the terminology of the varying efforts to renew America's cities appears in Slayton, *Conservation of Existing Housing*, 20 LAW & CONTEMP. PROB. 436, 438 (1955). Succinct definitions of the essential terminology of urban renewal appear in Johnstone, *The Federal Urban Renewal Program*, 25 U. CHI. L. REV. 301 n.2 (1958). See S. GREER, *supra* note 5, at 20-27, for a sociologist's rendering of the terminology of urban renewal.

¹⁵ *Redevelopment* is now generally used to denote a governmentally motivated form of urban action, normally created by a specific state statute, aimed at the destruction of an evil commonly referred to as "blight," followed by utilization of the newly renovated areas by private persons who acquire ownership or leases under restrictions and controls to ensure that "blight" will not recur. Jacobs & Levine, *Redevelopment: Making Misused and Disused Land Available and Usable*, 8 HASTINGS L.J. 241, 244 (1957). Redevelopment, at least its nascent stages, was first given statutory expression in New York and Illinois. Urban Redevelopment Corporations Law, N.Y. UNCONSOL. LAWS §§ 3301-22 (McKinney 1949); The Neighborhood Redevelopment Corporation Law, ILL. REV. STAT. ch. 32, §§ 550.1-44 (1954). Federal assistance for redevelopment is provided by 42 U.S.C. § 1464 (Supp. IV, 1969), and the enactments preceding its present designation.

¹⁶ 395 F.2d 920 (2d Cir. 1968).

often "test case" litigation is designed to formulate issues for resolution by appellate courts, lawyers are not uniformly insensitive to the immediate needs of their clients. Presumably, the bringing of the suit represents an informed prediction that relief will be granted, hopefully sooner than later.¹⁷

The recent significant shifts in judicial attitude toward review of urban renewal agency decisions have occurred in the federal courts, and it is federal court review that will be primarily considered in this Article.¹⁸ This is not to deny that state courts have played a significant role in the legitimation of urban renewal and slum clearance schemes.¹⁹ Far too often, however, the rights of many citizens affected by urban renewal programs cannot be adequately protected by proceedings in state courts.²⁰ This is particularly true of those displaced by such

¹⁷ See ABA CANONS OF PROFESSIONAL ETHICS No. 30:

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. . . . His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2, EC 2-30 (1969); *id.* DR 2-109; *id.* DR 7-102(A) (1)-(2).

¹⁸ And of course it is the federal courts that have amplified many of the relevant administrative law problems. See L. JAFFE, *supra* note 1, at 461 (1965):

Most of the writing on standing, as on administrative law generally, has been preoccupied with federal law. . . . The great, the dramatic developments have been in the federal sphere. But we are now in a period of doctrinal consolidation. Though there are obvious differences between state and federal law, . . . it is the resemblances which predominate.

¹⁹ That the [state] courts have played a major supporting role in the efforts to renew our cities is witnessed by the decisions of . . . the highest courts of twenty-nine states, the District of Columbia, and Puerto Rico sustaining local slum clearance and redevelopment legislation and project activities against a variety of constitutional and procedural attacks. . . . Since the beginning of the urban renewal program in 1949, there have been over 200 cases filed in thirty-four jurisdictions with respect to urban renewal projects and undertakings, exclusive of routine condemnation cases.

Osgood & Zwerner, *Rehabilitation and Conservation*, 25 LAW & CONTEMP. PROB. 705, 711 (1960).

²⁰ Cf. *Housing and Redevelopment Authority v. Minneapolis Metropolitan Co.*, 259 Minn. 1, 104 N.W.2d 864 (1960); *Hunter v. City of New York*, 121 N.Y.S.2d 841 (Sup. Ct. 1953). A classic—and cruel—illustration of the dilemma of litigants who seek to challenge urban renewal activity may be seen by the one-two punch delivered to relocatees in Illinois where both federal and state courts closed the door to judicial consideration of the problems of relocation. *Harrison-Halsted Community Group v. HHFA*, 310 F.2d 99 (7th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963). See text following note 103 *infra*; *City of Chicago v. R. Zwick Co.*, 27 Ill. 2d 128, 188 N.E.2d 489, *appeal dismissed sub nom. Gonzales v. City of Chicago*, 373 U.S. 542 (1963).

projects. State court relief, expressed most frequently in eminent domain condemnation proceedings, is often inadequate and usually too late.²¹ Moreover, neighborhoods marked for clearance usually begin to deteriorate as soon as schemes to redevelop them are made public. Landlords cease to repair, municipal services decline and residents begin to flee, often leaving the housing stock in disrepair and sometimes abandoned. Federal court review prior to condemnation proceedings is necessary if many of the disputes emerging from urban land use plans are

²¹ A recent study indicates that

[p]resent levels of relocation assistance are inadequate to compensate the losses suffered and individuals forced to leave their homes by government land acquisition and code enforcement campaigns. . . . By the time the number of displacements resulting from condemnation had become significant [*i.e.*, prior to massive government financed urban renewal programs], the concept of "just compensation" had already crystallized into substantially its present form: the market value of the property taken. Incidental losses are generally ignored in condemnation awards, at least in theory, unless they are directly associated with real property.

Note, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 STAN. L. REV. 801, 803 (1969). Although many groups have suffered, the impact on small businesses has been devastating. Brown University sociologist Basil G. Zimmer has written of the personal disasters suffered by small businessmen in Zimmer, *The Small Businessman and Relocation*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 380, 401 (J. Wilson ed. 1966):

The programs for rebuilding cities are effectively eliminating the small marginal businesses. For such units, relocation is frequently not feasible. These businesses tend to be owned by older persons and those with very limited financial resources. Displacement in such cases has the effect of depriving the owners of their usual livelihood, meager as it may have been prior to the disruption. For the most part, the owner received no compensation for his loss, even though he had been forced to vacate his site. In some instances where they happened to own the building that they occupied, some minor adjustments may have been made in the price paid for the property which would make the loss less severe. But no such even token adjustments were possible in the case of renters.

See also Ayer, *Allocating the Costs of Determining "Just Compensation,"* 21 STAN. L. REV. 693, 703-06 (1969); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1245-58 (1967); Sengstock & McAuliffe, *What is the Price of Eminent Domain? An Introduction to the Problems of Valuation in Eminent Domain Proceedings*, 44 J. URBAN L. 185 (1966). For a comprehensive compilation of the authorities, see Mandelker, *Housing Codes, Building Demolition and Just Compensation*, 67 MICH. L. REV. 635, 655 nn.92-94 (1969).

Ironically, "absence of a written constitution allows the English system greater flexibility in deciding when to compensate. Parliament makes the sole and final policy judgment as to what is fair. If it provides for compensation, then there is compensation; if not, then there is none. . . . [T]he courts fix awards at amounts that will compensate not only for loss of the land itself, but also for disruption of business, loss of good will, and removal expenses. The aim is full compensation for the whole change in the landowner's position before and after the taking." LAW AND LAND 277 (C. Haar ed. 1964).

to be resolved satisfactorily and not mooted.²² An appreciation of the struggle therefore primarily requires an appreciation of the evolution of review of urban renewal legislation by federal judges.

JUDICIAL LEGITIMATION OF URBAN RENEWAL

*I am not aware of any limitations in the Constitution of the United States upon a State's power to condemn land within its borders, except the requirements as to compensation.*²³

The Mood of Acquiescence

Limited judicial review of legislation designed to remedy urban housing ills is in large part the heritage of a traditional deference by the courts to the judgment of the people's elected representatives in the determination of land to be taken for public use. As Justice Frankfurter observed in his concurrence in *United States ex rel. TVA v. Welch*,²⁴ the Supreme Court

never deviated from the view that under the Constitution a claim that a taking is not "for public use" is open for judicial consideration, ultimately by this Court. It is equally true that in the numerous cases in which the issue was adjudicated, this Court never found that the legislative determination that the use was "public" exceeded Constitutional bounds.²⁵

Thus, the Supreme Court's decision in *Berman v. Parker*²⁶ in 1954 was but the culmination of more than a half century of judicial *laissez faire*-

²² If federal court review is to exist, it must be available at an early stage before these conditions begin to materialize. It may be argued that this is the only time at which many of the legal issues are open to judicial scrutiny. After the displacement has been effected by the commencement of the scheme, the litigants' efforts to enjoin the project are largely mooted since the primary damage sought to be prevented has become an irrevocable fact.

²³ *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 260 (1905) (Holmes, J., dissenting).

²⁴ 327 U.S. 546 (1946).

²⁵ *Id.* at 557. The majority opinion was susceptible to a broader reading than that of Mr. Justice Frankfurter. See notes 35-39 *infra* and accompanying text.

²⁶ 348 U.S. 26 (1954). Some commentators thought the public use doctrine was dead before *Berman*. Cf. Note, *The Public Use Limitation on Eminent Domain*, 58 YALE L.J. 599, 613-14 (1949), which commented on *Welch*:

The Supreme Court has repudiated the doctrine of public use. Most state courts have arrived at the same conclusion, although rarely with so much directness. Doubtless the doctrine will continue to be evoked nostalgically in dicta and

ism in eminent domain.²⁷ It was the archetypical case of taking from *A* in order to give to *B*. Pursuant to statute²⁸ the District of Columbia Redevelopment Land Agency sought to obtain nonslum property which was used as a department store. After acquisition, the property was subject to sale to another private party for use in accordance with an area-wide plan promulgated by the Planning Commission. Giving the statute the broadest possible scope,²⁹ Justice Douglas, speaking for a unanimous court, suggested that the landowner sought to substitute his standard of the public need for the standard prescribed by Congress.

If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. . . . It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.³⁰

"Once the question of the public purpose has been decided" was a fateful phrase. Read against the backdrop of *Welch*, which the court cited twice in the nine-page opinion, the language of *Berman*, if not

may even be employed authoritatively in rare, atypical situations. Kinder hands, however, would accord it the permanent interment in the digests that is so long overdue.

²⁷ For a collection of some of the state court decisions upholding urban renewal laws, see *In re Opinion of the Justices*, 332 Mass. 769, 126 N.E.2d 795 (1955); Osgood & Zwerner, *supra* note 19, at 711-12 (1960); 1955 ILL. L.F. 145 n.6.

²⁸ District of Columbia Redevelopment Act of 1945, ch. 736, 60 Stat. 790 (1946).

²⁹ The Court expressly disavowed a much narrower construction by Judge Prettyman, who wrote the opinion for a three-judge court in *Schneider v. District of Columbia*, 117 F. Supp. 705 (D.D.C. 1953), upholding the same legislation:

The District Court below suggested that, if such a broad scope were intended for the statute, the standards contained in the Act would not be sufficiently definite to sustain the delegation of authority. . . . We do not agree. We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums.

³⁴⁸ U.S. at 35. In *Schneider*, the case to which Justice Douglas had referred, Judge Prettyman said that the Government's claim was

that if slums exist the Government may seize, redevelop and sell all the property in any area it may select as appropriate, so long as the area includes the slum area. This amounts to a claim on the part of the authorities for unreviewable power to seize and sell whole sections of the city.

117 F. Supp. at 721.

³⁰ 348 U.S. at 35-36.

the facts upon which it was based,³¹ extremely narrowed the role of the judiciary while expanding to the outermost limits the power of the legislature to define public purpose.

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.³²

In declaring "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation"³³ and affirming the right of Congress to pursue definitions of public use under the aegis of police power, Justice Douglas all but removed the judiciary from the urban renewal equation.³⁴

³¹ The record and opinion of the lower court, 117 F. Supp. 705, make it clear that the renewal scheme was not unreasonable because the selected area was blighted by any standard.

Surveys revealed that . . . 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating.

348 U.S. at 30. In the same area death rates from tuberculosis per 100,000 population amounted to 83.7 persons as opposed to 35.5 for the entire District of Columbia, and deaths from syphilis 41.8 per 100,000 as opposed to only 7.1 for the entire District of Columbia. 117 F. Supp. at 709.

³² 348 U.S. at 33.

³³ *Id.* at 32.

³⁴ 1955 ILL. L.F. 145, and 40 IOWA L. REV. 659 (1955), disapproved of the decision. *Contra*, 53 MICH. L. REV. 883 (1955), viewing the case as a retreat from *Welch*:

[*Berman*] reasserts the intention of the Court to determine for itself whether a condemnation is for a public purpose, but the Court indicates that its role here is an extremely limited one. . . . Thus it is clear that the requirement of public use no longer exists and the only limits upon the federal government's power of eminent domain are the requirements that just compensation be paid and that the object falls within one of the enumerated powers.

Id. at 884.

Jacob M. Lashly, American Bar Association President for 1940-41, noted:

Though *Berman* might be viewed as the last brick in a wall of separation between the courts and the urban renewal programs, in some respects it did not go so far as *Welch*, where the Court approved TVA's taking of land in an isolated area to add to a national park. The action was designed solely to save local, state and federal authorities the cost of constructing a costly highway to reach families cut off when a TVA-constructed power dam flooded the only road servicing the disputed area. Justice Black, writing for the Court, declared, "it is the function of Congress to decide what type of taking is for public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."³⁵ Citing with approval language from an earlier case where the Court had said that legislative determination of public use "is entitled to deference until it is shown to involve an impossibility,"³⁶ Justice Black said that any other course "would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question."³⁷

Perceiving the implications of the Court's rationale, Justice Reed concurred in the result but refused to join in the opinion

The decision and opinion passed over quietly, like the Fourth of July in a foreign country. Yet, it informed the country that we have come to the end of something, to the end of much that we have been accustomed to regard as precious and to suppose that we would never relinquish. . . .

What measures are for the public good and what are public uses and purposes in the first instance are matters for legislative determination. The legislative decision of those agencies, when acting within their constitutional and statutory powers, are conclusive upon property owners. Courts are to determine questions of power, not policy. The decision seems to introduce a new era in democracy. Community symmetry and benefits are to be substituted for individual preferences, and the privileges of property ownership and the rights of property uses are to be directed and, in a larger measure than previously, controlled by public authority. The decision is of great political significance as well as legal consequence.

Lashly, *The Case of Berman v. Parker*, 41 A.B.A.J. 501, 503 (1955).

Mr. Lashly's lachrymose prose echoed Judge Prettyman's nostalgia about the poor . . . entitled to own what they can afford. The slow, the old, the small in ambition, the devotee of the outmoded have no less right to property than have the quick, the young, the aggressive, and the modernistic or futuristic.

117 F. Supp. at 719.

Other students of eminent domain viewed the decision in *Berman* more favorably. Allison Dunham applauded Justice Douglas' equating public use with public purpose, which removed "a real limitation on governmental power." Dunham, *Property, City Planning and Liberty*, in *LAW AND LAND* 28, 37 (C. Haar ed. 1964). In Dunham's view, *Berman* liberated planning so that its decisions could be subjected "to the tests of the market place." *Id.* at 35-36.

³⁵ 327 U.S. at 551-52.

³⁶ *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925).

³⁷ 327 U.S. at 552.

because of certain language which implies . . . that there is no judicial review of the Authority's determinations that acquisition of these isolated pieces of private property is within the purposes of the TVA Act. . . .

This taking is for a public purpose but whether it is or is not is a judicial question. Of course, the legislative or administrative determination has great weight but the constitutional doctrine of the Separation of Powers would be unduly restricted if an administrative agency could involve a so-called political power so as to immunize its action against judicial examination in contests between the agency and the citizen.³⁸

Furthermore, Justice Frankfurter, while endorsing the opinion of the Court, felt compelled to write a separate concurrence to emphasize "the fact that the nature of the subject matter gives the legislative determination nearly immunity from judicial review does not mean that the power to review is wanting."³⁹

In tandem, *Berman* and *Welch* represent the nadir of activism in judicial review of land acquisition through eminent domain.⁴⁰ Together they are representative of a judicial attitude of restraint which was to characterize subsequent review of urban renewal programs.

The Gordian Knot of Standing to Sue

For fifteen years following *Berman* the bleak lesson of federal court judicial review of urban renewal program activity was that city hall was invincible.⁴¹ In lawsuits where powerful economic and political interests were arrayed on the side of government in the name of progress, the outcome was with monotonous regularity favorable to urban renewal agencies. Litigants who attacked the planning process in federal courts prior to state eminent domain proceedings were often directed by the judges merely to await their day in court.⁴² How-

³⁸ *Id.* at 556-57.

³⁹ *Id.* at 557.

⁴⁰ "[*Berman*] appears to foreclose any substantial federal judicial control of renewal programs through the public use requirement." Note, *Public Use as a Limitation on Eminent Domain in Urban Renewal*, 68 HARV. L. REV. 1422, 1426 (1955).

⁴¹ *Norwalk CORE v. Norwalk Redevelopment Agency (Norwalk I)*, 395 F.2d 920 (2d Cir. 1968), discussed at text following note 142 *infra*, marked the end of this period.

⁴² *E.g.*, *Green Street Ass'n v. Daley*, 373 F.2d 1, 6 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967):

[I]n nearly all cases the question of whether land to be acquired will be devoted to a public purpose is more appropriate for the state court to make in condemnation proceedings.

Cf. Baber v. Texas Util. Co., 228 F.2d 665 (5th Cir. 1956).

ever, the day in state court condemnation proceedings was (and still is) usually a "dark" one, for eminent domain only involves the adequacy of compensation, not the propriety of the taking in the first instance. Courts grope rather ineffectually at determining how "just" compensation may be expressed in dollars and cents. They rarely, if ever, overturn the condemnor's decision to condemn.⁴³

Since the propriety of the taking—and the often attendant catastrophic effects—is a state court responsibility, federal judges often demur to the task of reconciling the sovereign power with Hobhouse's insistence that a rational social order does not rest "the essential indispensable condition of the happiness of one man on the unavoidable misery of another, the happiness of forty millions of men on the misery of one."⁴⁴ In cases after *Berman*, standing to sue was the rubric under which federal courts escaped the urgent questions presented by litigants seeking refuge from the urban renewal juggernaut.

Standing has been a special and largely self-imposed cross of the federal courts.⁴⁵ Though Congress has dealt generally with the question

⁴³ See Comment, *Abusive Exercises of the Power of Eminent Domain—Taking a Look at What the Taker Took*, 44 WASH. L. REV. 200, 207, 212-13 (1968):

The courts have retained complete and independent control over matters of compensation and the observance of statutory and due process requirements. . . . More important, courts have tended to defer to legislative declarations, express or implied, of what uses are "public uses."

.....
[T]he requirement that the owner of appropriated property be compensated for the taking does add an effective limitation—perhaps the only real limitation—on the exercise of the power of eminent domain. . . . To the extent that he has *or can borrow* the money to pay for the property he wants, the requirement of compensation does not limit his exercise of the power. And even with compensation, the property owner is not fully protected. Aside from the fact that one can never fully compensate an owner for intangible losses resulting from the taking of his property, even economic [losses] . . . have been held noncompensable injuries incident to a taking.

⁴⁴ L. HOBHOUSE: LIBERALISM 41 (1964), *quoted in* Michelman, *supra* note 6, at 1166.

