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ILLUSION AND CONTRADICTION IN THE QUEST FOR A DESEGREGATED METROPOLIS

Henry W. McGee, Jr.*

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

42 U.S.C. § 3601.¹

. . . From its inception, the Negro ghetto was unique among the city's ethnic enclaves. It grew in response to an implacable white hostility that has not basically changed. In this sense it has been Chicago's only true ghetto, less the product of voluntary development within than of external pressures from without. Like the Jewries of medieval Europe, Black Chicago has offered no escape. Irishmen, Poles, Jews, or Italians, as they acquired the means, had an alternative: they could move their enclaves to more comfortable environs or, as individuals, leave the enclaves and become members of the community at large. Negroes—forever marked by their color—could only hope for success within a rigidly delineated and severely restricted ghetto society.

Allan H. Spear²

America is worse than South Africa, because not only is America racist, but she also is deceitful and hypocritical. South Africa preaches segregation and practices segregation. She, at least, practices what she preaches. America preaches integration and practices segregation. She preaches one thing while deceitfully practicing another.

Malcolm X³

A decade of litigation in which the central issue of discrimination essentially was uncontested⁴ thus far has failed to disestablish racial

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1. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (1970).
2. A. SPEAR, *BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO* 229 (1967).
3. MALCOLM X SPEAKS 75 (1st ed. G. Breitman ed. 1965).
4. A concise chronology of the decade of litigation is provided as an Appendix entitled *THE SAGA OF DOROTHY GAUTREUX* at 1012, *infra*.
"The findings [as to racial segregation] were neither challenged nor appealed."

segregation or produce desperately needed low-income housing for Chicago blacks. Recently, the uncompleted litigation has produced a unanimous United States Supreme Court decision exposing suburban racial sanctuaries to the possibility of integrated public housing units.⁵ Although the first-named plaintiff in the suit, Dorothy Gautreaux, did not survive the decision,⁶ the extent of her posthumous triumph is the central theme of this article.

In *Hills v. Gautreaux* the Court held that "a metropolitan area remedy . . . is not impermissible as a matter of law,"⁷ when a government agency with metropolitan wide authority, has violated the Constitution by funding housing in a discriminatory manner. The use of a metropolitan area remedy under these circumstances does not offend the principle of *Milliken v. Bradley*⁸ which forbade metropolitan area relief against school districts on the premise that "a federal court is required to tailor the scope of the remedy to fit 'the nature and extent of the constitutional violation'."⁹ In *Milliken* the limits of federal equity power expired at the school district boundary line. "Innocent" school districts were insulated by the Court from "interdistrict" orders.¹⁰ In *Gautreaux*, however, the Court affirmed the propriety of disregarding municipal boundary lines in the desegregation of Chicago's public housing, because the relevant geographic lines for purposes of the inner-city black's housing options includes within their "noose"¹¹

Gautreaux v. CHA, 503 F.2d 930, 933 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 96 S. Ct. 1538 (1976).

A poignant footnote in the decision finding HUD complicitous in racial discrimination is more compelling than a page of statistics:

. . . Plaintiff Gautreaux has accepted public housing in Negro areas only because she has been living in a one bedroom apartment with a family of six. Plaintiff Odell Jones had moved to segregated public housing with his wife and three children to escape their two rooms in which "the rats had begun to run over the house at will."

Gautreaux v. Romney, 448 F.2d 731, 737 n.12 (7th Cir. 1971).

5. *Hills v. Gautreaux*, 96 S. Ct. 1538 (1976).

6. Interview with Alexander Polikoff, attorney for plaintiffs/respondents, in Chicago, Illinois (June 11, 1976); N.Y. Times, April 21, 1976, at 1, col. 8.

7. 96 S. Ct. 1538, 1550 (1976).

8. 418 U.S. 717 (1974).

9. 96 S. Ct. 1538, 1544 (1976).

10. 418 U.S. at 745. "Insulated" may be too strong a word. Interdistrict orders have been entered since *Milliken* thereby weakening its "requirement of significant interdistrict segregative effects." Note, *Interdistrict Desegregation: The Remaining Options*, 28 STAN. L. REV. 521, 522 (1976). See *Newburg Area Council, Inc. v. Board of Educ.*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975) and *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd*, 423 U.S. 963 (1975).

11. The metaphor is the now famous one of the UNITED STATES COMMISSION ON CIVIL RIGHTS, 1961: HOUSING 1 (1961). It appears again in NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 1 (1968).

In *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257, 1260 (N.D. Ohio, 1973), *rev'd*, 500 F.2d 1087 (6th Cir. 1974), Chief Judge Battisti described the same phenomenon with a less grim but equally descriptive phrase: "at present, [metropolitan Cleveland] has the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring."

the suburbs¹² as well as the city. Although this may appear as one law for school boards and another for city councils (or local housing authorities¹³), the Court limited its decision to the question of whether federal courts have authority to order governmental units with metropolitan wide authority to take remedial action within a metropolitan area, outside of the center city.¹⁴ The distinction between school desegregation cases and housing desegregation cases, therefore, rests not upon the relative complexity of enforcing court-ordered desegregation,¹⁵ but upon the scope of the equity power of the federal courts.¹⁶

Newspaper headlines trumpeted the pronouncement in *Gautreaux* as momentous.¹⁷ The initial response to the decision was that it promised the end of an era in which blacks effectively had been banned from the suburbs and the beginning of an era in which equality finally would be achieved through the integration of all communities. Secondary assessments, however, were more cautious. Reflection upon the current status of public housing revealed the practical limits of the decision.¹⁸ Public housing programs were stalled by a receding Con-

12. 96 S. Ct. 1538, 1547 (1976).

13. Public housing projects are administered by local housing authorities, permitted by federal law to be "any State, County, municipality, or other governmental entity or public body . . . , which is authorized to engage in the development or administration of low-rent housing" 42 U.S.C. § 1402(11) (1970). "These local authorities [are] created pursuant to State law, and their members are usually appointed by the mayors of the respective localities," S. REP. NO. 84, 81st Cong., 1st Sess. 16 (1949).

On the problem of different desegregation requirements depending on geographic locale if not governmental activity, see Karst, *Not One Law at Rome and Another at Athens: The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383.

14. 96 S. Ct. 1538, 1545 (1976). Both CHA and HUD have authority to operate outside of the Chicago city limits, *id.* at 1546. The opinion has added significance since "in many states the jurisdiction of the local housing authority extends beyond the boundaries of a central city," Rubinowitz & Dennis, *School Desegregation Versus Public Housing Desegregation: The Local School District and the Metropolitan Housing District*, 10 URBAN L. ANNUAL 145, 166 n.69 (1975), citing, for example, Hawaii, Illinois, Ohio, and New Mexico.

15. The court of appeals in *Gautreaux v. CHA*, 503 F.2d 930, 935-36 (7th Cir. 1974), "erred" in interpreting *Milliken* as limited to the determination that metropolitan area remedies were impermissible in school desegregation cases because of the "administrative complexities of school district consolidation and the deeply-rooted tradition of local control of public schools." See *Hills v. Gautreaux*, 96 S. Ct. 1538, 1544-45 n.11 (1976).

16. 96 S. Ct. 1538, 1544 (1976).

17. See, e.g., "Justices Uphold Minority Housing in Suburbs," N.Y. Times, April 21, 1976, at 1, col. 8, which described the case as a "landmark victory for civil rights groups." See also L.A. Times, April 21, 1976, § 1, at 1, col. 5, which headlined its story "Way Open for Public Housing in Suburbs."

18. Unfortunately, the decision applies only to Chicago. An abundance of political, economic, and legal barriers to the dispersal of subsidized housing still exists in other metropolitan areas. Cf. Editorial, "HUD and the Suburbs," Washington Post, April 23, 1976, § A, at 28, col. 1; Oser, "Supreme Court Ruling in Chicago Case is Likely to Have Only a Limited Effect," N.Y. Times, April 22, 1976, at 21, col. 1; and "U.S. Supreme Court Rules Metropolitan Remedy Permissible in *Gautreaux*," The Potomac Institute, Inc., Metropolitan Housing Program Memo 76-4 at 1 (April 22, 1976).

gressional commitment to the housing program,¹⁹ coupled with the Administration's decision to shift from conventional public housing projects to the new Section 8 strategy (the major conduit of housing subsidies in the 1974 Housing and Community Development Act).²⁰ Further analysis of the decision also revealed conceptual limitations. Subsequent decisions of the Court reinforced these doubts by raising serious questions about the scope of the case.²¹

19. The 'state of the union' in 1976, as viewed in the January 19 message of the President . . . and in a following statement on January 21 by Senator Edmund S. Muskie (D. Maine)—speaking for the Democratic Party—is a 'state' in which housing and community development do not exist. In neither of these messages is there a recognition of housing and community development as issues with any priority status or any relationship to the national welfare.

* * *

In major policy terms, the HUD budget for fiscal year 1977 calls for a decrease in the federal financial contribution to the operation of existing public housing projects.

* * *

The only new public housing units to be reserved in fiscal year 1977 are 6000 units for Indians, mandated by the Congress.

* * *

[a]bout 92,760 units . . . are due to be completed over the next two years.

Enno *et al.*, *HUD 1977 Fiscal Budget*, 33 J. HOUSING 71, 72-75 (1976) [hereinafter cited as Enno].

20. 42 U.S.C. § 1437f(b) (Supp. IV 1974) provides HUD with authority to enter into assistance contracts with private and public sponsors of newly constructed and substantially rehabilitated dwellings, paying directly to landlords part of the rent so as to reduce a typical tenant's payment to 25% of his income or less. Existing dwellings privately owned are also eligible for the program, and in fact, the activity to date has been largely in the existing dwellings program. "Section 8 constitutes the key housing assistance program of the 1974 Act. . . . It modifies and replaces a proposed revision of the public housing leasing program (Section 23 of the Housing Act of 1937) to replace the rental housing assistance programs (Section 236 and rent supplements) that were suspended by the Administration in January 1973." Kristof, *The Housing and Community Development Act of 1974: Prospects and Prognosis*, 27 J. ECON. & BUS. 112, 112-13 (1975).

. . . [T]he section 8 program, as presently scheduled by the Administration would pass all other assisted housing programs in terms of new commitments. . . .

The appropriations for assisted housing contained in the HUD budget are heavily weighted toward the Section 8 program. They just about close out activity under all other assisted housing programs. And they place a heavy emphasis on leasing of existing housing and acquired troubled properties of the Federal Housing Administration, rather than on new construction and substantial rehabilitation.

Enno, *supra* note 19, at 74. For a brief account of the metamorphosis of rental subsidies—§ 236 to moratorium to § 8—see, McGee, BOOK REVIEW, *Housing Subsidies in the U.S. and England*, 22 U.C.L.A.L. REV. 734, 739-45 (1975). See also text accompanying notes 267-312 *infra*.

21. See, e.g., *Washington v. Davis*, 96 S. Ct. 2040 (1976) and *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 2358 (1976). See text accompanying notes 77-170 *infra*. One assessment of these two cases has opined:

June [of 1976] has been so discouraging a month for those looking for federal court vindication of the interests of the underhoused that it is difficult to assess which opinion is the most serious setback. In *Eastlake* the U.S. Supreme Court upheld the constitutionality of mandatory referendums on any land use decision; in *Washington v. Davis* it disapproved leading lower court civil rights opinions in the course of ruling that evidence of disproportionate racial impact does not suffice alone to invalidate an official act as discriminatory. . . .

The Potomac Institute, Inc., Metropolitan Housing Program, Memo 76-6 at 1 (June 30, 1976).

Gautreaux, therefore, portends an impasse in the Court's struggle with discrimination and desegregation. Confronted in *Gautreaux* with egregious and blatant violations of the Constitution, the Court met the challenge of "the recalcitrant"²² and sanctioned relief. But the frequently more subtle and more persistent manifestations of racial discrimination may elude the Court's current instruments of analysis. If clear-cut violations of the magnitude of those in *Gautreaux* are requisite before the federal courts may act, then *Gautreaux's* promise of equality is illusory. Constitutional violations may not always be as obvious as those condemned in Chicago or in Blackjack, Missouri.²³ Discriminatory practices in public housing often take on "a more sophisticated bent than the Neanderthal practices of Chicago."²⁴ Moreover, in light of the Court's pre- and post-*Gautreaux* deference to the land use hegemony of local communities,²⁵ the decision represents serious contradictions. Although *Gautreaux* superficially indicates that a federal judge has the power to desegregate federally subsidized housing and thereby spearhead a breakout strategy for inner-city-trapped minorities, more recent land use decisions have strengthened the power of racially segregated suburbs to maintain economic, and hence, racial "purity."²⁶ Indeed, within a few weeks of the *Gautreaux* decision, the

22. Mr. Justice Clark, sitting by designation on the Court of Appeals for the Seventh Circuit, used the word "recalcitrant" in the opinion later confirmed by the Supreme Court to condemn those in the City of Chicago political establishment who frustrated compliance with the orders of the district court, *Gautreaux v. CHA*, 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 96 S. Ct. 1538 (1976). "With his orders being ignored and frustrated as they were, he kept his cool and courageously called the hand of the recalcitrant." 503 F.2d at 932.

23. *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). See text accompanying notes 249-57 *infra*.

24. Kushner & Werner, *Metropolitan Desegregation After Milliken v. Bradley: The Case for Land Use Litigation Strategies*, 24 CATH. U.L. REV. 187, 206 (1975). But see, however, the rather transparent strategies of Atlanta, Georgia area officials condemned in *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd* 457 F.2d 788 (5th Cir. 1972).

25. See Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1, 5-9.

26. The word is from the oft-retracted "ethnic purity" phrase of President-elect Jimmy Carter. Carter allegedly used the phrase on April 2, 1976, while flying across upstate New York in an interview with Sam Roberts, chief political correspondent of the New York Daily News. "And, asked about low-income scatter-site housing in the suburbs, [Carter] replied: 'I see nothing wrong with ethnic purity being maintained. I would not force a racial integration of a neighborhood by government action. But I would not permit discrimination against a family moving into the neighborhood.'" The original interview and some of Mr. Carter's various retractions are collected in an article, "Jimmy Carter and 'Ethnic Purity,'" *Washington Post*, April 11, 1976, § C (Outlook), at 7, col. 3.