⁴⁵ The constitutional requirement of a case or controversy, U.S. CONST. art. III, § 2, as a prerequisite of federal court jurisdiction does not specify standing and justiciability as the two tests which must be met before a court can act. The doctrine of standing has been developed by the courts as an adjunct to determining whether a case or controversy exists over which they can properly assume jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968). The result of this analytical tool has been a rigidification of the criteria of standing as ends which themselves must be met, regardless of whether a case or controversy might otherwise exist. While *Flast* suggests a return to examining the purposes for which the doctrine of standing was originally designed to serve in order to determine whether the court can take the jurisdiction of the case, *id.* at 99-101, it is doubtful that a body of case law so long established will erode overnight. The result will presumably continue to be that

[o]ne who is seriously harmed by reviewable administrative action which is

of standing in the Administrative Procedure Act (APA),⁴⁶ it has not specifically provided for judicial review of action by the Department of Housing and Urban Development (HUD).⁴⁷ Since there is no "person

illegal or even unconstitutional is often denied judicial review on account of lack of standing. The law of standing is fundamentally artificial to the extent that one who is in fact harmed by administrative action is held to lack standing to challenge the legality of the action. The artificiality—frequently running counter to natural instincts of judges—results in a complexity that is so great that the Supreme Court often violates the principles that the Court has laid down for its own guidance.

- 3 K. DAVIS, ADMINISTRATIVE LAW § 22.01, at 210 (1958). Professor Davis notes that [i]n contrast with the federal courts, many state courts recognize the standing of citizens, of residents, and of persons described as "citizens and taxpayers" to challenge administrative action. Standing of taxpayers is very common *Id.* § 22.10, at 249.

⁴⁶ The APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (Supp. III, 1968). While the Supreme Court has never decided the question, lower courts have consistently held that the APA does not expand the law of standing and that a person must have suffered a legal wrong or be able to point to a statute that specifically authorizes judicial review before he can rely on this section of the APA to support his claim for standing. *E.g.*, *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955). While Professor Jaffe endorses this position, L. JAFFE, *supra* note 1, at 528-31, Professor Davis, an advocate of a liberal and expansive law of standing, has argued that the older concepts of standing were broadened by Congress to include persons "adversely affected in fact." 3 K. DAVIS, *supra* note 45, § 22.02, at 212.

⁴⁷ See Note, *Family Relocation in Urban Renewal*, *supra* note 4, at 890-94; Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L.J. 966 (1968); Note, *Protecting the Standing of Renewal Site Families to Seek Review of Community Relocation Planning*, 73 YALE L.J. 1080 (1964). The only administrative remedy available to objectors who are not parties to the contract between the Department of Housing and Urban Development (HUD) and the local public agency (LPA, the agency usually executing the urban renewal plan), is to protest at a public hearing provided by statute and HUD regulation. 42 U.S.C. § 1455(d) (Supp. IV, 1969); HUD URBAN RENEWAL HANDBOOK, RHA 7212.1, ch. 1, at 3. The meeting considers the entire redevelopment plan and hardly lends itself to the interposition of personal or individualized objections. However, enterprising lawyers of the NAACP Legal Defense and Educational Fund, Inc. (and its newly funded division, the National Office for the Rights of Indigents) devised and filed complaints with HUD concerning projects in Pulaski, Tennessee, and Newark, New Jersey. Both complaints led to successful adjustment of community grievances about project plans. In the Pulaski controversy, the Renewal Assistance Administration of HUD rejected the final stage of the city's renewal plan partly because of the LPA's inability to provide adequate relocation facilities. In Newark, the complaint led to a massive reduction in the amount of land to be taken for the site of a medical college and the establishment of five committees, each with a majority of site residents to insure proper relocation, increased employment and better health services. See Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. PA. L. REV. 183, 202-04 (1968).

aggrieved" statute upon which the disputants of HUD activity can premise their standing,⁴⁸ they must seek to convince the court that they have been subjected to a legal wrong⁴⁹ or are implied beneficiaries of a statute.⁵⁰

In *Gart v. Cole*⁵¹ the court was faced with efforts of landowners and

⁴⁸ See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), which held that § 402(b) of the Communications Act of 1934, 47 U.S.C. § 402(b) (6) (1964), supported the right of a licensee of a broadcasting station to challenge an FCC permit to a rival station. The statute specifically provided for judicial review. The question was whether the licensee was a "person aggrieved or whose interests are adversely affected." *Id.* Prior cases had generally restricted the class of "persons aggrieved" to those showing a likelihood of economic injury. *E.g.*, *Southwestern Publishing Co. v. FCC*, 243 F.2d 829 (D.C. Cir. 1957); *NBC v. FCC*, 132 F.2d 545 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943). However, *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), *noted in* 52 VA. L. REV. 1360 (1966), apparently expanded "person aggrieved" to include a member of the licensee's audience. See 65 MICH. L. REV. 518 (1967).

On occasion, standing will obtain as a result of state or local legislative provision as in *Blachman v. Erieview Corp.*, 311 F.2d 85 (6th Cir. 1962), where plaintiff sued as a taxpayer pursuant to a specific provision in the city charter granting the right to institute proceedings to restrain performance of illegal contracts.

⁴⁹ Infringement by an agency or official of a right guaranteed by the Constitution, a statute, or the common law has generally been held a sufficient basis for standing under the "legal right theory." *Flast v. Cohen*, 392 U.S. 83 (1968) (alleged violation of establishment of religion clause of the first amendment); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (common law libel, by implication, held to support suit against agency for labeling it subversive); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940) (violation of statutory right, by implication).

The legal right theory of standing has been explained by Judge Frank:

In a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justiciable "controversy," without which, under Article III, § 2 of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invaded or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interest must be either of a "recognized" character, at "common law" or a substantive private legally protected interest created by statute. In other words, unless the citizen first shows that, if the defendant were a private person having no official status, the particular defendant's conduct or threatened conduct would give rise to a cause of action against him by that particular citizen, the court cannot consider whether the defendant officer's conduct is or is not authorized by statute. . . . Unless, then, the citizen first shows that some substantive private legally protected interest possessed by him has been invaded or is threatened with invasion by the defendant officer thus regarded as a private person, the suit must fail.

Associated Indus. v. Ickes, 134 F.2d 694, 700 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

⁵⁰ Findings of implied statutory protection against competition have been held a sufficient basis for the determination of standing. *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968), stating a concept first developed in *The Chicago Junction Case*, 264 U.S. 258 (1924).

⁵¹ 166 F. Supp. 129 (S.D.N.Y. 1958), *aff'd*, 263 F.2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959).

tenants to block New York City's Lincoln Square urban renewal project.⁵² A range of objections was raised against the project, among them that it violated the mandate of the first amendment for separation of church and state because Fordham University, a Catholic institution, sponsored the plan. Plaintiffs also claimed that the city's negotiation of minimum bids to be made by the sponsors at a subsequent public auction was unlawful and that the federal administrator of the Federal Housing and Home Finance Authority (HHFA is now HUD)⁵³ illegally denied tenants an oral hearing at which to challenge the feasibility of the city's relocation plan.

The court ruled that the plaintiffs did not have standing to sue under the APA.⁵⁴ It found they were not "suffering legal wrong because of any agency action" since the expenditure of funds for the project was not illegal. The only possible illegality in the scheme was the condemnation proceedings, and the court ruled that this issue must be decided by the state courts in eminent domain hearings.⁵⁵ It furthermore held that the plaintiffs were not "aggrieved . . . within the meaning of any relevant statute" since no statute provided specifically for judicial review nor did any legislative history imply that Congress contemplated such action.⁵⁶ The home owners and tenants were therefore denied the chance to litigate the merits of their case.

Although Lincoln Center now stands as a monument to the performing arts, to coordinated city planning,⁵⁷ and to the failure of area residents to bring the project to a halt, the Second Circuit Court of Appeals did take a more sophisticated view of the narrow issue of standing. While the court agreed with the district court's construction of the APA, it held, without offering an explicit rationale, that there was stand-

⁵² The case was the fifth of a protracted series of lawsuits seeking to halt the project, which included the famous Lincoln Center for the Performing Arts and its Metropolitan Opera House. *See* 64th Street Residences, Inc. v. City of New York, 4 N.Y.2d 268, 150 N.E.2d 396, 174 N.Y.S.2d 1, *cert. denied*, 357 U.S. 907 (1958).

⁵³ 42 U.S.C. § 3532(a) (Supp. IV, 1969).

⁵⁴ 166 F. Supp. at 134-35.

⁵⁵ *Id.* at 134.

⁵⁶ *Id.* at 135-36.

⁵⁷ There has been dissent about "decontaminated islands of monuments." *See* J. JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 167-70 (Vintage ed. 1961). She argues that primary uses, such as Carnegie Hall and the Metropolitan Opera House, are better spread throughout the city as "generators of diversity."

ing to challenge the refusal of HHFA to grant an oral hearing at which opponents could challenge the feasibility of relocation.⁵⁸

It may be possible to construct by inference the court's theory of standing. In dealing with the allegation that the bidding arrangements violated the Housing Act of 1949, the court said that the bidding procedures were designed to protect the public at large, not the site residents, and cited *Massachusetts v. Mellon*.⁵⁹ Immediately thereafter the court found there was standing to challenge the relocation plan. It therefore appears certain that while there was no standing as taxpayers to protect the general public, there was standing to protect individual rights as relocatees.⁶⁰ Although the basis of standing found was extremely narrow, *Gart* represented a rare recognition of the right to seek review of urban renewal activity in the federal courts. Ironically, subsequent cases limited the meager advance made in *Gart*, often citing that case as support for denying standing on general grounds.⁶¹

In a few urban renewal cases, courts have found standing presumably because the grievances were sharply defined—they could be reduced to some readily quantifiable concept—or were expressed in terms readily understandable by courts conditioned to protecting wealth and economic

⁵⁸ 263 F.2d 244, 250 (2d Cir. 1959). Despite the holding, the court refused to order such a hearing because there had been a previous public hearing and the Renewal Assistance Administration had granted an opportunity to submit documentary information on the issue of relocation. *Id.* at 250-51.

⁵⁹ 262 U.S. 447 (1923). The case was companion to the landmark *Frothingham v. Mellon*, 262 U.S. 447 (1923), where the Court rejected a suit by a taxpayer to determine the constitutionality of a federal statute providing grants to the states. *Frothingham* rested, of course, on lack of standing. In *Massachusetts*, the Court said the issue was political and therefore not justiciable. The force of both decisions has been diminished by *Flast v. Cohen*, 392 U.S. 83 (1968).

⁶⁰ The plaintiffs in *Gart* based standing on various provisions of the Housing Act of 1949 as well as the APA. The court said that the section prohibiting the Administrator from delegating the responsibility for reviewing findings by the LPA's of relocation feasibility, Housing Act of 1954, ch. 649, § 101(c), 68 Stat. 623, formerly 42 U.S.C. § 1451 (c)(iv), (repealed, Department of Housing and Urban Development Act, Pub. L. No. 89-174, § 7, 79 Stat. 670 (1965)), "is in protection of the interests of displaced residents such as appellants, [who] have standing" to raise the claim that the Administrator illegally delegated his duty. 263 F.2d at 251. The court, however, found summary judgment properly entered because of a lack of proof of misconduct.

⁶¹ E.g., *Harrison-Halsted Community Group, Inc. v. HHFA*, 310 F.2d 99, 104-05 (7th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); *Pittsburgh Hotels Ass'n v. Urban Redevelopment Authority*, 309 F.2d 186, 189 (3d Cir. 1962), *cert. denied*, 372 U.S. 916 (1963).

interests. Whatever the reason, it is clear that efforts to halt permanently an urban renewal project are almost invariably doomed to failure. On the other hand, as this Article will subsequently show, if some very narrow relief is sought that will not involve the court in confronting the political and economic decisions that led to formulating the project nor involve its consequent "disruption,"⁶² there is the possibility of getting beyond dismissal for lack of standing, and indeed, even beyond summary judgment.

*Merge v. Sharott*⁶³ illustrates judicial response to well-defined and narrowed prayers for relief. There, owners of the Asphalt Products Company brought suit in the District Court for the Western District of Pennsylvania against the Coordinator of the Urban Renewal Administration, the Administrator of the HHFA and the Urban Redevelopment Authority of Pittsburgh for declaratory judgment in an effort to recover \$30,500, the balance of the reasonable and necessary cost of moving their business. Pittsburgh's Chateau Street West Project included one-half of the land upon which the company operated as a unified business from two leased buildings located on opposite sides of the street. The Urban Renewal Authority paid the plaintiffs \$42,339.37, the cost of moving that part of the business which was operated from the building located in the project area, but adamantly refused to pay the cost of moving the remainder of the business housed across the street although there was absolutely no question that the two locations were operated as one indivisible unit.

The trial judge, apparently given to understatement, said he thought "*whoever is in charge . . . should have paid [the total expenses of relocation of the business] as an administrative matter. It seems to me just and fair that they should have paid it.*"⁶⁴ However, he accepted the defendants' argument that relocation payments are not a matter of right but of congressional grace,⁶⁵ and held that the owners of the business suffered no legal wrong that would entitle them to review under the APA.

The court of appeals disagreed, finding that the plaintiffs were "persons suffering legal wrong because of . . . agency action," were "adversely affected or aggrieved by such action," and were therefore

⁶² See generally Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 J. URBAN L. 1 (1968).

⁶³ 341 F.2d 989 (3d Cir. 1965).

⁶⁴ *Id.* at 991 (quoting unreported district court opinion).

⁶⁵ *Id.* See note 21 *supra*, especially the last paragraph.

"entitled to review under the Administrative Procedure Act."⁶⁶ Rather than attributing the relocation provisions of the Housing Act to Congressional largess, the court held they constituted a

binding obligation upon the United States . . . incurred pursuant to Congressional authority and design, as Congress from the first had evidenced a real and recurring concern for persons displaced as a result of the program, ultimately providing for compensation to mitigate their hardship.⁶⁷

Conceding that the amount of the relocation payment was within the discretion of the Housing and Home Finance Agency, the court held that

at the very least there is a substantial question . . . whether the Agency refusal to pay plaintiffs the balance of their moving costs is not arbitrary, capricious and actually contrary to the language of the statute and the HHFA regulations.⁶⁸

Finding that there was no way in which the company could proceed in the state courts under state law (since Pennsylvania did not authorize the payment of relocation expenses as part of its eminent domain proceedings), the court held that plaintiffs could sue in the district court on their claim against the HHFA for the balance of their moving expenses.⁶⁹

Merge represents the ideal situation from a plaintiff's point of view. The claim was liquidated. No alternative remedy existed. The Government's position was untenable, even outrageous. The intent of Congress was clearly to provide a compensatory subsidy⁷⁰ for businesses that were "urban renewed."⁷¹ The company was not attempting to represent

⁶⁶ 341 F.2d at 991. The court in this case also failed to define the precise theory of standing which it recognized. After noting plaintiff's theories of standing under the APA, it stated only that it saw "no real difficulty in plaintiffs continuing as they are under the Administrative Procedure Act." *Id.* at 995. Perhaps it is significant that the court thereafter noted that such "course has not been challenged by the defense." *Id.*

⁶⁷ *Id.* at 993 (footnote omitted).

⁶⁸ *Id.* at 995.

⁶⁹ *Id.*

⁷⁰ Cf. *Aycock-Lindsey Corp. v. United States*, 171 F.2d 518 (5th Cir. 1948).

⁷¹ The relocation payments were specifically provided for by 42 U.S.C. § 1456(f) (1958), which was repealed by Pub. L. No. 88-560, § 310(c), 78 Stat. 790 (1964); they are now authorized by 42 U.S.C. § 1465(b) (Supp. IV, 1969).

the general public or even a general class of relocated businesses. Also, in many ways the plaintiffs' claim was likely to be rare, for businesses situated as was plaintiffs' were bound to be few. Most important, payment of the claim would in no way disrupt development of the project.

Where protection of an asserted economic interest has required the court to judge the propriety and reasonableness of the decision to undertake the urban renewal project, standing has generally been found wanting. In the same year the Third Circuit found standing in *Merge*, the Second Circuit in *Berry v. HHFA*⁷² tersely disposed of an attempt by owners of a hotel to enjoin an entire nearby urban renewal project because it was to include transient housing units which would compete for guests that might otherwise have patronized plaintiffs' business. In a two-paragraph per curiam opinion the court denied standing to the hotel owners as taxpayers and as persons who sustained economic loss through competition, despite plaintiffs' contention that they were entitled to sue by virtue of a 1959 amendment to the Housing Act⁷³ which required a survey of the need for new hotels or transient facilities. The hotel owners had sought standing under 42 U.S.C. § 1456(g) partly to escape *Taft Hotel Corp. v. HHFA*,⁷⁴ which, relying on *Alabama Power Co. v. Ickes*⁷⁵ and *Perkins v. Lukens Steel Co.*,⁷⁶ held "[e]conomic loss stemming from lawful competition, even though made possible by federal aid, is *damnum absque injuria*."⁷⁷ The court, however, viewed the amendment as a device to protect the predominantly residential nature of projects and said the Housing Agency could vindicate the public interest by withholding funds if the provision was violated. Private hotel owners had no remedy, said the court.

⁷² 340 F.2d 939 (2d Cir. 1965) (per curiam).

⁷³ 42 U.S.C. § 1456(g) (Supp. IV, 1969).

⁷⁴ 262 F.2d 307 (2d Cir. 1958), *cert. denied*, 359 U.S. 967 (1959).

⁷⁵ 302 U.S. 464 (1938).

⁷⁶ 310 U.S. 113 (1940). *Perkins* was later legislatively overruled, 41 U.S.C. § 43a (1964), and according to Professor Davis "is difficult or impossible to reconcile with other Supreme Court decisions." 3 K. DAVIS, *supra* note 45, § 22.04, at 220. *Perkins* had held companies could not complain of and were bound by wage determinations made in administrative proceedings in which they did not participate. The statute under which the wage rates were made was not for the benefit of those who sold to the Government, the Court said, and the Government enjoyed "unrestricted power" to fix the terms upon which it would do business. Therefore, reasoned the Court, if the steel companies wanted to do business with the Government, they had to abide by the wage determinations even if they were founded upon erroneous statutory determinations, since no right of the companies had been violated.

⁷⁷ 262 F.2d at 308.

There are instances where an individual has no legal remedy even though a federal law affecting his interests may have been violated. Some statutes create public rights, enforceable only by the agency charged with their administration.⁷⁸

The holding was consistent with other decisions in which courts have had to choose between a citizen and an urban renewal project. Unable to frame the relief sought in terms that would not sabotage the project, the plaintiffs shared the fate accorded other litigants who had sought to stop urban renewal to avoid competition.⁷⁹

Displacee Relocation: Hard Cases and Human Suffering

The Housing Act of 1949 declared as its paramount objective "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family" ⁸⁰ The commitment was reaffirmed in the Housing and Urban Development Act of 1968 where Congress conceded that the "goal has not been fully realized for many of the Nation's lower income families; that this is a matter of grave national concern" ⁸¹ As to relocation, the original requirements of the Housing Act of 1949 for "decent, safe, and sanitary" ⁸² rehousing for displaced families were successively strengthened by Congress⁸³ in reaction to outrages visited upon poor (usually black)⁸⁴ families uprooted and dispersed by urban renewal projects.