Mr. Carter subsequently approved of *Gautreaux*, saying:

It still leaves a substantial amount of flexibility to local communities. I don't think this ruling means that in every neighborhood and block in Pittsburgh [where Carter was present when he commented on the case] you have to have low-income housing built. But if there is a definite pattern of collusion between the community and H.U.D. to exclude low-income housing, that's illegal. *N.Y. Times*, April 21, 1976, at 61, col. 6.

Court upheld an exclusionary land use device by permitting the residents of Eastlake, Ohio to veto by referendum a land use change approved by both a planning commission and city council.²⁷ The practical result of this classic demonstration of "devotion to democracy"²⁸ was to halt the construction of a multifamily, high-rise apartment building. Although the exclusionary implications of the decision did not escape the notice of the Ohio Supreme Court justices,²⁹ the United States Supreme Court ignored the exclusionary effects and focused instead on the due process rights of the landowner.³⁰ This article will discuss the contradictions and conflict between *Gautreaux's* use of a metropolitan area remedy and the Supreme Court's land use decisions. First, however, this article will explore both the reality and the illusion of *Gautreaux*.

I. THE REALITY OF *Gautreaux*

Mr. Justice Stewart's opinion described the litigation in *Gautreaux* as "extended,"³¹ an understatement that surely must rival any to issue from the Court. This article will refrain from an extended discussion of all of the details of the 10 year delay³² that deprived the plaintiffs of any practical results from the district court's judgment that was entered on July 1, 1969.³³ Out of the maze of litigation, however, evidence emerged of, in Justice Clark's words, "a callousness on the part of [the Chicago Housing Authority (CHA) and the Department of Housing and Urban Development (HUD)] towards the rights of the black, underprivileged citizens of Chicago that is beyond comprehension."³⁴ As the unanimity of the frequently divided Supreme Court emphasizes, Dorothy *Gautreaux's* case was a paradigm of racial discrimination. Her fight was one of the most protracted struggles in the

27. *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 2358 (1976). See text accompanying notes 217-22 *infra*.

28. *James v. Valtierra*, 402 U.S. 137, 141 (1971).

29. *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 198, 324 N.E.2d 740, 748 (1975) (concurring opinion) and text accompanying note 220 *infra*.

30. 96 S. Ct. 2358 (1976).

31. *Hills v. Gautreaux*, 96 S. Ct. 1538, 1541 (1976).

32. Justice Clark, in the court of appeals decision, similarly refrained from an extended discussion of the delays. *Gautreaux v. CHA*, 503 F.2d 930, 932 (7th Cir. 1974).

33. A history of the litigation would consume an article by itself. Even a skeletal chronology, which provides a pathway through the 10-year maze of litigation, is too lengthy to appear in the footnotes of this article and will be found as an Appendix entitled THE SAGA OF DOROTHY GAUTREAUX at 1012 *infra*.

34. *Gautreaux v. CHA*, 503 F.2d 930, 932 (7th Cir. 1974) (Clark, J.). Earlier the district judge had said:

There have been occasions in the past, in other parts of this country, when chief executives have stood at the school house and the state house doors with their faces livid and their wattles flapping, and have defied the federal government to enforce its laws and decrees. It is an anomaly that the 'law and order' chief executive of this City should challenge and defy the federal law. Apparently, 'law and order' applies only to the enforcement of state law and municipal ordinances.

Gautreaux v. Romney, 332 F. Supp. 366, 370 (N.D. Ill. 1971).

history of the continuing national search for equal justice under law.³⁵

Dorothy Gautreaux and five other tenants filed federal court cases in 1966 against CHA and HUD.³⁶ In 1969 the district court judge, a former prosecutor, found that during some 20 years CHA had selected locations for public housing that resulted in a total of 30,848 units that were more than 99 percent black and that were located in black, or predominantly black neighborhoods. Four projects, however, which were built prior to 1944 in white neighborhoods all had black tenant populations of 7 percent or less. These four projects had more than 90 percent white tenants even though 90 percent of the persons on CHA waiting lists were black. As a result of vetoes by white city councilmen, more than 99 percent of CHA's proposed public housing sites in white areas were rejected after they were initially found to be

35. Indeed, the lawsuit was part of a larger struggle in the city for racial justice that extended back to the 19th century. One historian has written:

At first glance, Chicago's racial problem in 1966 [the year Gautreaux was filed] seemed vastly different from the problems of the late nineteenth and early twentieth centuries. Quantitatively there had been enormous change. Over ten times as many Negroes lived in Chicago in 1966 as in 1920. . . . The ghetto occupied large sections of the city that had been all-white just two decades before. . . .

* * *

Nevertheless, in many significant ways, remarkably little had changed since 1920. Increased numbers had vastly expanded the ghetto, but had not changed its basic structure. Negroes were still unable to obtain housing beyond the confines of the ghetto, and within the black belt the complex of separate institutions and organizations that had first developed between 1890 and 1920 continued to serve an isolated Negro populace. The same restrictions that had limited Negro opportunities in the early twentieth century still operated in 1966. In fact, four civil rights bills, dozens of court decisions, and thousands of brace words about Negro rights had barely touched the lives of Chicago's Negroes.

* * *

From its inception, the Negro ghetto was unique among the city's ethnic enclaves. It grew in response to an implacable white hostility that has not basically changed. In this sense it has been Chicago's only true ghetto, less the product of voluntary development within than of external pressures from without. Like the Jewries of medieval Europe, Black Chicago has offered no escape. Irishmen, Poles, Jews, or Italians, as they acquired the means, had an alternative: they could move their enclaves to more comfortable environs or, as individuals, leave the enclaves and become members of the community at large. Negroes—forever marked by their color—could only hope for success within a rigidly delineated and severely restricted ghetto society.

A. SPEAR, *BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO, 1890-1920*, 223-29 (1967).

Cf. J. WILSON, *NEGRO POLITICS* 6 (1960):

. . . Efforts by Negroes to deal with race relations in a Northern city are not simply blocked by hostile forces, although powerful obstacles are undoubtedly raised. In part, Negro civic action is hampered by constraints inside the Negro community. Some of the important obstacles to civic action are products of the Negro's own community and way of life. Segregation may enforce, or even at some point in time create, the Negro community as it exists today, but within that community alternative modes of behavior are still possible. Segregation is a great determinant of Negro life in the city, but it is not an invariable determinant. . . . The Negro may live in a prison, as a Negro author wrote, but 'the prison is vast, there is plenty of space.'

The unsurpassed classic on life within Chicago's ghetto, however, remains that of ST. CLAIR DRAKE & H. CAYTON, *BLACK METROPOLIS* (1945) [hereinafter cited as *DRAKE & CAYTON*].