⁷⁸ 340 F.2d at 940.

⁷⁹ The public good sought through the Housing Act could well be frustrated by delay and expense of litigation if allowed on the suit of every person objecting to possible competition in renewal projects.

Id.; see *Pittsburgh Hotels Ass'n v. Urban Redevelopment Authority*, 309 F.2d 186 (3d Cir. 1962), *cert. denied*, 372 U.S. 916 (1963) (hotel association and owners had no standing to enjoin construction of hotels by private parties to be built on urban renewal land which would compete with plaintiffs); *Allied-City Wide, Inc. v. Cole*, 230 F.2d 827 (D.C. Cir. 1956) (lessees of business premises had no standing to contest agreements between New York City and the HHFA which they said would result in their eviction without compensation).

⁸⁰ 42 U.S.C. § 1441 (Supp. IV, 1969).

⁸¹ 12 U.S.C. § 1701t (Supp. IV, 1969).

⁸² 42 U.S.C. § 1455(c) (1) (Supp. IV, 1969).

⁸³ See *Merge v. Sharott*, 341 F.2d 989, 993 n.6 (3d Cir. 1965); Note, *Family Relocation in Urban Renewal*, *supra* note 4, at 870.

⁸⁴ Although Negroes occupy only about one-fourth of the substandard dwelling units in the nation, nearly 70 per cent of the dwelling units condemned for urban renewal projects have been Negro residences. This is largely due to their central location and deteriorated conditions, but the effects are the same as they would be if dehousing Negroes were the goal. There is little indication that urban renewal has had any intention or effect of increasing the housing open to

The dismal story of urban renewal's relocation tragedy has been told repeatedly in excruciating detail⁸⁵ and need not be recounted here except as a stark backdrop to nearly a decade of judicial apathy and diffidence in the face of a social problem of the highest magnitude. As the Kerner Commission pointed out:

Today, after more than three decades of fragmented and grossly under-funded Federal housing programs, decent housing remains a chronic problem for the disadvantaged urban household. Fifty-six percent of the country's nonwhite families live in central cities today, and of these, nearly two-thirds live in neighborhoods marked by sub-standard housing and general urban blight. For these citizens, condemned by segregation and poverty to live in the decaying slums of our central cities, the goal of a decent home and suitable environment is as far distant as ever.

....

To date, Federal building programs have been able to do comparatively little to provide housing for the disadvantaged. In the 31-year history of subsidized Federal housing, only about 800,000 units have been constructed, with recent production averaging about 50,000 units a year. By comparison, over a period only 3 years longer, FHA insurance guarantees have made possible the construction of over 10 million middle and upper-income units.⁸⁶

Yet, while urban renewal was displacing six families for each low-rent unit constructed,⁸⁷ and while "families in New York City scurr[ied]

Negro occupancy, with the exception of public housing and a few relocation housing projects. Most of the 97 per cent of housing in the "standing stock" remains closed to Negroes, while a portion of that which is available to them is being destroyed.

S. GREER, *supra* note 5, at 151. See P. ROSSI & R. DENTLER, *THE POLITICS OF URBAN RENEWAL* (1961); Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L.J. 966, 967 n.7 (1968), which lists some of the literature of "Negro removal."

⁸⁵ See, e.g., C. ABRAMS, *THE CITY IS THE FRONTIER* ch. 8 (1965); HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., *STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS* 1 n.1 (Comm. Print. 1964), noted in ADVISORY COMMISSION ON INTER-GOVERNMENTAL RELATIONS, *RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENT* (1965); Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in *THE URBAN CONDITION* ch. 12 (L. Duhl ed. 1963); Hartman, *The Housing of Relocated Families*, 30 J. AM. INST. PLANNERS 266 (1964).

⁸⁶ REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 257, 259-60 (1968) (O. Kerner, Chairman).

⁸⁷ Note, *Family Relocation in Urban Renewal*, *supra* note 4. By March 31, 1961, the urban renewal program had eliminated 126,000 low-rent homes and replaced them

from one slum to another before the bulldozer, often being relocated three or four times in a few years,"⁸⁸ federal judges were making statements similar to the ironic declaration of the court in a case in which plaintiffs had alleged that blacks were being driven out to create a "no-Negro buffer zone"⁸⁹ between a shopping area and surrounding residential community on Chicago's south side:

This Court is aware of the problems to be solved in the relocation of persons displaced by urban renewal plans. However, if this litigation were permitted to restrain the civic action, it would be standing in the path of progress already made and perpetuating the de facto segregation already existing to the detriment of those that this action purportedly seeks to protect.⁹⁰

Though there were isolated instances where various provisions of the Housing Act of 1949 were held to support standing to sue federal and local urban renewal administrators,⁹¹ federal courts consistently denied standing to private citizens seeking to enforce the relocation requirements of section 105(c). Reasons given by the judges in their decisions in favor of urban renewal agencies "mesh so poorly with decisions in allied standing cases that other explanations must be sought for their willingness to leave displacees out in the cold."⁹² Since it seems clear,

with about 28,000 homes, most of them in a much higher rent bracket. M. ANDERSON, *THE FEDERAL BULLDOZER* 67 (1964).

By 1967, as noted by Richard Cloward of the School of Social Work of Columbia University, urban renewal and highway construction had demolished 700,000 low rental units during the 15-year period involved while urban renewal had built at the most 100,000 new units. Center for the Study of Democratic Institutions, *Center Diary: 18*, p. 27 (May-June 1967).

Brief for Plaintiffs-Appellants at 1, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).

⁸⁸ C. ABRAMS, *supra* note 85, at 148. The author cites a survey of 709 tenants of a site required for public housing which showed that 49% moved into sections mapped for future development. NEW YORK CITY PLANNING COMMISSION, *TENANT RELOCATION REPORT* (Jan. 23, 1954).

⁸⁹ *Green Street Ass'n v. Daley*, 250 F. Supp. 139, 141 (N.D. Ill. 1966), *aff'd*, 373 F.2d 1 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967).

⁹⁰ *Id.* at 147.

⁹¹ *Gart v. Cole*, 263 F.2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959) (construing § 101(c) of the Housing Act of 1949, 42 U.S.C. § 1451(c) (Supp. IV, 1969)); *Merge v. Sharott*, 341 F.2d 939 (3d Cir. 1965) (finding a displaced business had standing to challenge HHFA determination of moving expenses under § 114 of the Act). See notes 58, 63 *supra* and accompanying text.

⁹² Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L.J. 966, 969-70 (1968).

if not self-evident, that "the interest which displacees have in being re-located in decent, safe and sanitary housing is no less important than any other interest, 'competitive' or otherwise, which has been given statutory protection,"⁹³ the studied refusal of the federal courts to grant relief to largely indigent casualties of urban renewal campaigns does not seem adequately explained by obeisance to mistaken conceptions of the law of standing or indifference to human suffering. The reasons would seem to be more deeply rooted. Though various theories have been suggested for judicial timidity in review of urban renewal cases,⁹⁴ the relocation cases resist, if not defy, analysis. Candor does not surface as a special virtue in the decisions.

The Ninth Circuit in *Johnson v. Redevelopment Agency*⁹⁵ was first to deal with section 105(c). While the court seemed to indicate in one line of reasoning that displacees could not seek judicial relief until they had exhausted their administrative remedies by taking advantage of the expertise of the housing administrator, it also decided that, in the final analysis, standing would never obtain no matter how exhaustively administrative remedies were pursued.⁹⁶ The court rejected the theory that the plaintiffs were third-party beneficiaries of the contract between the Local Public Agencies (LPA) and the HHFA with the right to seek judicial enforcement of the statutory conditions imposed on the agencies.⁹⁷ This reason for the rejection was not well-developed, and was in fact erroneously premised on decisions such as *Gart* and the *damnum absque injuria* economic competition decisions in the Second and Third Circuits.⁹⁸ Yet the interest of the inhabitants of the renewal

⁹³ *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 935-36 (2d Cir. 1968).

⁹⁴ See Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 518-19 (1959).

⁹⁵ 317 F.2d 872 (9th Cir.), cert. denied, 375 U.S. 915 (1963).

⁹⁶ 317 F.2d at 874.

⁹⁷ *Id.*

⁹⁸ *Gart v. Cole*, 263 F.2d 244 (2d Cir. 1959), had held just the opposite—that displacees (actually in *Gart* potential relocatees) did have standing to enforce statutes enacted for their benefit. See notes 51-61 *supra* and accompanying text. The other two cases, *Allied-City Wide, Inc. v. Cole*, 230 F.2d 827 (D.C. Cir. 1956), and *Pittsburgh Hotels Ass'n v. Urban Redevelopment Authority*, 309 F.2d 186 (3d Cir. 1962), cert. denied, 372 U.S. 916 (1963), hinge on *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938). *Allied-City* involved an attempt to stop an entire urban redevelopment project because plaintiffs would be put out of business without compensation. The two-paragraph, per curiam decision simply held that injuries sustained by another's lawful use of money "has no standing to assert that a third person's action in providing the money will be illegal," 230 F.2d at 828, citing immediately thereafter *Alabama Power*. *Pittsburgh Hotels* was

sites was significantly and qualitatively different, both in human and legal terms, from that of businessmen avoiding competition. Clearly, the Ninth Circuit's decision was "an unwarranted refusal to afford judicial protection to the families' interests"⁹⁹ in relocation. The

absolute refusal by the court to intervene in the administration of section 105(c) at the instance of site families seems an abdication of the court's traditional institutional responsibility to insure that administrative action is confined to the bounds of agency discretion and authority.¹⁰⁰

The abdication of the *Johnson* court becomes even more painfully evident when the inadequacy of the administrative process is unmasked. In its suggestion "that parties who are in the process of being relocated may present their grievances, if any, to the Administrator, who is able to protect the interests of private individuals,"¹⁰¹ the Ninth Circuit suggested nothing at all. It is increasingly clear that the LPA and the Relocation Assistance Administration (RAA) do not adequately represent the interests of relocatees but often compromise their interests with those whose political and economic futures and fortunes depend upon successful completion of the renewal projects. This often requires the subordination of relocation and low-income housing goals to other considerations. A student of the relocation process has written:

The interests of relocatees are not always compatible with those of the business and civic leaders of the community. The leaders are in-

strictly an economic competition case in which one group of hotel owners tried to enjoin private persons from erecting transient facilities on land of the urban redevelopment authority on the grounds that there was no need for additional facilities and that no survey of the need had been made as required by statute. In *Alabama Power*, the Supreme Court decided that a private electric power company lacked standing to sue to enjoin the Government from undertaking lend-and-grant agreements with certain Alabama municipalities which would enable the cities to construct their own electricity distribution centers. The injury petitioner would have suffered was the loss of business resulting from the erection of rival and competing plants. The Court held the

municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results.

302 U.S. at 480.

⁹⁹ Note, *Protecting the Standing of Renewal Site Families to Seek Review of Community Relocation Planning*, 73 YALE L.J. 1080, 1084 (1964).

¹⁰⁰ *Id.* at 1086 (footnote omitted).

¹⁰¹ 317 F.2d at 875.

terested in the increased tax base that results from a renewal project, in revitalization of the downtown business district to offset competition from suburban shopping centers, and in luring the middle class back into the cities. These goals are achieved by using the renewal land for just about any purpose except low income housing; the more such housing is included in the renewal plan, the less land there is with which to satisfy the major objectives of these groups.¹⁰²

Almost simultaneously with the Ninth Circuit's decision in *Johnson*, the Seventh Circuit decided in *Harrison-Halsted Community Group, Inc. v. HHFA*¹⁰³ that residents and potential displacees had no standing to contest selection of their homes and neighborhood as the site for an extension of the University of Illinois and to challenge the feasibility of the plan under which many of the plaintiffs were to be relocated. For purposes of this study, *Harrison-Halsted* is far more significant than *Johnson*.¹⁰⁴ Plaintiffs, premising standing on the federal question provisions of 28 U.S.C. § 1331¹⁰⁵ and on sections 10(a) and (c) of the APA, attacked both the relocation plan and the entire redevelopment scheme. Unfortunately for plaintiffs (a circumstance the court made much of), they had originally favored a renewal plan for the area on Chicago's near west side when they thought it was going to provide largely commercial redevelopment with advantageous economic implications for residents of the community. However, when city officials replaced the earlier decision for commercial redevelopment with a plan for what amounted to a huge educational park, the residents realized they were going to be removed, not renewed. Consequently, they became vigorous opponents of the city's plan for the area, rather than the enthusiastic supporters they had theretofore been. Thus, the challenge was construed by the court as an effort to win by lawsuit what had been lost in the political-legislative process—a decision about the reuse of the land which accorded with their own immediate interests.¹⁰⁶ *Berman* was invoked to support the court's refusal to intervene:

¹⁰² Tondro, *supra* note 47, at 198 (footnotes omitted).

¹⁰³ 310 F.2d 99 (7th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963).

¹⁰⁴ *Johnson* was decided May 17, 1963, *Harrison-Halsted* November 28, 1962. Yet the *Johnson* opinion makes no reference to *Harrison-Halsted*, though it would have been far stronger precedent than any of the cases relied upon by the Ninth Circuit.

¹⁰⁵ The court disposed of this theory of standing at the end of the opinion in 15 words: "As plaintiffs have failed to establish any standing to sue in this federal court action, . . . the decision of the District Court, dismissing the amended complaint . . . is affirmed." 310 F.2d at 106 (emphasis added).

¹⁰⁶ Plaintiffs had no objection, in fact, they favored the original slum clearance

The use to which plaintiffs desired the land to be put is undeniably a lawful public use. But, using the area acquired as a site for the Chicago branch of the University of Illinois is likewise a lawful public use. Courts have consistently denied the standing of citizens to challenge the choice made by public authorities between different and competing public uses. The legislature, through its lawfully created agencies, rather than "interested" citizens, is the guardian of the public needs to be served by social legislation.¹⁰⁷

The same trust the *Johnson* court said it placed in the administrative process was placed by the Seventh Circuit in the Illinois state courts. Plaintiffs were advised that the court had "no right or justification to speculate that the state courts of Illinois will not protect any rights the plaintiffs may have."¹⁰⁸ "Rights," perhaps, the Illinois courts might well protect. But the result, as the court must have known, was pre-ordained—the residents would lose. For in state condemnation proceedings the question would simply be how much would be paid for the land, not whether the land should be taken.

As to standing under the APA, the court readily compared the plight of the residents to that of the private power company in *Kansas City Power & Light Co. v. McKay*.¹⁰⁹ There it had been held that petitioners enjoyed no right of review simply because they had suffered economic loss as a result of federally supported power programs.¹¹⁰ What was

program. They voiced vigorous objections, however, when the proposed plan for redevelopment of the area was changed from residential and commercial uses to the University of Illinois-Chicago campus project. They argued that their interests and the interests of the community would be better served were the area to be redeveloped for residential and commercial use.

Id. at 105.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 106. Prospects of winning in a state condemnation proceeding have been called "forlorn," because a court "almost certainly will acquiesce in the city's plan and limit relief to monetary compensation for property taken." Berger & Cogen, *Responsive Urban Renewal: The Neighborhood Shapes the Plan*, 1 URBAN L. ANNUAL 75, 77 (1968); cf. *City of Chicago v. R. Zwick Co.*, 27 Ill. 2d 128, 188 N.E.2d 489, *appeal dismissed sub nom. Gonzalez v. City of Chicago*, 373 U.S. 542 (1963); *Deerfield Park Dist. v. Progress Dev. Corp.*, 22 Ill. 2d 132, 174 N.E.2d 850 (1961).

¹⁰⁹ 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

¹¹⁰ As mentioned earlier, see notes 45-46 *supra* and accompanying text, Professor Davis has been critical of so unimaginative a reading of the APA on this question. However, Professor Jaffe believes "Judge Washington, writing for the court [in *McKay*], regarded the provision of APA, correctly in my opinion, as no more than declaratory of existing law." L. JAFFE, *supra* note 1, at 525. Professor Davis thinks the phrase "adversely affected" must be read as though it were amplified by the language used in both the House and Senate committee reports on the pending bill. S. Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946). "This subsection confers a right of review

needed to get standing under the APA according to *McKay* was a "legal wrong." Although the *Harrison-Halsted* court admitted that plaintiffs were adversely affected and aggrieved,¹¹¹ they had suffered no "legal wrong" and were not aggrieved—in the court's view—within the meaning of any relevant statute, as is supposedly required by the APA. Thus, plaintiffs were both out of court and (as attested by the striking architecture of the University of Illinois campus) out of the area. The court acknowledged the allegations concerning the relocation grievances, but failed specifically to treat them in the opinion, swallowing relocation and other issues raised by the plaintiffs in the discussion of the APA and the questions of public use controlled by *Berman*.

Some five years later, however, *Harrison-Halsted* was cited by the same circuit court in *Green Street Association v. Daley*¹¹² as it denied standing to relocatees in another area of the same city. Evidently overlooking the fact that it had never really articulated its reasoning on the relocation issues in *Harrison-Halsted*, the court declared, "[w]e see no reason to reexamine our position [on relocation] in that case."¹¹³

Ironically, the court was nearly trapped by one of its own precedents—*Progress Development Corp. v. Mitchell*.¹¹⁴ There it had held that plaintiff real estate developers stated a "federal cause of action" when they sought to enjoin Deerfield, Illinois, officials from condemning land for alleged park purposes that the plaintiffs had purchased on which to construct an interracial subdivision. Village officials of the exclusively white suburb commenced condemnation proceedings immediately after announcement of the developer's integration scheme. The developers charged in their suit that the corporation's civil rights were being

upon any person adversely affected *in fact* by agency action or aggrieved within the meaning of any statute." 3 K. DAVIS, *supra* note 45, § 22.02, at 212 (emphasis added). Professor Jaffe is impressed by the omission of the words "in fact." L. JAFFE, *supra* note 1, at 529.

¹¹¹ For instance, relying on earlier promises by the City of Chicago that the area was to be designated for conservation and redeveloped by rehabilitation and spot clearance, residents of the area and owners of businesses therein relocated in adjacent areas with the expectation of returning after *Harrison-Halsted* had been redeveloped. A new parish school, replacing one that had given way to an expressway, was built in the heart of the area upon assurance that it would fit with the redevelopment plan. As it turned out, the school was consistent with the earlier plan, but conflicted with the subsequent scheme to turn the entire area over to the University, and the new building had to be demolished. 310 F.2d at 101. The court acknowledged the "outraged feelings of many people who have interests in this area." *Id.* at 103.

¹¹² 373 F.2d 1 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967).

¹¹³ *Id.* at 7.