36. See APPENDIX, *THE SAGA OF DOROTHY GAUTREUX* at 1012 *infra*.

suitable for public housing.³⁷ HUD acquiesced in CHA's capitulation to white intransigence, and rationalized its acquiescence on the premise that it was better to fund a segregated housing system than to fund no housing system.³⁸

The district judge ordered CHA to construct its next 700 units in white neighborhoods and to construct 75 percent of all public housing in white areas.³⁹ Between September and November, 1969, the judge issued five subsequent orders.⁴⁰ When CHA failed to submit new sites for Chicago City Council approval late into 1970, meetings were held with the judge,⁴¹ at one of which a CHA commissioner confessed that submission of sites to the city council before an upcoming mayoral election would have adverse political consequences.⁴² The judge then im-

37. *Gautreaux v. CHA*, 296 F. Supp. 907, 909-12 (N.D. Ill. 1969).

38. *Gautreaux v. Romney*, 448 F.2d 731, 737 (7th Cir. 1971).

39. *Gautreaux v. CHA*, 304 F. Supp. 736, 738-39 (N.D. Ill. 1969). The order is analyzed in Note, *Public Housing and Urban Policy: Gautreaux v. Chicago Housing Authority*, 79 YALE L.J. 712 (1970). Cf. Daye, *Role of the Judiciary in Community Development and Housing: A Suggested Analytical Method*, 52 J. URBAN LAW 689, 716-32 (1975).

40. *Gautreaux v. CHA*, 436 F.2d 306, 308 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

41. 436 F.2d 306, 308-311 (7th Cir. 1970).

42. *Id.* at 310. The adverse consequences described by CHA Chairman Swibel were:

- 1) complete stoppage of the urgently-needed housing program; 2) racial tension in the city to the point of strife; 3) acceleration of an already alarming flight to the suburbs by middle class White families, and 4) vigorous protests from the Black community for failure to make housing available to them outside of the city.

Id. at 309.

Mr. Swibel was prophetic. All of the consequences materialized, although not because of the construction of public housing, since no large projects have been constructed to this date. Only a handful of scatter-site units were built, and this provoked organized resistance from affected white communities. See *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 372 F. Supp. 147 (N.D. Ill. 1973), *aff'd*, 524 F.2d 225 (7th Cir. 1975). Racial strife over the housing issue continues unabated to this year. See Flannery, "Judge Restricts Nazis; 5 Held in Fair-Housing March," *Chicago Sun-Times*, June 10, 1976, at 5, col. 1:

Lawyers for the city obtained a court order Wednesday that restricts the activities of the local head of the Nazi Party and his followers in the racially troubled Marquette Park area.

They also gained an agreement from the neo-Nazi leader, Frank Collin, that the group would remove an offensive sign—"Stop the Niggers"—from the west wall of the group's headquarters

Meanwhile, five persons, including three ministers, were apprehended by police . . . as they lead some 40 youngsters marching to dramatize the need for open-housing laws to protect black families in the Chicago Lawn area.

Violent opposition to black attempts to escape the ghetto has historically served as the mailed fist inside the not so velvet glove of segregation. Cf. DRAKE & CAYTON, *supra* note 35, at 65-73, 213; K. CLARK, *DARK GHETTO* 235-36 (Roper ed. 1967); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 119 (1968); MALCOLM X, *AUTOBIOGRAPHY* 3 (1964). White flight and the expansion of the ghetto need no documentation, but for judicial despair, see, for instance, *Gautreaux v. CHA*, 503 F.2d 930, 938 (7th Cir. 1974) and *Crow v. Brown*, 332 F. Supp. 382, 384 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

"Efforts by white residents to delay or stop construction of housing projects that threatened their neighborhood have become fairly common [nationally]." Comment,

posed a timetable for submission of sites that the Court of Appeals for the Seventh Circuit affirmed in the first of several appellate decisions in the litigation.⁴³ In 1971 the judge resorted to halting the flow of \$26 million in Model Cities funds in an effort to coerce the city to move forward with the acquisition of new public housing sites.⁴⁴ A divided court of appeals panel reversed this order.⁴⁵ The court of appeals, however, upheld the judge's order suspending an Illinois law that required city council approval prior to construction of public housing projects, and directing the CHA to bypass the city council.⁴⁶

With CHA and HUD both before the district court,⁴⁷ the judge ordered a comprehensive plan not confined within Chicago's city limits. While the defendants were trying to convince the frustrated (if not exhausted) judge that a "best efforts" plan could confine new housing sites to Chicago and would not require metropolitan area relief, the Court of Appeals for the Sixth Circuit announced its decision in *Bradley v. Milliken* that permitted interdistrict relief for segregated public schools.⁴⁸ Nevertheless, the judge approved a city-only plan because

The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief, 122 U. PA. L. REV. 1330, 1331 (1974), citing *inter alia*, Special Project, *Public Housing*, 22 VAND. L. REV. 875 (1969) and the infamous resistance captured partly in *Forest Hills Residents Ass'n v. New York City Housing Authority*, 69 Misc. 2d 42, 329 N.Y.S.2d 69 (Sup. Ct.), *rev'd per curiam*, 39 App. Div. 2d 64, 332 N.Y.S.2d 156, *aff'd sub nom.* Margulis v. Lindsay, 31 N.Y.2d 167, 286 N.E.2d 724, 335 N.Y.S.2d 285 (1972).

43. *Gautreaux v. CHA*, 436 F.2d 306, 308 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971). See also APPENDIX, THE SAGA OF DOROTHY GAUTREUX at 1012 *infra*.

44. *Gautreaux v. Romney*, 332 F. Supp. 366 (N.D. Ill. 1971). The Model Cities Program, 42 U.S.C. §§ 3301-13 (1970), was enacted to improve the quality of urban life. The Congressional findings state that "the quality of urban life is the most critical domestic problem facing the United States," *id.* at § 3301. In an attempt to solve this problem, Congress allocated \$5 billion to be spent in neighborhoods of 150 "Model Cities" in the early 1970's. Under the plan, each model city was to have a planning year, followed by a series of 5 "action" years during which funds would be used for new and innovative programs and institutional change in the areas of housing, education, employment, and health, *id.* See, e.g., NATIONAL HOUSING AND ECONOMIC DEVELOPMENT LAW PROJECT, HANDBOOK ON HOUSING LAW, vol. 1, *Guide to Federal Housing, Redevelopment and Planning Programs*, ch. III, pt. III. For a detailed study of the development of low-income housing in three major cities see MARSHALL KAPLAN, GANS, & KAHN, THE MODEL CITIES PROGRAM (1970). See also C. HAAR, BETWEEN THE IDEA & THE REALITY: A STUDY IN THE ORIGIN, FATE & LEGACY OF THE MODEL CITIES PROGRAM (1975). Professor Haar was one of the key draftsmen of the Demonstration and Model Cities Act of 1966, 42 U.S.C. §§ 3301-13 (1970).

45. *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972).

46. *Gautreaux v. City of Chicago*, 480 F.2d 210 (7th Cir. 1973).

47. The court of appeals had reversed the district judge's earlier decision that HUD should not be made a party to the suit, *Gautreaux v. Romney*, 448 F.2d 731, 737 (7th Cir. 1971).