¹¹⁴ 286 F.2d 222 (7th Cir. 1961).

violated, and that the property was sought, not in furtherance of any public purpose to develop a park, but as a conspiracy to deny plaintiffs equal protection of the laws.¹¹⁵

In *Green Street*, the site occupants also alleged a conspiracy between the city and commercial interests to create in the Central Englewood area a "no-Negro buffer zone" between the shopping area and the 85 percent black residential area, which in just a few years had surrounded what had formerly been an all-white, working class neighborhood. The plan was alleged to be discriminatory as well as violative of due process, since it was approved without adequate hearing and its relocation provisions were geared to the patterns of residential segregation prevalent in Chicago.¹¹⁶ The Green Street Association, a residents' organization, and 125 individual black property owners and lessees filed suit to have the project declared invalid and to enjoin eminent domain proceedings planned for 300 buildings, consisting of 600 dwelling units. Standing in *Green Street* was bottomed not only on section 10 of the APA but also on the substantial federal question provisions of 28 U.S.C. § 1331(a).¹¹⁷

¹¹⁵ Ultimately the village was successful in its scheme to convert the interracial housing site into a park and the recreational site now "serves" the community.

¹¹⁶ 373 F.2d at 1-2. The Central Englewood Area was a 75-acre section of a 3,000-acre tract which had been designated as the Englewood Conservation Area pursuant to Illinois statute almost ten years before the lawsuit was commenced. Twenty-two acres of the Central project area were residential, 27 acres nonresidential. More than \$13 million in public funds were authorized for the scheme which called for new streets, parking lots and other improvements allegedly incidental to the "revitalization" of the shopping area which served the entire Englewood area.

¹¹⁷ The federal questions were supposedly presented by several civil rights violations, although the court really dealt only with the conspiracy allegation under 42 U.S.C. § 1983 (1964). However, the plaintiffs also claimed they were being deprived of their rights under the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1964), as applied by the Supreme Court to prohibit the refusal of a Missouri developer to sell a subdivision dwelling to an interracial couple, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), discussed in Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last*, 55 VA. L. REV. 272 (1969), and the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1964), which reads:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The plaintiffs charged that the urban renewal plan acknowledged the existence of a segregated housing market in Chicago and listed separate relocation facilities based on race for displacees. It is interesting to note that HUD now requires, to forestall LPA overstatement of available relocation facilities for nonwhites, a white-nonwhite breakdown in classifying displacees and housing resources. See Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L.J. 966, 979 n.63 (1968).

In affirming the dismissal of the district court,¹¹⁸ the court devoted much of its opinion to distinguishing the conspiracy in the suburb from that in the city. While it is unclear why the court's earlier civil rights stance in the *Progress Development* case was not equally applicable to the Englewood blacks in *Green Street*, three factors were given special prominence. First, the court said that the Central Englewood Project "is an integral part of a large conservation and urban renewal program undertaken by the City of Chicago,"¹¹⁹ apparently attempting to distinguish between a large, long range plan, and the precipitate *Progress Development* decision to create a park. Second, the court cited the absence of an allegation—present in the *Progress Development* complaint—that the project was designed solely to deprive plaintiffs of owning property.¹²⁰ Finally, the court construed the *Green Street* complaint as questioning the motives of the planners for condemning the land. The court emphasized this construction of the complaint in denying standing, holding "the subjective reasons of the legislative authority seeking the acquisition" is an "inappropriate area for judicial inquiry,"¹²¹ although the court had previously held it proper to explore motive in *Progress Development*, which it now termed an "exceptional" case.¹²²

Other than its tortuous and strained avoidance of the problems raised by the *Progress Development* case, the *Green Street* court came to grips neither with the constitutional issues, raised for the first time in the context of a relocation case, nor questions raised by section 105(c) of the Housing Act and section 10 of the APA.

The *Green Street* decision illustrates "the extreme reluctance of courts, both state and federal, to touch an urban renewal case where an approved plan is under attack."¹²³ Somewhat complex explanations have been suggested for judicial reticence to review urban renewal questions:

What lies at the root of the court's self-denial is reluctance to unravel a plan that has been many years in the making, that has built up com-

¹¹⁸ See note 89 *supra*.

¹¹⁹ 373 F.2d at 6.

¹²⁰ *Id.*

¹²¹ *Id.* But as to motive questioning, see *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1097 (1969):

On the other hand, the courts do not appear as unwilling to examine the motives behind unequal administrative action and to strike down such action if it [was taken solely for racially discriminatory reasons].

¹²² 373 F.2d at 7.

¹²³ Berger & Cogen, *supra* note 108, at 78.

munity expectations, and that has presented several opportunities for discussion, persuasion and attack during its years of preparation. This unwillingness, in turn, is responsive to the widely shared opinion that the courtroom is the improper milieu for planning (or unplanning) the physical and human development of a community. Moreover, even the delay of such a plan for the course of a trial and inevitable appeals might set in motion a wave of repercussions that would be difficult to foresee and which few judges would risk unleashing on a community. During this interim, while condemnation is stayed, land values might rise, increasing project costs beyond the limits of local and federal funds committed or even available to the venture; demand conditions might change, so as to undo the reuse assumptions that underpin the renewal scheme; the terms and availability of construction financing or municipal borrowing might become less advantageous; existing community or political support for the program might despair and vanish; federal moneys might be diverted to citizens ready to proceed; urgently needed public improvements, such as schools and neighborhood centers, which depend upon the urban renewal scheme for their financing, might be indefinitely delayed; and assuming the neighborhood is indeed a "blighted" one, the deterioration might get far worse and even spread.¹²⁴

Another and less complicated rationalization of judicial abdication in the urban renewal cases might be that the political strength of the displacees is too diffused and lacks sufficient economic support to withstand the larger and more powerful forces that compel the adoption of a renewal scheme. The real answer might well be that the courts *would* not disturb renewal schemes, not that they *could* not. The school desegregation cases,¹²⁵ reapportionment and welfare cases¹²⁶ demonstrate the capacity and flexibility of courts to confront complex, allegedly

¹²⁴ *Id.* at 78. Berger and Cogen demonstrate that the organization, expertise and effectiveness of a community organization vitally determine whether opportunities to be heard are seized. The bitter experience of the Harrison-Halsted residents and the black business men of Nashville recorded in (or perhaps memorialized by) *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968), indicates the disasters that can befall groups that fail either to mount effective coalitions or move quickly against accomplished facts.

¹²⁵ See, e.g., Judge J. Skelly Wright's imaginative decision in *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968), in which he committed the court to a rigorous and thorough-going exploration of educational policies in an effort to make them nondiscriminatory, regardless of their intent. See Carter, *Equal Educational Opportunity for Negroes—Abstraction or Reality*, 1968 *ILL. L.F.* 160.

¹²⁶ Cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

"nonjusticiable" questions when there is a sufficiently powerful social and political consensus that they do so.¹²⁷

Such a consensus was indeed coalescing even while the Seventh Circuit was washing its hands of the Englewood controversy. The rising sense of the national urgency over the "problems of the cities," that new euphemism for the recurrent and age-old American racial agony, found expression the very next year in two decisions¹²⁸ in which courts decided they could no longer afford a "see no evil" policy in urban renewal cases. "What everybody knows the court[s] must know."¹²⁹ The Kerner Commission stated that "[h]ousing grievances were found in almost all of the cities studied and appeared to be among the most serious complaints in a majority of them."¹³⁰

Segregated housing in the cities is the most visible manifestation of the social disease from which America suffers; segregated public housing in the cities shows the disease in its most virulent and noxious form. And the existence of segregated public housing is the fault of the government, just as government must accept a major position of the blame for the continuation of segregation in private housing.¹³¹

But in most instances blacks and disadvantaged groups, the overwhelming majority of displacees, are unable to find remedies for their complaints. In all too many instances, they are confronted with decision-making organs indifferent and even hostile to their plight. Ample corroboration for this reality of powerlessness and consequential frustration was also uncovered by the Kerner Commission:

The political structure was a source of grievance in almost all of the cities and was among the most serious complaints in several. There were significant grievances concerning the lack of adequate representation of Negroes in the political structure, the failure of local political

¹²⁷ See generally Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458, 481-86 (1970).

¹²⁸ *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), discussed at text following note 142 *infra*; *Powelton Civic Home Owners Ass'n v. HUD*, 284 F. Supp. 809 (E.D. Pa. 1968).

¹²⁹ *Meredith v. Fair*, 305 F.2d 343, 344-45 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962), *citing* *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905).

¹³⁰ REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 81 (1968) (footnote omitted).

¹³¹ P. JACOBS, *PRELUDE TO RIOT: A VIEW OF URBAN AMERICA FROM THE BOTTOM* 169 (Vintage ed. 1968).

structures to respond to legitimate complaints and the absence or obscurity of official grievance channels.¹³²

Perhaps in recognition of this oppression of blacks and inner city inhabitants, Congress has groped for ways to alleviate some of the socially dysfunctional aspects of urban renewal. Aside from successive emphasis on the goals of adequate rehousing for the poor and seeking more effective ways of providing housing for displacees,¹³³ there has been a recognition that demolition of the existing housing stock is not necessarily the best way to provide adequate shelter for the poor.¹³⁴ The 1964 amendments to the Housing Act of 1949 required enforcement of housing codes as part of the price of participation in urban renewal.¹³⁵ The HUD Administrator is also forbidden to approve contracts providing for demolition unless he "determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area."¹³⁶ With increased legislative and political accommodation to the exigencies of national housing problems,¹³⁷ accompanied by

¹³² *Id.*

¹³³ Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L.J. 966, 984 (1968).

¹³⁴ See L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING 69-72 (1968). "The most acute housing problem for America's poor is . . . the continuing shortage of decent housing at a cost it can afford." Farnsworth, *The City in the Recent Past*, 1 RUTGERS CAMDEN L.J. 1, 9 (1969).

¹³⁵ 42 U.S.C. § 1451(c) (Supp. IV, 1969). Professor Frances Fox Piven of Columbia University's School of Social Work has indicated, however, that massive code enforcement would result in boarding up many urban structures because of the prohibitive cost of repairs. She sees this as a way of creating the kind of "crisis" necessary to marshal a consensus so that effective, not stop-gap, measures will be devised to house the poor. See Piven & Cloward, *Rent Strike: Disrupting the Slum System*, NEW REPUBLIC, Dec. 2, 1967, at 11, 14.

¹³⁶ Housing Act of 1949, § 110(c), 42 U.S.C. § 1460(c) (Supp. IV, 1969).

¹³⁷ Urban renewal is no longer exceptional, and cities are expected to have redevelopment programs. . . . [W]here renewal has succeeded, powerful real estate, political and commercial interests have come to depend on the federal largess. Urban renewal has become a significant source of political patronage, and considerable local resources have become committed to continued action to the point that they will be difficult to extract. . . . [W]hereas in an earlier day the primary political problems were overcoming apathy and winning the support of conservative business elements in the community, today's opposition increasingly comes from organized and disaffected slumdweller themselves. Where such groups exist, they should heighten the interest of local politicians in achieving adequate relocation. Thus, not only is the local program stronger and more resilient today than a few years ago, but also there are independent forces shifting the politics of renewal in the direction of better relocation.

Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L.J. 966, 985-86 (1968).

the gathering storm of black dissent and revolt, the time has arrived for the judiciary to disavow its past evasion and disingenuousness, and to assume a more active role in the urban renewal controversy.¹³⁸

Norwalk CORE AND NASCENT JUDICIAL ACTIVISM

*The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied . . .*¹³⁹

Toward Equal Protection in Urban Renewal

In *Green Street*, plaintiffs charged urban renewal officials with implementing a strategy to drive blacks from a shopping area in order to create a "no-Negro buffer zone." The plan was claimed to have run afoul of constitutional requirements of due process and equal protection because the Chicago City Council had approved it without adequate rehearing, and because the relocation plans helped to reinforce the existing patterns of segregated housing. The displacees were held, however, to have no standing to litigate their assertions.¹⁴⁰

The next year, blacks and Puerto Ricans made similar assertions—though perhaps more precisely phrased and amplified—about an urban

¹³⁸ Judges may have some preparation for this proposed shift in role by the activity of federally funded legal services programs. Though generally legal services lawyers have yet to emphasize urban renewal litigation, their imaginative efforts on behalf of welfare recipients, slum tenants and other disadvantaged persons have undoubtedly helped sensitize the courts to the need to make more tangible the law's purported equality.

For a comprehensive survey of the Office of Economic Opportunity Legal Service Programs, see Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967). An excellent symposium, *Justice and the Poor*, appears in 41 NOTRE DAME LAWYER 843 (1966).

It must be noted, however, that the salutary impact of legal services lawyers upon appellate judges does not necessarily influence trial level proceedings. A recent study for the OEO gives a bleak picture of the hostile and negative attitude of the bench in the San Francisco Bay area towards law reform activity on behalf of the poor:

[The] critical element in local lawyers' and judges' opposition to the program is their apparent inability to perceive the legal process as an instrument of social change. . . . The fact that many private practitioners and local judges not only refuse to accept, but do not even understand, this essential role of law in society has become a serious stumbling block for a program that offers one of the more promising alternatives to the use of violence as a means of solving social problems.

Stumpf & Janowitz, *Judges and the Poor: Bench Responses to Federally Financed Legal Services*, 21 STAN. L. REV. 1058, 1075-76 (1969).

¹³⁹ *St. Joseph Stock Yards v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

¹⁴⁰ See text at notes 112-24 *supra*.

renewal plan in Norwalk, Connecticut. Though the district court denied relief to the plaintiffs,¹⁴¹ the Second Circuit Court of Appeals held in *Norwalk CORE v. Norwalk Redevelopment Agency*¹⁴² (*Norwalk I*) that displacees of an urban renewal scheme have standing to sue in federal court when constitutional and legislative measures designed for their protection are violated. The widely discussed opinion signalled a return by the federal courts to both traditional and more realistic notions of standing.¹⁴³ It was also part of a deepening and more imaginative conception of the requirements of equal protection.¹⁴⁴ Furthermore, the justiciability conundrum was candidly and effectively confronted.

The facts of the case followed an all too familiar pattern.¹⁴⁵ The Norwalk Redevelopment Agency planned erection of commercial office buildings and a middle-income housing project on low-income housing sites, the demolition of which required the displacement of 271 families—nearly half of them black or Puerto Rican. The agency commenced demolition heedless of the uncontroverted facts that the pervasive community discrimination in housing severely restricted shelter to blacks and Puerto Ricans, that the vacancy rate in low-cost public housing in the city was wholly inadequate to meet the needs of the displacees, and that the minority group families who could find shelter were being forced into overcrowded and substandard housing at double the rents charged whites for superior facilities. The destruction of black and Puerto Rican homes continued although the Agency knew that plaintiffs “were being subjected to such hardships and deprivations in connection with relocation (not experienced to any substantially equal degree by white families in the City) that many were being forced to leave the City entirely.”¹⁴⁶

¹⁴¹ *Norwalk CORE v. Norwalk Redevelopment Agency*, 42 F.R.D. 617 (D. Conn. 1967), *rev'd*, 395 F.2d 920 (2d Cir. 1968).

¹⁴² 395 F.2d 920 (2d Cir. 1968).

¹⁴³ Several law reviews have noted—and saluted—this landmark decision. See 43 N.Y.U.L. REV. 1257 (1963); 20 SYRACUSE L. REV. 157 (1968); 14 VILL. L. REV. 149 (1968); 10 WM. & MARY L. REV. 482 (1968). See also Note, *The Federal Courts and Urban Renewal*, 69 COLUM. L. REV. 472, 494, 508-09 (1969); Note, *Family Relocation in Urban Renewal*, *supra* note 4, at 890-95; Comment, *Judicial Review in Urban Renewal Cases*, 57 GEO. L.J. 615 (1969).

¹⁴⁴ The equal protection aspects of *Norwalk* are emphasized in 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 176 (1968).

¹⁴⁵ The *Norwalk I* story is taken largely from the plaintiffs-appellants' brief and partly from the opinion. “Since the action was dismissed, the allegations of the complaint . . . must be accepted as true.” 395 F.2d at 924.

¹⁴⁶ *Id.* This was “Negro removal” with a vengeance. Most “Negro removal” schemes have involved shifting blacks around the city. Banishment and exile has either been

Plaintiffs, headed by the somewhat militant local chapter of the Congress of Racial Equality (CORE),¹⁴⁷ sought injunctive relief to prevent the City and Agency from conveying six acres of cleared land within the project area to a private developer who planned the erection of moderate-income housing and from further demolition until site occupants were properly relocated. Plaintiffs sought an order compelling defendants "to provide with all deliberate speed . . . low-rental housing units" and "to have such a program administered under court jurisdiction and control."¹⁴⁸

Regarding the threshold question of the plaintiffs' standing, the court affirmed the contention that section 105(c)¹⁴⁹ was enacted by Congress to confer upon displacees a "legal right" to protection.

[T]he fact that Congress intended to protect the specific interests of displacees when it enacted the section is enough to give the displacees standing, in the absence of a persuasive reason to believe that Congress intended to cut off judicial review. Judicial review obtains not only to advance what have traditionally been viewed as "legal rights," but also to vindicate the public interest, and Congress has made clear its view that adequate relocation is in the public interest.¹⁵⁰

In looking "to the traditional principles of standing,"¹⁵¹ the Second Circuit brought the problems in judicial consideration of urban renewal

seen as unnecessarily eroding the surplus labor pool, or else infrequently resorted to because less drastic effects were consistent with the project.

¹⁴⁷ Waverly Yates, Norwalk CORE Director, described urban renewal as "a program used to disenfranchise black people." Address by Waverly Yates, Norwalk CORE Director, National Lawyers Guild Second Regional Conference on Government Assisted Low- and Middle-Income Housing at Columbia University School of Law, June 6, 1969.

¹⁴⁸ Brief for Plaintiffs-Appellants at 7, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).

¹⁴⁹ Section 105(c) of the Housing Act, 42 U.S.C. § 1455(c)(1) (Supp. IV, 1969), provides that contracts for loans or capital grants shall require the availability or the provision of "decent, safe, and sanitary dwellings" for displacees "not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within [their] financial means"

¹⁵⁰ 395 F.2d at 934. The court several times used "legal right" as a quoted phrase, perhaps in allusion to section 10 of the APA. Standing was not, however, bottomed on the APA, although in a footnote the court adopted the construction placed on the Act in *Hadin v. Kentucky Util. Co.*, 390 U.S. 1 (1968) that the "person aggrieved" category of section 10 does not limit judicial review to those situations where Congress has explicitly referred to persons "adversely affected or aggrieved" by agency action, but may give standing to implied beneficiaries of the Act. 395 F.2d at 933 n.26.

¹⁵¹ 43 N.Y.U.L. REV. 1257, 1258 (1968).

programs into the increasingly liberal currents of judicial review.¹⁵² Indeed, it all but reaffirmed and extended its prior conception of standing in *Gart*.

The traditional, and even common law, origins of the court's position are evident from Judge Smith's citation of Mr. Justice Brandeis' opinion in *The Chicago Junction Case*.¹⁵³ In that case, rival railroad trunk lines sought to enjoin the Interstate Commerce Commission from permitting New York Central to acquire control over what had hitherto been an independent terminal railroad in Chicago. The acquisition had the effect of giving New York Central a monopoly over use of the terminal facilities, subjecting other carriers to serious economic disadvantage and prejudice.¹⁵⁴ Justice Brandeis viewed the loss as not incident to "more effective competition," but incident to denial of "equality of treatment."¹⁵⁵ Declaring that the rival railroads had a "special interest"¹⁵⁶ in the ICC order, Justice Brandeis declared the plaintiffs had standing

¹⁵² The dramatic developments in the law of standing are evident at all levels of the federal court system. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 99-104 (1968) (federal taxpayers have standing to attack expenditure of tax money allegedly in violation of the establishment clause of the first amendment); *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 5-7 (1968) (statutory protection of competition provides injured competitor with standing); *United Church of Christ v. FCC*, 359 F.2d 994, 1000-06 (D.C. Cir. 1966) (responsible representatives of listening public have standing to contest renewal of broadcasting license); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 615-16 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (aggrievement need not be economic, but may be aesthetic in nature); *Road Review League v. Boyd*, 270 F. Supp. 650, 659-61 (S.D.N.Y. 1967) (APA manifests a congressional intent that towns and civic groups may be aggrieved by agency action that has disregarded their interests).

¹⁵³ 264 U.S. 258 (1924). *Chicago Junction* was also persuasive authority for the Second Circuit's liberal doctrine favoring judicial review, for it was certainly clear that there was "no persuasive reason" to believe that Congress sought to preclude review of final HHFA action. Quite the reverse was the case. See Tondro, *supra* note 102, at 211-12.

That time has not sapped the vitality of *Chicago Junction* may be seen by the Supreme Court's decision in *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968), that a power company had standing to challenge TVA supply of power to certain Tennessee towns:

This court has . . . repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. . . . In contrast, it has been the rule, at least since the *Chicago Junction Case*, . . . that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.

Id. at 5-6.

¹⁵⁴ 264 U.S. at 266. At the time of the suit, diversion of traffic to New York Central as a result of the ICC order amounted to more than ten million dollars.

¹⁵⁵ *Id.* at 267.

¹⁵⁶ *Id.*

to challenge the Commission's finding that the acquisition was "in the public interest," thus making standing "rest on a determination that an interest intended by statute to be protected has been denied that protection."¹⁵⁷ Similarly, in *Norwalk I*, the court found that Congress had recognized the "interest" of displacees "in being relocated in decent, safe and sanitary housing."¹⁵⁸ Since the court inferred that Congress intended to insure that dislocatees were protected, it found standing.¹⁵⁹

Having determined that the plaintiffs had the requisite "direct, personal interest" in the Agency's relocation plans to give them standing to "vindicate the public interest . . . in adequate relocation,"¹⁶⁰ the court was confronted with the essential issue that the Seventh and Ninth Circuits had effectively dodged—the justiciability of the controversy, or what dissenting Judge Hays simplistically dichotomized as whether or not the federal courts could administer the housing program.¹⁶¹

Review of agency activity in relocation as well as other areas of administration of the urban renewal program would seem to embroil the courts in an essentially political question:

The extent to which relocation of those displaced by urban renewal is required will necessarily affect the pace at which urban renewal can take place, and the priority of goals in urban renewal planning. Issues are at stake which are, in the truest sense of the word, political. For example, if public housing were required to be available for every displacee of urban renewal, then it would follow, at least in the present condition of the nation's cities, that the building of public housing would be assigned very high priority.¹⁶²

¹⁵⁷ L. JAFFE, *supra* note 1, at 507.

¹⁵⁸ 395 F.2d at 935-36.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 934. In *Powelton Civic Home Owners Ass'n v. HUD*, 284 F. Supp. 809 (E.D. Pa. 1968), which held two months prior to *Norwalk I* that section 105(c) gives relocatees "substantive legal rights," *id.* at 821, Judge Body anticipated Judge Smith's theory of standing with even greater clarity than its expression in the Second Circuit opinion: "They have private individual legal rights; and they are the appropriate representatives of legal rights conferred by the Housing Act on the general public." *Id.* See discussion of *Powelton* in text at notes 186-91 *infra*. See also Tondro, *supra* note 47, at 212:

Even if section 105(c) is viewed as having created "private" rights in relocatees, they could be found to have standing to seek review as representatives of the public's interest in enforcement of the section. It is clear that relocatees as a group will be more likely than members of the public at large to seek enforcement of the public's interest [in] adequate relocation.

¹⁶¹ Judge Hays said that they could not. 395 F.2d at 938.

¹⁶² *Id.* at 929.

Having made this concession, Judge Smith asserted that it was Congress, not the court, that provided the standard for relocation. The constitutional claim that the standard was relaxed in the relocation of blacks and Puerto Ricans could be reached without consideration of political questions as to the merits of the standard, and the courts could fashion remedies to insure that the standard was applied equally to all displacees. Thus, the court was measuring agency activity against constitutional requirements in light of congressionally determined standards. Basic and fundamental policy had been properly hammered out in the political arena, but case-by-case inquiry would be proper for resolving problems to be undertaken, "with due regard for the need for judicially discoverable and manageable standards . . . and with recognition of the role played by the coordinate branches of the Federal Government in the planning and implementation of urban renewal."¹⁶³

The court cited, but did not forcefully apply, the rubber stamp of *Berman*. It suggested that, particularly where constitutional questions were raised, the courts may properly assume a role as monitor and safeguard of individual rights.¹⁶⁴ These cannot be abandoned to unreviewed agency discretion. To be sure, such a role involves a hedge on legislative and executive power, but even the most restrained views of judicial power recognize the legitimacy and value of judicial review as a "legal check" upon the other two branches of government.¹⁶⁵ Of such is the "stuff" of checks and balances.

This decision by the people to limit themselves by law—not only by the idea of law but by the actual processes of law in courts of their own establishing—is part of the distinctive essence of American democracy.¹⁶⁶

The *Norwalk I* decision's "recognition of the role played by the coordinate branches of the Federal Government in the planning and implementation of urban renewal"¹⁶⁷ affirms the need for judicial deference to the expertise of HUD and LPA in the administration of urban renewal

¹⁶³ *Id.*

¹⁶⁴ The court of course relied heavily upon *Baker v. Carr*, 369 U.S. 186 (1962), for this conception of the dynamic nature of the relationship between the judiciary and legislature.

¹⁶⁵ Cf. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149 (1950) (Frankfurter, J., concurring); Mendelson, *Jefferson on Judicial Review: Consistency Through Change*, 29 U. CHI. L. REV. 327 (1962).

¹⁶⁶ C. BLACK, *THE PEOPLE AND THE COURT* 117 (1960).

¹⁶⁷ 395 F.2d at 929.

programs. Yet, as Dean Pound pointed out late in life, "the question of deference does not admit of an answer on strictly analytical lines."¹⁶⁸ Thus the case-by-case inquiry called for in *Norwalk I* is the only rational way in which courts can exercise their responsibilities without overstepping their bounds.

Certainly, where claims are raised under the equal protection clause, the judiciary bears a special responsibility for "those about whom the other branches and divisions of government often will not be concerned."¹⁶⁹ Clearly the *Norwalk I* decision imaginatively meets the challenge posed by the constitutional requirement of equal protection of the laws. It is in fact arguable that *Norwalk I* turns on equal protection rather than on construction of a congressional scheme to insure the interest of relocatees in decent housing and their consequential "legal right" to enforce that interest.¹⁷⁰

The *Norwalk I* plaintiffs alleged that the urban renewal authorities failed to assure relocation for blacks in the way they had for whites, and that they even intended, through a combination of the project and the discrimination in the Norwalk housing market, to drive the blacks from the city. The court refused to permit the agency to shield itself from its statutory responsibilities behind the "accident" of segregated housing. Notwithstanding this "accident," the court held that the planners must still ensure that there is available relocation housing for all displacees. The court articulated an expansive conception of equal protection of the laws declaring that it

means more than merely the absence of governmental action designed to discriminate . . . [A]s Judge J. Skelly Wright has said, "We now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." . . .

¹⁶⁸ Pound, *Foreword to Symposium, Judicial Review: Its Role in Intergovernmental Relations*, 50 GEO. L.J. 653, 658 (1962).

¹⁶⁹ Choper, *On the Warren Court and Judicial Review*, 17 CATH. U.L. REV. 20, 43 (1967).

¹⁷⁰ The equal protection claims were asserted with more clarity and vigor in *Norwalk I* than in the previous relocation cases, and the court responded far more vigorously than had the Seventh Circuit in *Green Street*. See note 112 *supra* and accompanying text. The *Green Street* court called the segregated pattern of housing, recognized by the Chicago LPA and integral to its relocation scheme, as

accidental to the Plan. The city admittedly could not require relocation in any particular area; it may only determine what housing is available in fact and offer whatever assistance it can in furnishing this information to displacees.

373 F.2d at 9.

Where the relocation standard set by Congress is met for those who have access to any housing in the community which they can afford, but not for those who, by reason of their race, are denied free access to housing they can afford and must pay more for what they can get, the state action affirms the discrimination in the housing market. This is not "equal protection of the laws."¹⁷¹

The fashioning of relief for plaintiffs in *Norwalk I* involved considerations which encompassed both the constitutional rights of the displacees and the justiciability of the controversy. Defendants' major contention had been that the nonjusticiable nature of plaintiffs' claim flowed from the inevitable involvement of the court in overall urban renewal planning should it attempt to fashion relief, after a decision on the merits favorable to plaintiffs. Yet not to extend relief would be to acquiesce in the violation of the plaintiffs' constitutional rights. Since the case was only at the pleadings stage, the court could hazard the prediction that "we see no reason to believe that the courts are incapable of fashioning remedies to insure that the standard is equally met for all citizens."¹⁷² It escaped—at least for the time being¹⁷³—the very real problems of "fashioning remedies" without in fact cutting into the decision-making process normally reserved to the agency. The decision was framed to avoid undue undercutting of the planning process by restraining its role to ensuring that statutory standards are met while leaving the definition of those standards to Congress.¹⁷⁴

The Limits of Intervention

Norwalk CORE: *Aftermath*

Victory in the appellate court is justifiably a source of pride to the triumphant lawyer, but clients sometimes discover that "winning" a

¹⁷¹ 395 F.2d at 931. The passage by Judge Wright adopted by the court is from *Hobsen v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 861 (1968).

¹⁷² 395 F.2d at 935.

¹⁷³ The "time being" may be a long time. After remand and filing of the mandate, the lawsuit was placed on the discovery calendar awaiting trial. Inadequate funds for expenses slowed the taking of depositions. Interview with Stephen L. Fine, Associate of Lubell and Lubell, attorneys for Norwalk CORE, in New York City, May 13, 1969.

¹⁷⁴ Thus, actually ordering the construction of low-cost housing and thereby forcing a shift in the allocation of project resources and expenditures—suggested by the *Norwalk I* plaintiffs—was stamped by the court as a less desirable form of relief. 395 F.2d at 930.

lawsuit is not invariably accompanied by tangible rewards. The frustration of a "paper victory" is a special hazard of test case litigation, as the problem of fashioning relief in *Norwalk I* indicates. Though Judge Smith indicated that ordering construction of low cost homes was not the most desirable form of relief, by the time the opinion was handed down and the case was sent back to the district court, ordering the building of shelter for the displacee plaintiffs was about the only meaningful relief left.

Plaintiffs never sought money damages because of inherent difficulties in setting an amount and dividing it among members of the class.¹⁷⁵ Also, a claim for damages might have undercut the plea for affirmative relief. No attempt was made to appeal the denial of the injunction—partly because the Seventh and Ninth Circuit precedents¹⁷⁶ did not augur well for the success of the appeal, and certainly did not indicate that the denial of the injunction would be reversed.

After remand, the lawyers were unsuccessful in obtaining an injunction after a complicated series of events. As soon as the appeal was decided and the mandate filed, a plea was made to Judge Zampano, who had originally heard the matter prior to the appeal, for an injunction to forbid the city from renting any of the apartments in the new structures¹⁷⁷ constructed in accordance with the renewal plan. Judge Zampano caused the case to be reassigned to another judge who refused an *ex parte* injunction, ordered a hearing on the prayer for injunctive relief, and required strict compliance with notice procedures. Threatened with inordinate delay, the lawyers attempted to have the case transferred to the district court in New Haven. The effort was unsuccessful, and after the Norwalk Housing Authority lost a motion to have the entire case dismissed, the court ruled that the plaintiffs had abandoned their petition for an injunction.

Despite this rather complicated sequence of events—and enormous expenditures of time and energy—all the respective parties to the litigation, as well as persons indirectly affected by the urban renewal project, were still in much the same relative position they were when the suit was filed. The only significant change was that the area had been re-

¹⁷⁵ This discussion of the aftermath of the litigation is based on the interview with Stephen L. Fine, *supra* note 173.

¹⁷⁶ See *Green Street Ass'n v. Daley*, 373 F.2d 1 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967); *Johnson v. Redevelopment Agency*, 317 F.2d 872 (9th Cir.), *cert. denied*, 375 U.S. 915 (1963).

¹⁷⁷ By the time the appeal was decided, the six-acre tract had been completely developed.

developed in basic conformance with the plan, and the process of dispersal had largely run its course.

Norwalk CORE: *Sequel and the Alternatives of Relief*

The rapid and dramatic expansion of judicial review of urban renewal programs is illustrated by the fact that the year after the *Norwalk I* decision—and while the case was pending trial—the same federal and appellate courts had to dispose of another dispute between displacees and developers in Norwalk. Some of the alternatives of relief and some of the problems courts face in this difficult and complex area are suggested by *Norwalk CORE v. David Katz & Sons, Inc.*¹⁷⁸ (*Norwalk II*). In *Norwalk II*, relocatees asked a Second Circuit Court of Appeals panel¹⁷⁹ to overturn an order denying an injunction against their eviction. The plaintiff-family sought to remain in the apartment into which they had been relocated following the demolition of their former apartment building pursuant to the plan attacked in *Norwalk I*.

Defendant David Katz & Sons, Inc., a “preferred sponsor” of the urban renewal project, managed the Carlton Court apartments into which plaintiffs Frank and Ethel Williams were placed on a referral from the Norwalk Redevelopment Agency. The Williamses paid a reduced rental—\$130 monthly—because of the preferred status of Katz, Katz itself making up the difference. This reduced rental resulted from the contract between HUD and the Norwalk Redevelopment Agency which provided that displacees be relocated into housing within their financial means.¹⁸⁰ This provision was controlled by the HUD (then HHFA) regulation which declared standards for “ability of displacees to pay” are to be expressed “in terms of gross rent as a percentage of income.”¹⁸¹ The percentage used in the Norwalk project was twenty percent of the family income.

The Williams family shared the apartment with another couple, the Davises; their combined income fixed the amount of the rent. When the Davises moved, the Williamses ceased paying the \$130 rental. They then applied to the district court to enjoin Katz & Sons from concluding

¹⁷⁸ 410 F.2d 532 (2d Cir. 1969).

¹⁷⁹ Judge Smith, who wrote *Norwalk I*, was replaced by the author of *Norwalk II*, Judge Feinberg. Judges Kaufman and Hays, who respectively concurred and dissented in *Norwalk I*, completed the *Norwalk II* panel.

¹⁸⁰ This provision was in conformance with section 105(c) of the Housing and Urban Development Act of 1968, 42 U.S.C. § 1445(c) (Supp. IV, 1969).

¹⁸¹ HHFA, URBAN RENEWAL MANUAL §§ 16-1, 16-2-1, now HUD, URBAN RENEWAL HANDBOOK RHA 7212.1 (1968), cited in 410 F.2d at 534.

eviction proceedings in the Connecticut state courts. They asserted in support of the application for a preliminary injunction that, as relocated tenants, they could not be evicted because the \$130 monthly rental at the time they were relocated exceeded twenty percent of their income. They asserted that the Davis couple were "boarders" and that the Davis income could not properly be combined with theirs as that of a "family" for the purpose of computing the monthly rent.

Conceding that "the impact of urban renewal on family displacement raises a host of problems,"¹⁸² the court asserted that in the controversy about the eviction of the Williamses, the question was the narrow one of whether the family in the context of the case could be defined to include the Davises. The court upheld the previous determination by the district judge that the family could and should be so defined—especially since the Williamses had always previously taken the position in a host of other contacts with the urban renewal and allied agencies that the Davises were part of their family. Pointing out that in fact the Williamses would probably not have received the large apartment rented to them in February 1966 had they not included the Davis family as part of their household, the court said, "It is not sensible to hold that the Williamses are now entitled to remain indefinitely in an apartment larger than they require at a reduced rental."¹⁸³ The court held that changes in the family group did not justify alteration of the original terms of the lease and that therefore, the lower court properly refused the temporary injunction since there was no reasonable probability of success at trial on the request for a permanent injunction.

Judge Hays concurred this time—but referred back to the last sentence of his dissent in *Norwalk I* in which he said, "The Federal courts cannot administer the housing program."¹⁸⁴ His aphoristic phrase gained luster in the context of *Norwalk II*, for the plight of the Williams family does seem like the kind of detail which could be left to the vicissitudes of administrative and state court action.¹⁸⁵ On the other hand, since the Williamses had been forced to move from an apartment where they paid rent of only \$75 a month, the controversy at least underscores the often inequitable, indeed unjust, results of urban renewal. For no

¹⁸² 410 F.2d at 535.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 536.

¹⁸⁵ There were deeper issues the court left unresolved, among them whether any or all of the private defendants were obligated to assist in the relocation of tenants in a project area, and if they were so obligated, whether that obligation extended to include a second relocation of a family whose situation had changed.

matter what definition was placed on the word "family", the stark reality remains that but for the project, the Williamses might still be paying a \$75 monthly rental. This low-income family was in effect partly paying for an urban renewal project in which developers would reap profits and in which, in all probability, the Williamses could not afford to live.

The narrow sort of question presented in *Norwalk II* is not likely to be difficult for the courts to deal with in any event. The broader actions attacking whole projects will offer far greater difficulties, particularly in settling upon appropriate forms of relief. The problem of relief in urban renewal controversies, as it has in school desegregation litigation, will call for imagination and innovation on the part of the judiciary. While injunctive powers first come to mind as a mode of relief, the courts are likely to be sparing in the use of their power to stop projects altogether—especially where the project is well underway.

In *Powelton Civic Home Owners Association v. HUD*,¹⁸⁶ a district court halted continuation of a project still in condemnation to let a homeowners' association gain a hearing on the adequacy of relocation shelter.¹⁸⁷ The order granting the preliminary injunction was entered two months prior to the court's decision in April 1968 where it ultimately held (two months prior to *Norwalk I*) that relocatees had standing to "challenge the propriety of the Secretary's decisional procedures . . . and standing in the more traditional sense" because of "substantive legal rights conferred by the National Housing Act."¹⁸⁸ In granting the injunctive relief, the court pointed out that it was actually conditional, and that upon a determination that plaintiffs had been illegally denied a procedural remedy,¹⁸⁹ the injunction would

¹⁸⁶ 284 F. Supp. 809 (E.D. Pa. 1968).

¹⁸⁷ The suit did not ask the court to review the substantive merit or policy of the HUD decision to authorize funds for the project, but rather that the court determine whether Secretary Weaver should consider the "point of view of the citizens whose homes will be razed by the project before he decides the eligibility of the project for federal funds." *Id.* at 816.