48. 484 F.2d 215 (6th Cir. 1973), *rev'd sub nom.* *Milliken v. Bradley*, 418 U.S. 717 (1974). Fortuitously, the Supreme Court decision rejecting the use of metropolitan area remedies in school desegregation, *Milliken v. Bradley*, was handed down while the Seventh Circuit was considering *Gautreaux v. CHA*, 503 F.2d 930 (7th Cir. 1974). *Milliken* had been argued before the Court on February 27, 1974, and was decided on

. . . the wrongs were committed within the limits of Chicago and solely against the residents of the City. It has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein.⁴⁹

Yet another court of appeals opinion held that desegregating Chicago's public housing program required metropolitan wide action. That decision distinguished the Supreme Court's opinion in *Milliken v. Bradley* that had reversed the Sixth Circuit's use of an interdistrict remedy against school districts.⁵⁰ Ignoring pleas by civil rights groups to both HUD Secretary Lynn and his successor, Mrs. Hills, not to appeal, the government sought review.⁵¹

In *Hills v. Gautreaux*⁵² the Supreme Court affirmed Justice Clark's holding that a federal court should make every effort to employ all reasonable means and methods necessary to achieve the greatest possible degree of relief taking into account the practicalities of the situation.⁵³ The Court also agreed that the "breadth and flexibility"⁵⁴ inherent in the exercise of equity permitted a resort to suburban land if desegregation of Chicago's public housing so required. The opinion, written by Justice Stewart, addresses two basic issues. First, the opin-

July 25, 1975, the day after the Court ended its extended session on the fate of President Nixon by deciding *United States v. Nixon*, 418 U.S. 683 (1974). On August 7, 1974, the Seventh Circuit issued an unreported order requiring supplemental memoranda discussing *Milliken v. Bradley*, see *Gautreaux v. CHA*, Civil No. 74-1048 (7th Cir., Aug. 7, 1974). If the *Milliken* decision had not been decided before, or considered in, the decision of *Gautreaux v. CHA*, yet another round of appeals may have been required to reach the current status. See also Note, 43 GEO. WASH. L. REV. 663, 669 (1975).

49. *Gautreaux v. Romney*, 363 F. Supp. 690, 691 (N.D. Ill. 1973).

50. See note 48 *supra*.

51. The Potomac Institute, Inc., Metropolitan Housing Program, Memo 76-4, at 1 (April 22, 1976):

The civil rights groups were trying to protect the support for housing dispersal policies provided by the . . . decision of the court of appeals. What HUD was trying to protect, other than its independence from judicial supervision, by lodging the appeal has never been clear (the "ethnic purity" of neighborhoods?). Perhaps HUD was attempting to do what the Supreme Court now says cannot be done: to "transform *Milliken's* principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct."

The government argued in its brief that metropolitan area relief "would significantly interfere with [the] historic local autonomy over public housing . . . [and] lead suburban communities to refrain from applying to HUD for public housing assistance . . . [which could] severely impede the implementation of HUD programs designed to assure that all citizens are adequately housed." The brief also raised the spectre that "the difficulties entailed in effectuating inter-district public housing orders could prove even more intractable than those that arise in the course of enforcing inter-district public school desegregation orders." Petitioner's Brief at 30-31, 39, *Hills v. Gautreaux*, 96 S. Ct. 1538 (1976).

52. 96 S. Ct. 1538 (1976).

53. *Id.* at 1546, quoting, as did Justice Clark, from *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971).

54. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1970).

ion distinguishes *Milliken*. Then the opinion addresses whether metropolitan wide relief would interfere impermissibly with local governments and suburban housing authorities.

The *Gautreaux* opinion may owe its unanimity in part to the support that it arguably imparts to *Milliken* and in part to the extent that it chips away at the outer edges of *Milliken*.⁵⁵ Justice Stewart, who provided the decisive vote in *Milliken* (and an opinion in which he qualified the Chief Justice's opinion for the Court),⁵⁶ described the essence of *Milliken* as a case in which the Court held interdistrict relief to be "an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation."⁵⁷ Justice Stewart noted that *Milliken* had discussed the complexity of a possible interdistrict order combining Detroit's school district with 53 other metropolitan area school districts; but he stressed that the heart of *Milliken* was the limitation on federal equity power. Because federal equity power is not plenary, but is based upon the existence of a constitutional violation,⁵⁸ such a violation must exist in order to invoke the power. The necessary predicate of a constitutional violation which did not exist throughout the metropolitan area in *Milliken*, was found to exist in *Gautreaux* because both CHA and HUD had authority to operate outside the Chicago city limits.⁵⁹ Once the district court found a constitutional violation committed by a metropolitan area governmental entity, it was under a duty to grant a metropolitan area remedy.⁶⁰ To foreclose metropolitan relief solely because the violation took place within the city limits⁶¹ would transform *Milliken*'s limitation on the exercise of federal equity powers into "an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct."⁶²

Justice Stewart thus diminished the importance of the suburban boundary by undercutting what had been a strong peg of the Court's

55. See the brief opinion by Mr. Justice Marshall, joined by Justices Brennan and White, in which *Milliken* is attacked and then described as "distinguished" by *Gautreaux*, hence in part their concurrence, 96 S. Ct. 1538, 1550 (1976). Cf. Justice Clark's more lengthy effort for the court of appeals, 503 F.2d at 935-37, which was disapproved by the Supreme Court, 96 S. Ct. at 1544-45. For a critique of Justice Clark's efforts, see Note, 1975 U. ILL. L.F. 135, 141, which suggests that, "[I]f *Gautreaux* stands, *Milliken* will become only an equitable restraint on inter-district remedies, rather than the complete prohibition [when] it first appeared." See also Note, *Interdistrict Desegregation: The Remaining Options*, 28 STAN. L. REV. 521 (1976).

56. *Milliken v. Bradley*, 418 U.S. 717, 753 (1974).

57. 96 S. Ct. 1538, 1545 (1976).

58. *Id.* at 1544.

59. *Id.* at 1546.

60. *Id.*

61. This was the rationale used by the district court in denying a metropolitan area remedy. *Gautreaux v. Romney*, 363 F. Supp. 690, 691 (N.D. Ill. 1973).

62. 96 S. Ct. 1538, 1547 (1976).

opinion in *Milliken*—the practical, political, and educational problems that would arise if the district judge became a “super”⁶³ school superintendent. In *Milliken* Chief Justice Burger emphasized how ill-equipped the courts are to handle the complex situations that would arise in the supervision of a multidistrict desegregation order. Furthermore, court supervision of such an order would deprive the people of control of schools by their elected representatives.⁶⁴ The lack of emphasis on the limits of federal equity power in *Gautreaux* may reveal that Justice Stewart and some other members of the Court are uneasy with the modest view of the federal equity power espoused in *Milliken*. The essence of *Milliken*, as articulated in *Gautreaux*, is a refusal to “involve” suburban school districts absent a showing of their implication in inner city school segregation.

Although *Gautreaux* narrows the scope of *Milliken*,⁶⁵ those who formed the majority in *Milliken* may have subscribed to *Gautreaux* solely because relief was extended in a situation in which the agency implicated in unconstitutional activity operated across local government boundaries. Some of the justices may have thought that to vote for relief in a “single district” case would reaffirm their position that inter-district relief should be extended only in the rarest of situations.⁶⁶ Thus, the first building block of the opinion was its careful delineation of the limits of *Milliken*, not the limits of federal equity power.

The second stage of the *Gautreaux* opinion addressed the propriety of metropolitan area relief. Even though a metropolitan area remedy would cross local governmental boundary lines, the remedy would apply only to one relevant geographical region. By finding that the remedy would be restricted to a “single area,” albeit an area that extended into several counties, the Court avoided the *Milliken* limitation on federal equity power and concluded that the remedy was merely intradistrict relief. An analysis of HUD’s operation and of the nature of the constitutional violation in *Gautreaux* strongly support Justice Stewart’s choice of a relevant geographic area:

Here the wrong committed by HUD confined the respondents to segregated public housing. The relevant geographic area for purposes of the respondents’ housing options is the Chicago housing market, not the Chicago city limits. That HUD recognizes this

63. The word was used by Chief Justice Burger in his opinion for the Court, *Milliken v. Bradley*, 418 U.S. 717, 743 (1974), where he paraded the horrible possibility of “a vast new super school district” if interdistrict relief were ordered.

64. *Id.* at 743-44.

65. 96 S. Ct. 1538, 1546 (1976).

66. One is inclined to surmise also that a few of the Justices may have subscribed to *Gautreaux* as a way out of the *cul-de-sac* of school desegregation, busing orders, and fleeing whites. Perhaps the Court will “end-run” the school desegregation problem by a strong stand on housing desegregation, which if successful, will solve the school desegregation issue once and for all. See *Crow v. Brown*, 332 F. Supp. 382, 392 (N.D. Ga. 1971), *aff’d*, 457 F.2d 788 (5th Cir. 1972).

reality is evident in its administration of federal housing assistance programs through "housing market areas" encompassing "the geographic area 'within which all dwelling units . . . are in competition with one another as alternatives for the users of housing.'" . . . The housing market area "usually extends beyond the city limits" and in the larger markets "may extend into several adjoining counties." An order against HUD and CHA regulating their conduct in the greater metropolitan area will do no more than take into account HUD's expert determination of the area relevant to the respondents housing opportunities and will thus be wholly commensurate with the "nature and extent of the constitutional violation."⁶⁷

Having established that only a single geographic region was involved, Justice Stewart then discussed the question of interference with local governmental units. This issue had been paramount in *Milliken*, in which an interdistrict order would have required the consolidation and restructuring of 53 local school districts that had not committed constitutional violations. Justice Stewart again chose to delineate the limits of *Milliken* by emphasizing that interference with "innocent districts" was beyond the Court's power *only* because of the absence of a predicate for the exercise of the Court's equity power. He then closed the opinion with a discussion of "[t]he more substantial question [of] whether an order against HUD affecting its conduct beyond Chicago's boundaries would impermissibly interfere with local governments and suburban housing authorities that have not been implicated in HUD's unconstitutional conduct."⁶⁸

The question of interference with local government is "substantial" indeed. Counsel for the tenants had emphasized, in an attempt to avoid *Milliken's* shadow, that subsidized housing is established by federal law, supported by federal funding, and pervasively federal in administration. Furthermore, the joinder of HUD allowed the plaintiffs to argue that remedial action could be limited to the federal agency and, even if extended to local agencies, would not involve reorganization or consolidation of any local governmental units.⁶⁹ Although no actual order was before the Supreme Court,⁷⁰ Justice Stewart accepted the position of respondents that, at least in the instant case, a federal court would have the ability to fashion an order that would not preempt

67. 96 S. Ct. 1538, 1547 (1976).

68. *Id.*

69. Respondent's Brief at 16, *Hills v. Gautreaux*, 96 S. Ct. 1538 (1976). The essential argument for metropolitan area relief expressed in the brief is also articulated by an associate of counsel for respondents in Rubinowitz & Dennis, *School Desegregation Versus Public Housing Desegregation: The Local School District and the Metropolitan Housing District*, 10 URBAN L. ANNUAL 145 (1975).

70. The Seventh Circuit had remanded the case to the district court for entry of a metropolitan area order, *see Hills v. Gautreaux*, 96 S. Ct. 1538, 1545, 1550 (1976).

the power of local governments by undercutting the role of those governments in the federal housing scheme.

Although the Supreme Court, by sanctioning metropolitan area relief, merely manifested the policy embodied in Title VI of the Civil Rights Act of 1964,⁷¹ Title VIII of the Civil Rights Act of 1968,⁷² and HUD regulations adopted pursuant to the antidiscrimination and affirmative action legislation, Justice Stewart felt impelled to reassure suburban communities of their autonomy. He emphasized that orders directed solely to HUD may not force unwilling localities to apply for assistance under federal programs. Metropolitan area housing desegregation orders may merely reinforce regulations guiding HUD's determination of which locally authorized projects to assist with federal funds.⁷³ Stated more succinctly, only communities with federal projects are in significant danger of integration via low income housing.⁷⁴ Communities that presently do not have federal programs, but that are contiguous to cities with federally subsidized programs, have substantial safeguards to insure that federal housing programs are not initiated in their communities without an opportunity to express their opposition. As a further assurance that *Gautreaux* was not intended to infringe on suburban autonomy, Justice Stewart explicitly stated what may become suburbia's trump card: "The remedial decree would . . . [not] displace the rights and powers accorded local government entities under federal or state housing statutes or existing land use laws"⁷⁵ (emphasis added). Thus, local communities may preclude desegregation by merely enacting zoning restrictions on low income and multi-family dwellings or by requiring a referendum to change the zoning of any land parcels within the community.⁷⁶ This contradiction between the policy behind *Gautreaux* and the Court's assurance that local communities may thwart the effect of *Gautreaux* is addressed in Section III *infra*. Before proceeding to that discussion, however, two recent cases that raise even more serious doubts as to the impact of *Gautreaux* will be discussed.

II. THE ILLUSION OF *Gautreaux*

The potential sweep of the *Gautreaux* remedy is overshadowed by the extent and character of the constitutional violation in the case.

71. 42 U.S.C. § 2000d (1970).

72. 42 U.S.C. § 3608(d) (1970).

73. 96 S. Ct. 1538, 1549 (1976).

74. See text accompanying notes 171-224 *infra*.

75. 96 S. Ct. 1538, 1550 (1976).

76. The technique of requiring all zoning changes to be approved by a referendum, which places the franchise rights of the local residents in counterpoise with the equal protection rights of the discriminatees, was approved by the Court within weeks after *Gautreaux* was decided, *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 2358 (1976). *Eastlake*, of course, had been argued (March 1, 1976) before *Gautreaux* was decided (April 20, 1976). See also note 296 *infra*.