¹⁸⁸ *Id.* at 821. The injunction preceded the decision on the merits by two months because it "was necessary in order to protect [the court's] jurisdiction and in order to protect the plaintiffs' claim from the threat of mootness." *Id.* at 814. It is interesting to note that the injunction was not entered against the Philadelphia Redevelopment Authority because the court was "concerned only with the legality under federal law of the disbursement of federal funds by federal officers." *Id.*

¹⁸⁹ *Id.* at 838. As the equal protection clause was a major premise of *Norwalk I*, so in *Powelton* the spectre of a denial of procedural due process weighed heavily in the court's decision: "Particularly where, as here, the gravamen of the plaintiff's complaint is that the Secretary has failed to provide implicitly required procedural machinery,

only hold up disbursement of federal funds pending the grant of the illegally denied relief. Once the hearing was held and procedural due process afforded, the injunction would lose its force.

A comparison of *Powelton* and the district court opinion in *Norwalk I* suggests the importance that timing may play in successful prosecution of urban renewal cases. When the latter suit was filed, the project was near completion, while in *Powelton* the project was still in its initial stages. The relatively hostile reception that the *Norwalk I* plaintiffs received¹⁹⁰ would appear to be at least partly attributable to the lateness of their action:

If residents of a project area cannot challenge a project while it is in the planning stages and before construction has begun, certainly they can have no standing to assert the same kind of challenge at a time when planning has been implemented, most of the land has been purchased and conveyed to developers, and construction of new buildings has been almost completed.¹⁹¹

Timing was clearly important in *Nashville I-40 Steering Committee v. Ellington*.¹⁹² There, plaintiffs sought to prevent state highway officials from obliterating a black business area in order to construct a section of an interstate highway. In its denial of a preliminary injunction, the court "regretted that appellants waited so late to begin their efforts to correct the grave consequences"¹⁹³ resulting from the construction. "So late" was some nine years after the initial purchases of approximately 1,100 parcels of property and the expenditure of \$10 million in acquisition and engineering costs. Though no urban renewal program was at stake, the problems of interrupting the planning process were acutely present, and the court relied partly on *Berman v. Parker* to affirm the refusal of the district judge "to substitute his judgment for that of highway officials in the selection of a route for a highway."¹⁹⁴ *Nashville I-40* is perhaps additional evidence that injunctive relief is likely to be granted sparingly and to achieve narrow—albeit crucial—

the court should not abandon its institutional responsibility for assuring the procedural due process of agency actions." *Id.* at 822.

¹⁹⁰ Judge Zampano described the relief sought as "almost dictatorial" and said it was a request for "drastic judicial intervention into a large, almost fully constructed urban renewal project." *Norwalk CORE v. Norwalk Redevelopment Agency*, 42 F.R.D. 617, 621, 623 (D. Conn. 1967).

¹⁹¹ *Id.* at 622.

¹⁹² 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

¹⁹³ *Id.* at 186.

¹⁹⁴ *Id.* at 185.

goals. And courts will be reluctant to disrupt the planning process and to enjoin renewal activity gone almost beyond the point of no return.

An alternative to injunctive relief is an order requiring an urban renewal agency to modify or supplement its plan to cure any constitutional or statutory infirmity. Thus, rather than halt a project, a court could shift predetermined priorities. For example, a meaningful amount of low cost shelter might be provided rather than the token amount usually constructed; the court might choose among differing kinds of low cost shelter, requiring minimal architectural and engineering standards with a view to realizing the congressional mandate for "safe, decent and sanitary" housing. And a court might play a role in mediating the selection of sites for different aspects of the project, for instance directing that some of the low cost housing be in favorable inner-city locations convenient to cultural and employment opportunities; it might even require that the plan not, as most usually do, abet existing patterns of racial separation.

The Problem of Expertise

Whatever the form of relief granted, no matter how imaginative the judge, an exercise of judgment that disturbs the planning process will inevitably involve the court in problems beyond its ken, or as Judge Smith admitted in *Norwalk I*, in "areas foreign to its experience and competence."¹⁹⁵ Had *Berman v. Parker* not preceded the school desegregation and reapportionment cases, the problem of expertise might well be dispositive. But since the *Brown* decisions¹⁹⁶ and their progeny,¹⁹⁷ and *Baker v. Carr*¹⁹⁸ and the reapportionment decisions,¹⁹⁹ courts have grown accustomed to managing the complex and often conflicting data provided by the social, economic and allied sciences. The experience has been uneven at best in achieving "deliberate speed,"²⁰⁰ though some-

¹⁹⁵ 395 F.2d at 930.

¹⁹⁶ *Brown v. Board of Educ.*, 347 U.S. 483 (1954); 349 U.S. 294 (1955).

¹⁹⁷ See, e.g., *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), appeal dismissed, 393 U.S. 801 (1968); *Barksdale v. Springfield School Comm.*, 237 F. Supp. 543 (D. Mass.), vacated, 348 F.2d 261 (5th Cir. 1965).

¹⁹⁸ 369 U.S. 186 (1962).

¹⁹⁹ E.g., *Burns v. Richardson*, 384 U.S. 73 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Conner v. Johnson*, 256 F. Supp. 962 (S.D. Miss. 1966), modified, 265 F. Supp. 492, aff'd mem., 386 U.S. 483 (1967).

²⁰⁰ Judge Tuttle threw up his hands over the difficulties of supervising desegregation, lamenting:

This is the fourth appearance of this case before this court. This present appeal,

what more satisfactory in imparting meaning to the phrase "one man, one vote."²⁰¹ This difference, however, may be instructive. The reapportionment cases have often turned on largely mathematical considerations (more suited perhaps to sophisticated computers), while the desegregation cases—concerned with the all-pervasive racial issue—have involved a spectrum of disciplines such as education, psychology, social psychology, sociology, medicine, and economics.

Urban renewal decisions are even more complex than the educational judgments involved in instilling equality in the public schools. Many of the "major problems . . . are within the special competence of civil engineers, architects, transportation specialists, . . . land developers, builders, mortgage lenders, real estate dealers, land appraisers, sociologists, social workers, and civic leaders."²⁰² Moreover, even should the court be able to command—or commandeer—the necessary expertise, the problem of determining goals and priorities would abide.

Finally, whatever relief a court grants will in the last analysis depend upon public acceptance and official support. Affirmative relief is particularly dependent upon the cooperation of administrators and legislators. As J. Skelly Wright has said:

[T]he Court, having the power neither of the purse nor the sword, must rely on the legislative and executive branches of government to enforce its directives. . . .

[T]he Court's affirmative mandate may require the state to expend money which the legislature is unwilling to appropriate.²⁰³

coming as it does from an order of the trial court entered nearly eighteen months ago, on March 31, 1965, points up, among other things, the utter impracticability . . . for supervising the manner in which segregated school systems break out of the policy of complete segregation into gradual steps of compliance with the constitutional requirements of *Brown v. Board of Education*. . . . One of the reasons for the impracticability of this method of overseeing the transitional stages of operations of the school boards involved is that, under the Supreme Court's "deliberate speed" provisions, it has been the duty of the appellate courts to interpret and reinterpret this language as time has grown apace, it now being the twelfth school year since the Supreme Court's decision.

Davis v. Board of School Comm'rs, 364 F.2d 896, 898 (5th Cir. 1966).

²⁰¹ Of the reapportionment decisions, New York University School of Law Dean Robert B. McKay has said that although they "precipitated a revolution in the concept and practice of legislative representation at every level of government, they were implemented quickly and with surprisingly little dislocation." McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223, 225 (1968).

²⁰² Foard & Fefferman, *supra* note 13, at 177.

²⁰³ Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 4 (1968). Judge Wright spoke from experience. After his order in *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967),

What Judge Wright has called the "institutional incapacity"²⁰⁴ of the courts certainly will continue to limit the role and effectiveness of judges in review of urban renewal projects. The decisions are preferably left to the legislature and agency. "All too often, however, the practical choice has been between the Court doing the job as best it can and no one doing it at all If the legislature simply cannot or does not act to correct an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so."²⁰⁵ In the enduring words of Mr. Justice Story:

The most delicate, and at the same time, the proudest attribute of American jurisprudence is the right of its judicial tribunals to decide questions of constitutional law. In other governments, these questions cannot be entertained or decided by courts of justice; and, therefore, whatever may be the theory of the constitution, the legislative authority is practically omnipotent, and there is no means of contesting the legality or justice of a law, but by an appeal to arms.²⁰⁶

NEW CURRENTS IN URBAN RENEWAL LITIGATION

*Those who make no mistakes will never make anything, and the judge who is afraid of committing himself may be called sound and safe in his own generation, but will leave no mark on the law.*²⁰⁷

Decisions since *Norwalk I* presage the pervasiveness of its spirit. Judges are becoming increasingly less reluctant to question the sanctity of urban renewal, housing and other land use schemes. Imaginative legal challenges to programs that run afoul of constitutional and statutory mandates promise to expand the limits of judicial participation in the urban planning process.

A district court in San Francisco has departed from precedent in its own circuit²⁰⁸ to follow *Norwalk's* path. In the first of two opinions in

requiring transportation for volunteering students in overcrowded school districts to underpopulated schools, Congress included in the District of Columbia appropriations bill a provision barring the use of appropriations in the Act for "the assignment or transportation of students to public schools in the District of Columbia in order to overcome racial imbalance." District of Columbia Appropriations Act of 1968, Pub. L. No. 90-495, § 16, 81 Stat. 435, 441 (1967).

²⁰⁴ Wright, *supra* note 203, at 4.

²⁰⁵ *Id.* at 6.

²⁰⁶ J. STORY, MISCELLANEOUS WRITINGS 428 (1835).

²⁰⁷ B. CARDOZO, SELECTED WRITINGS 31 (M. Hall ed. 1947) (quoting Sir Frederick Pollock).

²⁰⁸ The controlling precedent in the Ninth Circuit was *Johnson v. Redevelopment*

a San Francisco urban renewal dispute, the United States District Court for the Northern District of California has embraced liberal doctrines of standing and has given displacees a forum to challenge plans of the San Francisco Redevelopment Agency inimical to their interests. In *Western Addition Community Organization v. Weaver*²⁰⁹ (*WACO I*), disclaiming "presumptuously attempting to administer the complexities of urban redevelopment,"²¹⁰ the district court enjoined the Secretary of HUD from honoring LPA requisitions for funds to continue a project and prohibited LPA displacement of site residents by condemnation or eviction or threats thereof. Though the second opinion, *Western Addition Community Organization v. Romney*²¹¹ (*WACO II*), largely took from the community organizations with the right hand what *WACO I* had given with the left, conjointly the two decisions affirm the propriety of judicial scrutiny of urban renewal activity.

The *WACO* cases emerged from controversy over the San Francisco Redevelopment Agency's Western Addition II project.²¹² Characteristically, the area selected was the cultural, political and economic center of the black community.²¹³ The Western Addition Community Organization, an unincorporated interracial community combine of churches, tenants, homeowners and welfare rights committees, was the principal plaintiff. The Community Organization objected to relocation plans that it said were inadequate and violative of HUD and congressional mandates because no study had been made of the city's housing needs and resources, and because no feasible plan had been devised for relocation,

Agency, 317 F.2d 872 (9th Cir. 1963). See note 95 *supra* and accompanying text. *Johnson* was found to be distinguishable and inapplicable by the district court because it was decided under standing concepts that predated *Flast v. Cohen*, 392 U.S. 83 (1968), and *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968), and because of congressional strengthening of relocation legislation. See note 209 *infra* and accompanying text. See Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L. J. 966, 983-85 (1968).

²⁰⁹ 294 F. Supp. 433 (N.D. Cal. 1968). The New York Times quoted a lawyer as saying the decision was "perhaps the most significant in the new national effort to establish legal rights for the poor." The paper also quoted an area resident as saying, "All along we've been saying that urban renewal means nigger removal. This [the court order] says that we know what we were talking about." N.Y. Times, Dec. 29, 1968, § 1, at 44, col. 5.

²¹⁰ 294 F. Supp. at 441.

²¹¹ No. 49,053 (N.D. Cal., Mar. 5, 1969).

²¹² The facts are partly drawn from the court's two opinions and partly from the plaintiffs' memorandum in support of the motion for a preliminary injunction and in opposition to the defendants' motion to dismiss.

²¹³ A significant part of the city's Japanese community also resided in Western Addition.

since more families were to be displaced than the available shelter in the San Francisco area would house. After unsuccessfully pursuing a variety of administrative remedies for three years,²¹⁴ application was made to the district court to halt the project and prevent HUD from continued support of the venture. The relocation plan was attacked as violative of section 105(c), and the charge was made that the Secretary had arbitrarily acquiesced in the removal scheme for site residents. Also, plaintiffs urged that certification of the workable program had lapsed, thereby depriving them of a forum in which to exercise free speech rights under the first and fifth amendments.

The argument for standing in *WACO I* was broadly based. Plaintiffs relied upon the APA, *Flast v. Cohen*,²¹⁵ section 105(c), *Abbott Laboratories v. Gardner*,²¹⁶ and *Norwalk I* in support of the right to sue the federal and local defendants.²¹⁷ Defendants, however, flatly denied that there was any legal right "to obtain judicial review of an urban renewal plan in a federal court." They also asserted that the controversy was not "judicially cognizable," and that the adequacy of relocation plans could only be properly assessed by HUD by reason of its administrative expertise. Finally, the defendants asserted that they had complied with congressional relocation strictures and accused WACO of a "rigid attack" upon section 105(c).²¹⁸

²¹⁴ Redevelopment plans for the area were first presented on April 14, 1964. Considerable public protest, partly spillover of resentment at the havoc created by the predecessor project Western Addition I, failed to move the City and County Board of Supervisors. However, HUD delayed execution of the loan and grant contract until June 1966, following passage of California's Proposition 13, an amendment to the California Constitution which purported to repeal the State's fair housing laws, but was later struck down by the California Supreme Court in *Reitman v. Mulkey*, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), and affirmed by the U.S. Supreme Court, 387 U.S. 369 (1967). Had Proposition 13 been upheld, federal legislation and regulations barring discrimination in federally assisted housing programs might have been in conflict with, or hampered by the amendment. Proposition 13 barred state legislation prohibiting racial discrimination in the sale or rental of housing and "embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government," the right to discriminate on racial grounds. 387 U.S. at 377.

²¹⁵ Plaintiffs relied on language in *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968):

[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.

²¹⁶ 387 U.S. 136 (1967).

²¹⁷ Defendants' Motion to Dismiss at 1. In support of this position, defendants alternately fought a rearguard action against *Norwalk I* and sought to distinguish it.

²¹⁸ Brief for Defendants at 13. The charge of rigidity was buttressed by a plea that urban renewal officials be given maximum flexibility in relocation planning

The court upheld in the strongest possible terms the standing of the plaintiffs to sue. "The test for judicial reviewability . . . is not . . . whether the statute provides for it, but whether the statute precludes it. Federal administrative action is subject to judicial review unless the statute, itself, precludes such review."²¹⁹ Relying upon *Abbott Laboratories v. Gardner*, the court held that the APA embodied and supported the basic presumption of the availability of judicial review to one suffering from agency action. "When no other remedy for judicial review is provided, persons suffering legal wrong because of administrative action . . . may proceed under the Administrative Procedure Act . . . except to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law."²²⁰ The court also reasoned that since under *Flast* a taxpayer had standing, those not "dependent on mere taxpayer status" certainly had standing to sue for enforcement of a statute designed by Congress to protect that person's interest. In support of this position, *Norwalk I* and *Powelton Civic Home Owners* were coupled with *Hardin v. Kentucky Utilities*.²²¹

The substantive issues in the case—the adequacy of the relocation plan and the certification of the workable program—were structured by the court in the narrowest possible terms. Having taken judicial cognizance of the controversy, the court then skirted its edges. It tersely disposed of the workable program problem with a statement that "no material issue" was tendered by the allegations concerning the program. Rather than determining expiration as occurring on June 30, 1967, as plaintiffs charged, the court adopted the defendant's position, which was predicated on a proviso in the program's original certification that the workable program remained in force for projects in which a loan and grant were executed prior to the expiration date of the workable program.²²²

The major part of the opinion turned on a discussion of the relocation

because of the exceedingly fluid nature of the process. Because of voluntary removal by site residents, the defendants argued there was never any way to know exactly how many persons would require relocation, and reaching histrionic heights, the brief declared:

There are people who live in the project area who may not move until 1975. How can . . . this court or any plaintiff or the Secretary of HUD know now whether or not the relocation plan of the local agency is going to be able to relocate someone who moves out of the project area in 1975? San Francisco might not even be here in 1975.

Id.

²¹⁹ 294 F. Supp. at 442.

²²⁰ *Id.*

²²¹ See *id.* at 443, citing *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968).

²²² See 294 F. Supp. at 445.

program. Rather than examining the sufficiency of the relocation program per se, the court decided that the issue really was whether HUD had been given "satisfactory assurance" of the adequacy of relocation plans. Because of a 1965 amendment to the urban renewal statutes²²³ which "was adopted to make doubly sure that the Secretary would police the local agency's performance of its contractual relocation obligations,"²²⁴ and because there was no express statutory provision requiring HUD to approve relocation plans, the court refined the case to the question whether HUD had complied with the statute and its own regulations. The court thus avoided the necessity of making an independent judgment about the adequacy of the relocation plan. Under its view of the case, it had only to determine that the statute had been complied with—not as to relocation but as to assurances about the adequacy of relocation. By using this approach, the case could be decided without infringing on the agency's discretion and expertise.

Conceding that considerable discretion was vested in the Secretary, the *WACO I* court ruled that this discretion was not so totally committed to agency action as to preclude judicial review of its arbitrary abuse. However, the court limited its own function to deciding whether the discretion concerning the satisfactoriness of the relocation plan rested upon some substantial and supporting factual basis. After ordering defendants to file the complete and voluminous administrative record, it was discovered that the HUD Secretary had never found the relocation plan for the project to be satisfactory, but had nevertheless disbursed funds under the loan and grant contract.²²⁵ The court refused to accept the defendants' position that approval with a number of con-

²²³ 42 U.S.C. § 1455(c)(2) (Supp. IV, 1969).

²²⁴ 294 F. Supp. at 436. "Further, entirely apart from subsection (c)(2), defendants' own regulations, enacted pursuant to subsection (c)(1), e.g., Urban Renewal Manual, Sec. 10-1, . . . [provide] that the local agency must 'assure' the Secretary concerning the relocation situation." *Id.* at 437.

²²⁵ *Id.* at 439-40.

Upon this record the court can well understand why the Secretary refrained for a year from making any official determination, one way or the other, concerning the satisfactoriness of the local relocation plan. It was just *not* satisfactory. When pressed by this court's order of June 26, 1968 for production of evidence that the law was being complied with, all that the Secretary could then honestly do was to make a belated determination of 'satisfactoriness' with one hand and then take it back with the other by making that determination entirely contingent on future events and accomplishments. Without these contingencies, a determination of satisfactoriness just could not have been reasonably made because the evidence before the Secretary was all to the contrary.

ditions and contingencies was satisfactory approval within the requisites of section 105 (c) and the pertinent HUD regulations.