Racial discrimination and segregation permeated nearly every facet of the operation of the Chicago Public Housing Program.⁷⁷ Apartheid was its hallmark.⁷⁸ Thus the Supreme Court in *Gautreaux* focused only on relief.⁷⁹ Although Chicago's program was not unique,⁸⁰ qualifying for a *Gautreaux* metropolitan area order may require proof of blatant and extensive constitutional violations. Furthermore, post-*Gautreaux* cases indicate that the Court will not be receptive to enforcing orders on communities that are wealthy enough to forego federal hous-

77. Tenants were assigned on a segregated basis. There were only four white projects. In the balance of the projects, 99% of the tenants were black. After 1954, all new projects were constructed in, or immediately adjacent to, the black ghetto. See generally *Gautreaux v. CHA*, 296 F. Supp. 907 (N.D. Ill. 1969).

Cf. Fuerst, *Public Housing: Promise and Despair in Chicago*, PLANNING, AM. SOC'Y. OF PLANNING OFFICIALS, Oct., 1973, at 14, quoting Elizabeth Wood, former CHA Executive Director:

. . . Chicago is in a most violent though invisible state of war on the question of race; and every public servant must elect on which side he will enlist, whose enmity he will incur. Though he may seek with all his mind to find the safe way to play it, there really is no safe way.

Cf. Ms. Wood's remarks with those of CHA Chairman Swibel, note 42 *supra*. Her role and the politics of public housing are described in illuminating detail in M. MEYERSON & E. BANFIELD, *POLITICS, PLANNING AND THE PUBLIC INTEREST: THE CASE OF PUBLIC HOUSING IN CHICAGO* (First Free Press Paperback Ed., 1964).

78. Whether the use of the South African phrase is too extreme may be a question of point of view. See A. SACHS, *JUSTICE IN SOUTH AFRICA* 11 (1973), for the view that the term apartheid has become internationally synonymous with segregation. Cf. MALCOLM X SPEAKS, 54, 75 (1st ed. G. Breitman ed. 1965):

Any time you have a filibuster in America, in the Senate, in 1964 over the rights of 22 million black people, over the citizenship of 22 million black people, or that will affect the freedom and justice and equality of 22 million black people, it's time for that government itself to be taken before a world court. How can you condemn South Africa? There are only 11 million of our people in South Africa, there are 22 million of them here. And we are receiving an injustice which is just as criminal as that which is being done to the black people of South Africa.

* * *

America is worse than South Africa, because not only is America racist, but she also is deceitful and hypocritical. South Africa preaches segregation and practices segregation. She, at least practices what she preaches. America preaches integration and practices segregation. She preaches one thing while deceitfully practicing another.

79. 96 S. Ct. 1538, 1540-41 (1976).

80. While *Gautreaux* was being fought out in Chicago, public housing desegregation struggles were underway on other fronts. Cf. *Blackshear Residents Org. v. Housing Authority*, 347 F. Supp. 1138 (W.D. Tex. 1972) (Austin, Texas); *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973) (Cleveland, Ohio); *Croskey Street Concerned Citizens v. Romney*, 335 F. Supp. 1251 (E.D. Pa. 1971), *aff'd*, 459 F.2d 109 (3d Cir. 1972) (Philadelphia, Pa.); *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (Atlanta, Ga.); and *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969) (Bogalusa, La.), discussed and compared with *Gautreaux* in Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63, 116 (1970). Site selection litigation spread to state courts. See *El Cortez Heights Residents & Property Owners Ass'n v. Tucson Housing Authority*, 10 Ariz. App. 132, 457 P.2d 294 (1969). The cases are discussed in Comment, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. PA. L. REV. 1330 (1974), which argues that courts found violations of tenants' rights but rendered "hollow" remedies. Often, the result of litigation over site selection produced a *Gautreaux* effect—no public housing anywhere for anyone. Cf. Recent Cases, *Administrative Law-Urban Renewal*, 85 HARV. L. REV. 870 (1972).

ing funds. By not accepting federal housing funds, wealthy communities avoid the requirements of the 1964 Civil Rights Act banning racial discrimination in federal programs⁸¹ and thereby maintain their ethnic purity.⁸² Indeed, the Court held over for argument to the present term (from the 1975-76 term) a case from a Chicago suburb, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁸³ that will

81. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), provides that: "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." This declaration of national policy may be enforced by 42 U.S.C. § 2000d-1 which mandates the adoption of rules and regulations by federal agencies to enforce Title VI, and provides that compliance *may* then be "effected . . . by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient" failing to comply with the requirements of nondiscrimination. The Act specifically limits the termination of, or refusal to grant, federal funds

to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been found.

Id. at § 2000d-1.

The careful delineation and circumscription of the federal bureaucracy's power to obtain compliance with national policy has been reinforced by the leading Fifth Circuit decision of Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969). The decision generally is regarded as authority for the proposition that federal aid cutoffs or grant refusals must be "pinpointed" to the specific program in which discrimination has been found. The decision, however, does not consider or decide whether federal agencies should lend assistance to a grantee in a program in which there is no direct evidence of discrimination, but where the extension of aid insures or supports the viability of the grantee and thus has the effect (concededly indirect) of supporting the discriminatory activity.

Even as construed by *Finch*, Title VI, coupled with President Kennedy's Executive Order, Exec. Order No. 11,063, 3 C.F.R. 261 (Supp. 1962), 42 U.S.C. § 1982 (1970), effectively can check discriminatory action by local governmental units.

But on a program-by-program basis HUD and other federal agencies are in a position to implement federal anti-discriminatory policy in a significant way. HUD's regulations implementing Title VI list some 38 programs it administers subject to Title VI. Nondiscrimination in Federally Assisted Programs of the Department of Housing and Urban Development—Effectuation of Title VI of the Civil Rights Act of 1964, 24 C.F.R. §§ 1.1-.12, Appendix A (1976).

Among the programs that relate to the planning function, and hence involve potential or actual change in boundary lines, are: (1) Advance Acquisition of Land for Public Purposes, § 704, Housing and Urban Development Act of 1965, 42 U.S.C. § 3104 (1970); (2) Comprehensive Planning, § 701, Housing Act of 1954, 40 U.S.C. § 461 (Supp. V, 1975) (dealing with comprehensive planning assistance, planning research and demonstration); (3) Reserve of Planned Public-Works, § 702, Housing Act of 1954, 40 U.S.C. § 462 (1970) (dealing with public works planning advances); (4) Slum Clearance and Urban Renewal, ch. 8A, subch. 2, Housing Act of 1949, 42 U.S.C. §§ 1450-1469 (Supp. V, 1975); and (5) Grants for Basic Water and Sewer Facilities, § 702, Housing and Urban Development Act of 1965, 42 U.S.C. § 3102 (Supp. V, 1975).

Finch indicates that the discrimination must be found within the "four corners" of the program itself, or else bear a direct nexus with the discriminatory activity. Clearly, *Finch* seems to speak against the propriety of withdrawing assistance from related HUD-funded programs not part of the discriminatory activity in order to shrink the resources of the local governmental unit. Still, local governmental units have some operative freedom to select from federal programs and still operate discriminatorily.