If plaintiffs' strategy was to use the relocation issue to force an abandonment or major revision of the project, they were not successful. The court refused to invalidate previous payments or unconditionally to restrain future financing of the project. Relief was narrowed to prohibiting eviction and condemnation by the LPA and halting HUD from honoring fund requisitions until the HUD Secretary could show that the relocation plan was satisfactory to him. The court also required that its approval be obtained, but apparently intended that satisfactory to the Secretary was satisfactory to the court, or so *WACO II* seems to hold.

Before *WACO I* had appeared in the advance sheets, the preliminary injunction was dissolved in *WACO II*²²⁶ and the project was permitted to proceed apace—on the assurance that relocation was satisfactory to HUD, although plaintiffs offered evidence that it was still grossly inadequate.²²⁷ The narrow range of judicial review in *WACO I* was re-emphasized in the *WACO II* decision:

Since the statute vests the function and responsibility squarely upon the Secretary, the judicial function is narrowly limited to ascertaining whether the Secretary has made the determination required of him by law and, if so, whether he has acted in apparent good faith, reasonably rather than arbitrarily and with some factual basis for his decision. If so, judicial review can go no further. The Court may not, and should not, substitute its judgment for that of the Secretary—even if the court might believe that the Secretary could have made a different decision concerning the satisfactoriness of the local agency's relocation plan and assurances.²²⁸

²²⁶ *WACO I* was filed December 16, 1968, and appeared in the West advance sheets dated March 17, 1969. The opinion in *WACO II* was filed March 5, 1969.

²²⁷ The evidence that the plaintiffs introduced was noted by the court, but it was not found to be dispositive. As the court observed:

This evidence, however, merely indicates that the record is such as to be subject to different inferences and is, therefore, controversial. The Secretary has drawn one inference while the plaintiffs argue to the contrary.

No. 49,053 at 7.

²²⁸ *Id.* at 8-9. This language was very similar to that of the court in *WACO I*:

We conclude, therefore, that the Secretary's action now under consideration is subject to judicial review—at least to the extent of determining whether the Secretary's discretion concerning the satisfactoriness of the relocation plan has been exercised not arbitrarily but reasonably upon some substantial and supporting factual basis.

294 F. Supp. 433, 443 (N.D. Cal. 1968).

Whatever its intent and purposes, WACO's lawsuit was principally a delaying action, since *WACO II* placed site residents squarely back within the discretionary power of the LPA and HUD. The court had simply sought to insure that the appropriate agencies complied with procedural requirements for satisfactory assurance of adequate relocation facilities. Since "satisfactory assurance" had to be subjectively determined, the court only looked for a reasonable agreement with appearances.²²⁹ Thus, the actual finding of what was adequate remained in the hands of the agencies; upon LPA assurance that the relocation facilities were adequate and a non-arbitrary determination by HUD of the satisfactoriness of the assurances, judicial inquiry ended.

It is clear that the initial intervention of the court and its clear-cut grant of standing caused the local and federal officials to be more malleable, more amenable to the influence and more sensitive to the needs of site residents. This effect was similar to the result of *Norwalk I*, where CORE's status and function as a power broker for the city's blacks was significantly enhanced by the litigation.²³⁰ An appeal from Judge Sweigert's *WACO II* order was filed and then later voluntarily dismissed following an agreement between site residents and the LPA creating a citizens' advisory committee with a salaried staff and a \$100,000 budget.²³¹ The suit remains on Judge Sweigert's call and presumably can be activated on motion. Given the limitations—self-imposed or actual—of the judiciary in reviewing large scale urban renewal projects, even the indirect check on urban renewal projects of potential judicial intervention may be regarded as significant.

Two days after the *WACO II* decision undercut the force of *WACO I*, federal district Judge Keith in *Garret v. Hamtramck*²³² preliminarily enjoined the city of Hamtramck, Michigan, from selling or redeveloping property acquired in an urban renewal project until it complied with relocation provisions of a loan and grant contract. Black residents of the Wyandotte Area Renewal Project had filed the suit to stop the city, an inner-city suburb of Detroit, from acquiring and demolishing substandard and low-cost housing. Unlike any of the other relocation controversies, none of the plaintiffs lived in the area undergoing renewal, although some did reside in an adjacent area scheduled for redevelop-

²²⁹ See No. 49,053 at 8.

²³⁰ Interview with Stephen L. Fine, *supra* note 173.

²³¹ Interview with Michael Davidson of the NAACP Legal Defense and Educational Fund, Inc., one of the attorneys for WACO, in New York City, June 20, 1969.

²³² No. 32,004 (E.D. Mich., Mar. 7, 1969).

ment next. Plaintiffs alleged that all of the city's urban renewal activities were designed to "remove Negroes" and that absent court action contracts would be entered into for construction of housing that blacks could not afford, assuring the permanency of their removal. Therefore, plaintiffs sought to have the city include in its renewal plan adequate relocation shelter within the means of potential displacees as required by statute and HUD regulation.

Although HUD had approved the project, the court deemed the evidence unclear whether the agency was completely satisfied with relocation plans.²³³ However, relying upon a private study commissioned by the city which called for the "[a]doption of new relocation procedures to meet both the letter and spirit of the law,"²³⁴ the court found that HUD relocation procedures had not been followed and that defendants had failed to show the existence of adequate low-cost relocation facilities. The court refused to stop acquisition and condemnation, but did impede project activity by barring the resale and redevelopment of cleared land in the only area available for housing pending provision of low-cost relocation shelter.

Thus, the court delayed but did not halt the project; it effected a compromise that left the parties substantial room to settle the dispute out of court. The opinion appeared designed to prod, rather than coerce, the city into satisfactory relocation planning; it suggested that the city "may find that the only way to comply with the loan and grant contract is to make available low-cost housing or rental units within the Wyandotte Area, but the Court is in no position at this state of the proceedings to order that to be done."²³⁵

If dramatic intervention by the federal judiciary in the planning process comes at all, it is more likely to occur in situations involving some form of racial discrimination with its attendant constitutional issues. Such is the lesson of two recent district court decisions—*Ranjel*

²³³ To say the least, HUD was ambiguous about the satisfactoriness of the relocation plans. As early as April 1967 (part II of the loan and grant application was approved October 1, 1968), plaintiffs sent a 22-page letter to the HUD regional office detailing objections to the provisions for relocating the displacees. In April 1968 a letter was sent to Secretary Weaver requesting an investigation of the project. What action HUD took about the letter to Weaver was never revealed to the court, although the earlier letter "did result in some type of investigation by the Department of Housing and Urban Development, but the findings of that investigation have not been made available." *Id.* at 6.

²³⁴ *Id.* at 7.

²³⁵ *Id.* at 8.

*v. City of Lansing*²³⁶ and *Gautreaux v. Chicago Housing Authority*.²³⁷

Although *Ranjel* was subsequently reversed by the Sixth Circuit,²³⁸ the lower court's opinion may be representative of future judicial attitudes toward racial issues in urban renewal controversies. It is, at the least, an interesting study in the problems likely to be encountered in future cases. The district court in *Ranjel* permanently enjoined the city from holding a referendum that would have repealed a zoning change that permitted the development of a low rent and interracial housing complex in an exclusively white section of the city. In an unpublished order, the court also granted affirmative relief by ordering city officials to process the plans previously submitted for construction of the disputed housing. The site was selected by city and federal officials to alleviate an emerging crisis in minority group housing accommodations and to comply with the HUD policy that site selections be made outside areas of racial concentration.²³⁹ The genius—and to some the consequent vice—of the plan was that its execution would have in one blow significantly integrated Lansing housing and schools.

The court found that the resistance to the originally selected site, the motivation behind the circulation of the referendum petitions, and the attempts to hold the referendum for denying the original variance, were "in major part based on economic and racial discrimination in housing."²⁴⁰ The court pursued two theories in invalidating the proposed referendum.²⁴¹ First, frustration of the project would have deprived plaintiffs of rights and benefits conferred on them by an act of Congress

²³⁶ 293 F. Supp. 301 (W.D. Mich.), *rev'd*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970).

²³⁷ 296 F. Supp. 907 (N.D. Ill. 1969).

²³⁸ 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970). See notes 245-47 *infra* and accompanying text. In seeking certiorari in the Supreme Court, the plaintiffs argued that the Sixth Circuit opinion conflicted with the Ninth Circuit's decision in *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291 (9th Cir. 1970).

²³⁹ District court Judge Fox's opinion held that federal policy against racial discrimination, as evidenced by the thirteenth amendment of the Constitution, provisions of the Civil Rights Acts of 1866 and 1964, 42 U.S.C. §§ 1982, 2000(d) (1964), and the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19, 31 (Supp. IV, 1969), barred passage of the referendum. However, the only reference to a specific policy of relocation of displaced persons outside areas of racial concentration was found in HUD, *Low RENT HOUSING MANUAL* § 205.1, ¶ 4g, which does not have the weight of a federal regulation. 293 F. Supp. at 309.

²⁴⁰ *Id.* at 307.

²⁴¹ There are "two basic and independent points on which this decision stands: federal pre-emption and municipal furtherance of discrimination." *Id.* at 312.

implementing the thirteenth and fourteenth amendments and seriously impeded federal policy to remove the badges of slavery by erasing the effects of racial discrimination.²⁴² Thus, the supremacy clause of the United States Constitution²⁴³ forbade local efforts to override a national strategy designed to insure full citizenship for blacks. Second, the city's collaboration with the whites who initiated the referendum would involve it in private discrimination prohibited under the equal protection clause of the fourteenth amendment of the Constitution.²⁴⁴

The Sixth Circuit, in a per curiam opinion, reversed the district court on the grounds that there was no identifiable conflict between state and federal law²⁴⁵ and that the finding of racial discrimination underlying the referendum was not supported.²⁴⁶ Moreover, the finding of state action in conducting the referendum was held to be improper since "neutral principles" exempted this governmental process from restraints by the federal courts.²⁴⁷

Reasoning analogous to the original *Ranjel* decision was followed by District Judge Richard Austin in *Gautreaux v. Chicago Housing Authority*.²⁴⁸ There he granted summary judgment to black public housing tenants and applicants who complained that the city's housing authority had selected project sites and adopted tenant assignment procedures for the purpose of maintaining Chicago's existing patterns of residential separation of the races.²⁴⁹ The Chicago Housing Authority justified its segregationist policy as a way of avoiding tension and violence between blacks and whites in public housing. Through an elaborate and rather byzantine scheme devised by the City Council and

²⁴² *Id.* at 308-09. See note 239 *supra*.

²⁴³ U.S. CONST. art. VI, § 2.

²⁴⁴ The court relied heavily upon *Reitman v. Mulkey*, 387 U.S. 369 (1967), in finding that the referendum involved state action. 293 F. Supp. at 311-12.

²⁴⁵ 417 F.2d at 323. The court based this finding on its inability to find direct language requiring relocation outside of areas of racial concentration in any of the statutory authority relied upon by the district court.

²⁴⁶ 417 F.2d at 323-24. A finding of racial motivation in seeking the referendum could only have been accomplished by searching the minds of the electorate. The district court's reliance on opinion evidence to support its finding of discriminatory purpose was found to be improper. *Id.* at 324.

²⁴⁷ *Id.* This reference to "neutral principles" was based upon the concurring opinion of Justice Harlan in *Hunter v. Erickson*, 393 U.S. 385, 395 (1969).

²⁴⁸ 296 F. Supp. 907 (N.D. Ill. 1969).

²⁴⁹ The court had found standing to sue in an earlier opinion. *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967). Civil rights legislation was found to uphold the right of plaintiffs to challenge racially motivated site selection. See 42 U.S.C. §§ 1983, 2000d (1964).

CHA, the city maintained four segregated white projects; the balance of its public housing was 99 percent black in occupancy, and 99.5 percent of the units were located in areas that were (or soon would be) substantially all black.²⁵⁰ Refusing to enjoin the expenditure of federal funds for public housing in Chicago, the court directed the parties to formulate site and tenant selection policies together.²⁵¹ The order subsequently adopted by the court has broad implications for the future of city planning in Chicago, given the all-pervasive racial segregation in its housing,²⁵² and may be a rather startling step in the evolution of judicial review in urban renewal controversies.

While it is beyond the scope of this study to consider all of the ramifications of the order, the detail and breadth of its language indicate how critically judicial review can affect the planning process—in this case the provision of low-cost shelter. The order applies to all CHA housing projects; it establishes an immediate quota of 700 new housing units in the hitherto “white preserves”²⁵³ and placement of 75 percent of all future housing in those areas; it limits the number of occupants of any dwelling unit to 120 persons (except that in exceptional circumstances the maximum may be 240 persons)²⁵⁴ and formulates new tenant selection and assignment policies;²⁵⁵ and it forbids assignment of families with children to apartments above the third floor of any dwelling unit.²⁵⁶ The various limitations and directives contained in the order regarding planning decisions based on race probably were necessary to satisfy statutory and constitutional requirements against racial discrimination. However, the lack of flexibility left to the planning apparatus regarding racial considerations could have adverse side effects. The already tenuous political support for public housing may wither as the

²⁵⁰ The history of apartheid in Chicago's public housing has been ably told in M. MYERSON & E. BANFIELD, *POLITICS, PLANNING AND THE PUBLIC INTEREST* (1955).

²⁵¹ 296 F. Supp. at 914.

²⁵² 304 F. Supp. 736 (N.D. Ill. 1969).

²⁵³ *Id.* at 738. The court labeled all the areas of nonwhite racial concentration “Limited Public Housing Area.” All the remaining area of Cook County was named the “General Public Housing Area.” *Id.* at 737. It was in this latter area that the next 700 units and 75% of all future housing had to be located. *Id.* at 738-39.

²⁵⁴ *Id.* at 739.

²⁵⁵ *Id.* at 742-43.

²⁵⁶ *Id.* at 739. A recurrent hazard of project dwellers is the death and serious injury of young children falling from balconies. Chicago has the world's largest housing project under one management—the Robert Taylor Homes—which is composed of 28 high rise buildings, each 16 stories high. A variety of social problems have been abetted and sometimes caused by the height of the buildings. See McGee, *Juvenile Justice and the Ghetto Law Office*, 60 U. CHI. MAGAZINE 12 (1967).

spectre of subsidized desegregation becomes manifest to white communities indifferent or mildly hostile to public housing, but implacably opposed to the racial mixing of their own neighborhoods. In a telegram to HUD Secretary George Romney after the *Gautreaux* decision, the National Committee Against Discrimination in Housing declared that "we must face the fact that local housing authorities and suburban communities, which heretofore have been reluctant to introduce public housing, may now use this ruling to reject all further low-income housing proposals, and instead continue their emphasis on middle-income housing developments, water and sewer grants, highway programs, and other federal aids and grants."²⁵⁷

Compounding the political problem of race, the order also strikes another public nerve—that of the cost of public housing. The court has effectively limited the size and height of project buildings that the CHA may plan to erect. Thus, the CHA will be forced to recast completely its existing design commitment to mammoth, multi-storied structures. Smaller structures in large projects will inevitably require acquisition and clearance of larger tracts should the Authority persist in its open-space bias. Moreover, these may not be as cheap to construct and maintain as the existing tiered cells which loom above Chicago's ghettos. Dispersing smaller, compact units throughout the city could also require an increase in CHA expenditures. "Vest-pocket public housing makes good architectural news; it also tends to be slow in production, expensive, very difficult to secure sites for, and substantially nonexistent."²⁵⁸

Although "HUD has decided not to appeal Judge Austin's ruling, thereby limiting its effect to Chicago,"²⁵⁹ the principle established in *Gautreaux*, that those eligible for public housing may obtain relief for discriminatory site-selection, was followed elsewhere in a different social and planning context. In *Hicks v. Weaver*,²⁶⁰ a Louisiana district judge expressly relied on *Gautreaux*²⁶¹ and enjoined the Bogalusa Housing Authority, an LPA in a small town 35 miles north of New Orleans, from constructing public housing units in racially segregated black

²⁵⁷ The telegram appears in Craig, *A Housing Desegregation Ruling in Chicago is Having Reverberations on a National Scale*, CITY CHRONICLE (MONTHLY REPORT OF URBAN AMERICA), July 1969, at 4.

²⁵⁸ Sternlieb, *New York's Housing: A Study in Immobilism*, THE PUBLIC INTEREST 123, 133 (No. 16, Summer 1969).

²⁵⁹ Craig, *supra* note 257, at 4.

²⁶⁰ 302 F. Supp. 619 (E.D. La. 1969).

²⁶¹ *Id.* at 621, 623.

communities within Bogalusa. Unlike *Gautreaux*, the *Hicks* court also enjoined the Secretary of HUD from making any further payment of federal funds to the LPA. The court found HUD to have been an "active participant [in discrimination against the plaintiffs] since it could have halted the discrimination at any step in the program."²⁶² It is noteworthy that the *Hicks* court looked to the standards that HUD itself had established in finding discrimination in site selection.²⁶³

The *WACO*, *Garrett*, *Ranjel* and *Gautreaux* decisions indicate the range and depth of recent judicial contact with urban renewal and allied land use schemes. Increasingly, litigants are pressing courts to resolve disputes that emerge in the wake of the implementation of urban renewal plans. Lawyers with the NAACP Legal Defense and Educational Fund, Inc., architects of much of the school desegregation litigation, are participating in important cases throughout the country that involve the fate of housing, urban renewal and highway projects. The far-reaching nature of the relief sought in many of the cases will require courts to consider a variety of issues which, until recently, might have been held beyond their grasp.

Routing of the New York Hudson River Expressway and related access routes has been challenged in *Pinn v. Rockefeller*²⁶⁴ by minority group citizens of Ossining and North Tarrytown, New York. They followed two villages and two conservation groups which had already filed actions to enjoin construction of the road that threatened to displace over 4,100 households.²⁶⁵ As in *Norwalk*, the blacks and Puerto

²⁶² *Id.* at 623. The American Civil Liberties Union has filed a separate lawsuit against HUD, in sequel to *Gautreaux*, seeking a ruling that HUD, through its funding of CHA projects, participated in the LPA's racially discriminatory site selection practices. The ACLU's lawyer, Alexander Polikoff, who was the principal lawyer for the plaintiffs in *Gautreaux*, said that if "Judge Austin agrees on the liability of HUD, . . . we can ask for an order making more realistic the relief we are seeking through utilizing a broader scope of programs" going beyond public housing to other forms of federal subsidies aimed at low-income families. See Craig, *supra* note 257.

²⁶³ 302 F. Supp. at 622. The court relied in large part on a policy articulated by HUD that "forbids the construction of federally-financed public housing in all-Negro neighborhoods in the absence of a clear showing that no other acceptable sites are available." *Id.*

²⁶⁴ No. 69 Civ. 420 (S.D.N.Y. 1969). The *Pinn* action has not been pressed by either side pending the disposition of the concurrent conservationists' suit. See note 265 *infra*.

²⁶⁵ In the original actions brought by the conservationists, the district court blocked the plan for the road by enjoining the U.S. Army Corps of Engineers from issuing a permit to the State of New York to dredge and fill in the river for the proposed construction. The court also enjoined the New York Department of Transportation from further construction without the approval of the Secretary of the U.S. Depart-

Ricans in *Pinn* assert that state action in building the highway has been undertaken without consideration of the disproportionate impact on displaced citizens subject to rampant discrimination in the housing market. Equal protection arguments have been raised in an effort to force abandonment of the route that will either exile blacks from Ossining and North Tarrytown or force them into substandard dwellings because of alleged lack of relocation shelter. The normally esoteric engineering problems involved in the planning of a major expressway have been further complicated by navigational and conservation problems, because much of the route follows the eastern shore of the Hudson with consequential impact on recreational and historical areas. Aside from its aesthetic effect on the river and shoreline, the charge has been made in the conservationists' suit—consolidated with *Pinn*—that filling in parts of the river will destroy the habitat of vast numbers of fish and other aquatic life. The court's task is not simplified by consideration of the growing crisis in traffic congestion in the area to be served by the expressway²⁶⁶ and the increased cost of delay, factors which were persuasive to the judge who denied the conservationists' application for a preliminary injunction. Even more difficult, however, are the critical problems of displacement developed in excruciating detail in the affidavit of city planner Yale Rabin (filed in opposition to defendants' motion to dismiss) which concludes:

ment of Transportation or without obtaining express congressional consent. Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969). The court reserved decision on issues raised in the consolidated suit of the minority groups until disposition of the appeal of its action in the conservationists' lawsuits.

The Court of Appeals affirmed, Citizens Comm. for the Hudson Valley v. Volpe, No. 34010 (2d Cir., April 16, 1970), holding that although the statute under which the Army Chief of Engineers issued the disputed permit contained no provision for judicial review, "[t]he district court properly relied on the presumption of reviewability embodied in the Administrative Procedure Act where there was no evidence of a congressional intent to prohibit review." The court said that through the APA Congress intended to assure comprehensive review of a "broad spectrum" of administrative actions, including those made reviewable by specific statutes without adequate review provisions as well as those for which no review is available under any other statute. Although the conservationists did not claim that the proposed expressway threatened any direct personal or economic harm to them, the court determined that they had standing as "private Attorneys General" to protect the public interest "in the natural resources, scenic beauty and historical value of the area." *Id.* at 2343.

²⁶⁶The expressway is planned to extend for approximately nine miles along the east shore of the Hudson River from a point near the Tappan Zee bridge at Tarrytown north to Grotonville. Some 22,000 feet of the road will rest on fill extending at the widest point 1,300 feet into the river.

For many Black and Puerto Rican families life in their present surroundings represents a hard won alternative to the tense and oppressive conditions of the city ghetto. To deprive these households of the continued opportunity to live in the communities of their choice is to expose the insensitive disregard for human needs which has characterized the planning of this expressway, and provide evidence in support of the Kerner Report findings that, "White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II."²⁶⁷

English v. Town of Huntington,²⁶⁸ another suit in which plaintiffs are represented by the NAACP Legal Defense and Educational Fund lawyers, involves a challenge to the adequacy of relocation plans in an urban renewal project. The court has been asked to enjoin local officials from taking action that will result in displacement and to stop federal officials from granting funds or otherwise approving financing until adequate relocation shelter is assured. The court has also been asked to void the town's building ordinance that discourages multiple dwellings and low-cost single family residences. Additionally, affirmative relief has been requested to require local urban renewal officials to modify the plan so that low-rent public housing would be constructed on certain designated tracts. The court thus has been asked not only to void and/or enjoin project activity harmful to plaintiffs but also to reshape the plan itself to afford relief.

Affirmative relief has also been sought in *Kennedy Park Homes Association, Inc. v. City of Lackawanna*.²⁶⁹ The suit seeks to force officials of the industrial community near Buffalo, New York, to approve a subdivision scheme and issue building permits, variances and certificates of occupancy for the development of a low-income housing complex located outside of the black ghetto. The action also requests that the court invalidate zoning ordinance amendments passed pursuant to resolutions adopted by the Lackawanna City Council three days after the FHA declared the low-income housing subdivision feasible. The zoning action, which restricted the lands intended for the project to park and recreational use, was reminiscent of the action taken in Deerfield, Illinois, described in *Progress Development Corp. v. Mitchell*.²⁷⁰

²⁶⁷ Affidavit of Yale Rubin in Behalf of Plaintiffs at 16, *Pinn v. Rockefeller*, No. 69 Civ. 420 (S.D.N.Y. 1969).

²⁶⁸ No. 69 Civ. 144 (E.D.N.Y. 1969).

²⁶⁹ No. 1968-385 (W.D.N.Y. 1968).

²⁷⁰ 286 F.2d 222 (7th Cir. 1961). In this case, land intended for interracial residency

The resolutions also declared an indefinite moratorium on all subdivision construction in the city. Plaintiffs have invoked the thirteenth amendment and the equal protection and supremacy clauses to protect their rights to develop low-cost housing pursuant to federal statutes, including the Fair Housing Act of 1968²⁷¹ and the United States Housing Act of 1937.²⁷² In contrast to many of the actions in which HUD or other federal officials have been defendants, the Government has intervened as plaintiff, though only to seek injunctive relief against giving effect to the rezoning.

That there is the quality of *déjà vu*²⁷³ to much of the litigation is illustrated by *Harris v. Charlottesville Redevelopment and Housing Authority*,²⁷⁴ a suit that recalls *Gautreaux*. The action seeks to enjoin the Virginia city's LPA from constructing low-rent public housing on three sites in close proximity to each other, near existing public housing, and either within or on the edge of the black residential neighborhood. Plaintiffs have charged that construction of the some 400 housing units will perpetuate and concentrate the city's ghetto. As evidence that site selection was racially motivated, plaintiffs allege that a location near a white residential area outside the black ghetto was rejected after its initial selection by the agency following receipt of a petition signed by 2,538 citizens opposing location of the housing outside the ghetto but supporting public housing within it. No affirmative relief is requested; in fact, the plaintiffs ask that the agency be enjoined from condemnation proceedings until the disestablishment of the prevailing custom and practice of residential segregation in the city, and until adequate relocation facilities are provided for site residents.

The suit is further complicated by an attack upon codefendant Charlottesville School Board's location of an elementary school in the vicinity of either of the public housing project sites. The overall thrust of the suit, however, is to prevent the defendants from locating the public housing and the school so as to shape the pattern of growth

had been condemned for use as a park. See note 114 *supra* and accompanying text. See *Deerfield Park Dist. v. Progress Dev. Corp.*, 22 Ill. 2d 132, 174 N.E.2d 850 (1961), *cert. denied*, 372 U.S. 968 (1963).

²⁷¹ 42 U.S.C. §§ 3601-31 (Supp. IV, 1969).

²⁷² 42 U.S.C. §§ 1401-36 (1964).

²⁷³ As sociologist Kenneth B. Clark said in testimony before the Kerner Commission, "I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland with the same moving picture reshowed over and over again, the same analysis, the same recommendations, and the same inaction." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 265 (1968).

²⁷⁴ No. 68-C-25-C (W.D. Va. 1968).

in the city along racial lines. The suit posits both a constitutional and a statutory duty of the defendants to take affirmative steps to eradicate segregated housing and educational practices.²⁷⁵

The creativity of the new litigation is best exemplified by an appeal from a district court dismissal of an action to enjoin a private developer from undertaking the renewal of part of a black ghetto even though no federal funds were involved. In *Arrington v. City of Fairfield*²⁷⁶ the Fifth Circuit was asked to reverse a district court's dismissal of a suit brought to halt displacement of black tenants by commercial development and construction of a motel in an area that had been proposed for an urban renewal project using federal funds. The suit alleged that the development scheme in which the city participated, and the consequential exclusion of the displacees from the city, denied blacks the right to hold and lease property in the city in violation of the due process and equal protection clauses of the fourteenth amendment.

Many of the factors common to urban renewal controversies considered earlier in this Article appeared in *Arrington*, except for the all-important and otherwise constant element of federal funding. The controversial site was in a black ghetto. Application was made to HUD for an urban renewal grant, but the request was denied because of HUD objection to the lack of public or private resources in the city sufficient to house persons who would have been displaced. The only housing planned for displaced low income black families was in Dolomite, Alabama, an unincorporated, predominantly black community five miles from the city, which did not meet the HUD requirement that relocation be within the city.

While the application to HUD was still pending, the city council (apparently deciding to proceed without federal funds) authorized the mayor to enter into a contract with Engel Realty Company, one of the defendants, for the commercial development of the area. For its part

²⁷⁵ Cf. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967); 24 C.F.R. § 1.4(b)(2)(i) (1970); HUD LOW-RENT HOUSING MANUAL § 205.1, ¶ 4g which reads in part:

The aim of a Local Authority in carrying out its responsibility for site selection should be to select from among sites which are acceptable under the other criteria of this Section those which will afford the greatest opportunity for inclusion of eligible applicants of all groups regardless of race, color, creed, or national minority groups an opportunity to locate outside of areas of concentration of their own minority groups. Any proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable.

²⁷⁶ 414 F.2d 687 (5th Cir. 1969).

the city would install drainage pipe. HUD subsequently rejected the urban renewal application upon finding that the displacement caused by development of the area would exile many blacks from Fairfield. The lawsuit and subsequent appeal charged the city with doing indirectly what it could not have done directly—drive blacks from the city into substandard housing facilities. Plaintiffs suggested that HUD relocation procedures be used as minimum standards to govern the application of the thirteenth and fourteenth amendments in both federally aided and non-federally aided urban development and housing programs.²⁷⁷ The core of plaintiffs' theory was that the city's agreement to participate by laying the drainage pipe, thereby making possible the motel construction and commercial development, constituted constitutionally prohibited state action when coupled with the presence of pervasive racial discrimination and the consequent shortage of relocation housing for blacks in the community.

The defendants and the lower court took the relatively simplistic position that the drainage pipe benefited everyone in the area equally, that the agreement to build the motel was strictly between the owners of the property and the developers, and that the city was not participating in a federal urban renewal program. Thus, it was not bound by the strictures of federal statutes and regulations.

The Fifth Circuit Court of Appeals reversed the district court, although the dissenting judge warned that "the effect of their decision is to convert the federal courts into local drainage ditch supervisors."²⁷⁸ In the majority's view, the district judge mainly erred by embracing a discredited rationale of standing and "never reached the merits of the claim because [he] concluded that the 'plaintiffs having no interest in the property or interest in the contracts [for commercial development of the disputed area] . . . have no right to invoke the jurisdiction of this Court.'"²⁷⁹ Although the plaintiffs were tenants rather than landowners, the court avoided the objections that defendants raised on this point by noting that "[t]he crux of [plaintiffs'] claim is not deprivation of property without due process . . . but violation of equal

²⁷⁷ *Id.* at 693. Although the court declined to "cross this threshold of constitutional law," it might have found precedent for such a use of federal guidelines in *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

²⁷⁸ 414 F.2d at 694. The dissent was by Circuit Judge James P. Coleman, who was once Governor of Mississippi.

²⁷⁹ *Id.* at 691.

protection.”²⁸⁰ Thus, a fee interest is not a prerequisite to the vindication of constitutional rights in this context.

In a lucid, uncomplicated view of standing, the court declared that “plaintiffs’ stake in the outcome of the case is immediate and personal and they stand to suffer economic injury if they lose.”²⁸¹ *Norwalk I* was expressly endorsed, *Flast v. Cohen* followed, and *Johnson v. Redevelopment Agency*²⁸² was found “not apposite” and described as “rejected in subsequent decisions.”²⁸³ The “personal stake” of the plaintiffs coupled with the alleged violation of a constitutionally protected right (the right not to be subjected to racial discrimination by state action) was sufficient to confer standing.

Thus, equal protection was the other theory upon which the court predicated its reversal. As had the lower court, dissenting Judge Coleman said the case presented no federal question and “offers the slimmest support I have ever seen for federal intervention in a purely local matter (at the Board of Alderman level).”²⁸⁴ The majority thought otherwise, however, and held that the district court shut off inquiry prematurely by granting summary judgment. “[P]laintiffs may be able to show that the City will knowingly and actively precipitate the dislocation of persons who, because of a city-wide practice of residential discrimination, will have no place to go. . . . Where there is state involvement, the fact that the decision to discriminate may be made by [a] private individual rather than a public official is not decisive.”²⁸⁵ There being “little doubt” on the part of the majority that state action was present, the trial court was commanded to determine its constitutionality.

Despite plaintiffs’ clearcut victory, it should be noted that the court’s view was more restricted than the one contended for by the plaintiffs, who called for the imposition of federal statutory and HUD regulatory schemes as minimum standards for urban development projects, whether federally financed or not. By arguing for the federal standards, the plaintiffs selected legal terrain more suitable to the defendants. In the

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² 317 F.2d 872 (9th Cir.), *cert. denied*, 375 U.S. 915 (1963). See text at notes 95-102 *supra*.

²⁸³ 414 F.2d at 691-92. The court supported this conclusion with *Norwalk I*, *WACO I*, and *Powelton Civic Home Owners*. Cited also—as evidence of broadening concepts of standing—was *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

²⁸⁴ 414 F.2d at 696.

²⁸⁵ *Id.* at 692.

total absence of federal participation, it was unlikely (as the opinion confirmed) that the court would apply the requirements of federal urban renewal law. Plaintiffs' approach only highlighted the lack of federal and perhaps state government participation. The court's endorsement of an expansive view of equal protection and a simplified approach to standing was a more manageable approach to plaintiffs' case.

The entire controversy demonstrates some of the basic dilemmas and limits of judicial review. While in the usual action, the presence of federal funds and activity will render inapplicable the vexing and anomalous facts of *Fairfield*, the case illustrates how vitally important economic and political factors are in the planning process. Both the classic legal impotency of tenants and the political powerlessness of blacks emerge in the decision, with especially important consequences in the absence of a legislative scheme for their protection. A city administration sensitive to the needs of the 161 families, nearly all poor and black, would not have permitted the site development without making adjustments for the plight of the displacees and obtaining appropriate concessions from those who stood to profit from the construction of the motel and other commercial facilities. Indeed, with sufficient political power, the site residents might have compelled the city to consummate an agreement with HUD providing for low-cost housing instead of, or in addition to, the commercial venture. Even the exceptionally capable and imaginative lawyers who have challenged the city's action in this case did not seek this ultimate of remedies. Thus, even if the courts eventually stop the project and prohibit development of the motel, the blacks will still be living in progressively deteriorating housing and will remain, in the understatement of plaintiffs' brief, "impoverished."

CONCLUSION

*Justice will be universal in this country when the processes as well as the doors of the courthouse are open to everyone. This can occur only as the institutions of justice, the courts and their processes are kept responsive to the needs of justice in the modern world. Such a goal will be accomplished only as all elements of the legal system, the lawmakers, practicing attorneys, legal scholars and judges, recognize the very changing effects of the law on society and adapt them within the principles which are fundamental to freedom.*²⁸⁶

²⁸⁶ Address by Mr. Chief Justice Earl Warren, cornerstone-laying ceremonies of the Roscoe Pound American Trial Lawyers Law Center, Sept. 28, 1968.

Ever-expanding contours of equal protection have thrust the federal courts into the midst of urban renewal. Clearly the abdication of *Berman v. Parker* belongs to another day. Though "federal courts cannot administer the housing"²⁸⁷ or the urban renewal program, wherever they sit, "human rights under the Federal Constitution are always a proper subject for adjudication."²⁸⁸ *Norwalk CORE* and other recent decisions indicate that federal judges are increasingly reluctant to permit the rich mixture of political and technical issues abounding in urban renewal to block review of program activity when constitutional questions require resolution.

Much of this shift in judicial approach to urban planning is due to the example of the Warren Court, "the revolutionary committee"²⁸⁹ which has established precedent for facing questions once evaded under the rubric of justiciability. The expansive approach of federal courts to equal protection is at war with notions of times past that "there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power."²⁹⁰

The new dialectic energizing fourteenth amendment exegesis requires the creation of solutions that transform equal protection into more than a negative check upon deliberately contrived injustice. Where legislators and administrators either create or permit constitutional vacuums, equality may require courts to fill the void. Such a mandate, increasingly realized in education, voting and criminal justice, inevitably will find expression in other areas vitally affecting the national life. "Once loosed, the idea of Equality is not easily cabined."²⁹¹ Urban renewal programs must maintain in equilibrium the larger considerations of the commonweal with concerns for the poor and powerless. Fidelity to the planning process does not require indifference to human needs and suffering.

Under Article III of the Constitution, urban renewal controversies in many instances are justiciable, for a significant number of "the claim[s] presented and the relief sought are of the type which admit of judicial resolution."²⁹² Urban renewal cases thus far indicate that

²⁸⁷ This phrase was used in Judge Hays' dissenting opinion in *Norwalk I*. See note 161 *supra* and accompanying text.

²⁸⁸ *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

²⁸⁹ A. BERLE, *THE THREE FACES OF POWER* at vii (1967).

²⁹⁰ *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

²⁹¹ Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

²⁹² *Powell v. McCormack*, 395 U.S. 486, 516 (1969).

relief can be "judicially molded,"²⁹³ that there exist in the planning process identifiable issues that can be isolated and dealt with successfully, and that these issues need not turn on the stake or the standing of the plaintiff.²⁹⁴

Yet only the naive will not perceive the essential limits of judicial review. Courts faced with the proposition of dismantling or disrupting a plan painstakingly pieced together over months and years must inevitably opt for some middle ground, fashioning a remedy somehow consistent with execution of the plan. Prayers for relief should be narrowly framed if they are to be entertained seriously. The courts have limitations and are not likely to make the difficult choices that ultimately are determined by considerations of political and economic power.

Often, only abandonment of an existing plan or its drastic revision will really protect the interests of groups excluded from meaningful participation in the decision-making power apparatus which fashions urban renewal and allied land use programs. In *Pinn v. Rockefeller*²⁹⁵ engineering considerations with political overtones threaten to propel the highway through the hearths of poor blacks, driving them from Ossining and North Tarrytown. Political and economic realities, part of any equation, tend to predetermine much of the oppressive impact of urban renewal.

Allocation of resources is therefore the ultimate issue. Despite the gathering momentum of courtroom legislating,²⁹⁶ this critical aspect of public power is largely beyond judicial reach. The power of the purse is still in the firm grasp of legislators. Thus the threat, not the actuality, of judicial review may be the way in which judges can best insure the responsiveness of planners, administrators and legislators to considerations which cannot be charted on drawing boards. The increased willingness of courts to conform land use planning to the requisites of due process and equal protection is a factor that no agency can ignore. Judicial vigilance increasingly stands as a viable check to arbitrariness and injustice in urban renewal.

²⁹³ *Baker v. Carr*, 369 U.S. 186, 198 (1962).

²⁹⁴ Scholarship continues to erode the concept and mythology of standing. Cf. Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969):

In sum, the notion that the constitution demands injury to a personal interest as a prerequisite to attacks on allegedly unconstitutional action is historically unfounded.

²⁹⁵ No. 69 Civ. 420 (S.D.N.Y. 1969).

²⁹⁶ Some have seen its consummation. "Ultimate legislative power in the United States has come to rest in the Supreme Court of the United States." A. BERLE, *supra* note 289, at 3.