82. See note 26 *supra* for a discussion of the import of the phrase "ethnic purity."

83. *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 373 F. Supp.

squarely confront the Court with the issue of whether local governments may preclude the development of low income housing merely in order to exclude integrated housing developments.⁸⁴ The resolution of *Arlington Heights* will reveal how much leadership the Supreme Court will provide in the struggle for metropolitan desegregation. Cases already decided, however, indicate that relief may be forthcoming only in the most clearcut, and therefore rare, instances of racially segregated housing.

A. *Equal Protection Barriers to Desegregated Housing*

Housing desegregation cases frequently rely upon the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment. Thus, the Court's interpretation of the equal protection clause may determine the extent to which housing desegregation is converted from an empty promise into an extant fact. Unfortunately, the recent decision in *Washington v. Davis*⁸⁵ raises serious doubts about the willingness of the Court to intervene in governmental action which impacts adversely upon racial minorities. The *Davis* decision also may have confirmed the popular belief that the Court no longer is "a major catalyst for obtaining social justice for blacks and other Americans."⁸⁶

208 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *cert. granted*, 423 U.S. 1030 (1975), on 1976-77 docket, 45 U.S.L.W. 3013 (July 27, 1976). See text accompanying notes 155-170 *infra*.

84. Certiorari was granted in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.* on the following two questions: "(1) Does failure to grant rezoning request for multiple-family housing for low and moderate income families in midst of single-family area violate the Fourteenth Amendment even though Village was admittedly maintaining integrity of its zoning plan and protecting neighborhood property values? (2) Does alleged discriminatory housing pattern in Chicago metropolitan area impose upon suburban municipality affirmative duty to ignore its admittedly proper zoning ordinance to permit construction of multi-family low and moderate income housing?" 44 U.S.L.W. 3323 (U.S. Nov. 25, 1975). The tenor of these questions, of course, differs significantly from the tenor of the Court of Appeals for the Seventh Circuit decision which found a denial of equal protection because the zoning plan of Arlington Heights was not being consistently applied, 517 F.2d 409, 415 (7th Cir. 1975).

85. 96 S. Ct. 2040 (1976).

86. Judge A. Leon Higginbotham, Jr., quoted in Mathews, *High Court Keeps Low Profile*, L.A. Times, July 6, 1975, § IV, at 1, col. 1. Judge Higginbotham is a United States District Judge for the Eastern District of Philadelphia.

Cf. Mathews, *Law Strategy: Don't Take It to High Court*, L.A. Times, May 10, 1976, § I, at 1, col. 1, quoting several civil rights lawyers sharply critical of the Court, including Aryeh Neier, American Civil Liberties Union Executive Director: "Ever since President Nixon's appointees took control of the court, they've been murdering us." Also quoted is Hope Eastman of the American Civil Liberties Union Washington office: "This Court is not just cool to new legal theories that would expand civil rights and civil liberties, it is affirmatively hostile."

One of President Nixon's appointees, Mr. Justice Powell, in a rare move for a Supreme Court Justice, answered critics in an American Bar Association speech on August 11, 1976, declaring in part that it was "perhaps inevitable" that a new court would bring "fresh and different assumptions and perceptions" to constitutional issues and, "mindful

In *Davis* the Supreme Court reversed a court of appeals invalidation of a qualifying test for District of Columbia police officers. The court of appeals struck down the test as being an employment practice that operated to exclude blacks on a basis unrelated to job performance.⁸⁷ The Supreme Court reversed, in an opinion by Justice White, on the ground that the court of appeals erroneously had transferred and applied the flexible standards of review used in Title VII cases into the equal protection component of the fifth amendment's due process clause.⁸⁸

In Justice White's view the fact that four times as many blacks failed the test as did whites was no reason to set aside the test designed to select police officers in a community largely composed of minorities.⁸⁹ The more important question for Justice White was whether the District of Columbia Civil Service Commissioners purposefully designed and administered the test so as to discriminate invidiously against blacks. The basic premise for the decision was that the Court has never embraced the proposition that a law or other official act, regardless of whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.⁹⁰ Conceding that racial impact was important in the Congressional effort to make equal opportunity a reality in the nation's job market, Justice White announced that the Constitution requires less of employers than did the Congress that passed the 1964 Civil Rights Act.⁹¹

of preserving the vitality of Democratic processes," the present Court is "more deferential to legislative judgments." *Criminal Rights Rulings Defended*, L.A. Times, Aug. 12, 1976, § I, at 1, col. 3.

For earlier studies of the impact of President Nixon's appointees, see Kurland, 1970 *Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265, and see McGee, *Blacks, Due Process and Efficiency in the Clash of Values as the Supreme Court Moves to the Right*, 2 BLACK L.J. 220 (1972).

87. *Davis v. Washington*, 512 F.2d 956, 959 (D.C. Cir. 1975), quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

88. 96 S. Ct. 2040, 2047 (1976).

89. "Among the applicants tested in the District of Columbia from 1968 through 1971, 57% of the blacks failed the test, as compared to a failure rate of 13% for whites. . . . [B]lack applicants thus failed at a rate more than four times greater than the rate for whites. . . ." *Davis v. Washington*, 512 F.2d 956, 958-59 (D.C. Cir. 1975). The population of Washington is predominantly, some would say overwhelmingly, black. As long ago as 1960, it was 54% black, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 120 (1968). The black population of Washington, D.C. has risen from 35% in 1950 to 71% in 1970, U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1975 at 29.

90. 96 S. Ct. 2040, 2047 (1976).

91. Title VII requires more than a rational basis for the practices. The test must be validated in terms of job performance, a process which "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." 96 S. Ct. 2040, 2051 (1976).

It has been said that, "[I]n the eyes of the Court, constitutionality [of a statute] is as low a standard of legislative and political morals as we could have, and yet have any at all." Curtis, *A Modern Supreme Court in a Modern World*, 4 VAND. L. REV. 427,

Davis was filed prior to the 1972 amendments to the Civil Rights Act which applied equal opportunity employment provisions to public employers.⁹² Relief, therefore, was sought on an equal protection theory.⁹³ Because an employment situation was presented, however, the court of appeals naturally looked to the experience of the courts in analogous situations. The court of appeals mistakenly applied the well-developed precedents that had governed the resolution of discrimination in labor disputes. Later developments proved this to be a mistake. Without express Congressional sanction, the experience of Title VII litigation was inapposite.

In deciding the *Davis* case Justice White described the present state of racial impact law. He drew from a variety of contexts, including even the docketed, but unargued, *Arlington Heights* case.⁹⁴ Improperly constituted grand juries, gerrymandered congressional apportionment statutes, *de jure* segregated school districts, and Social Security Act classifications all require more than disproportionate racial impact before the Court will act. A discriminatory purpose may be inferred from the totality of facts, including the fact of disproportionality. Indeed, serious racial imbalance may demonstrate unconstitutionality if the imbalance occurs in circumstances in which the discrimination cannot be explained on nonracial grounds. *Davis*, however, suggests that a law which is neutral on its face does not violate the equal protection clause simply because it may affect adversely a greater proportion of one race than of another.⁹⁵ In Justice White's view the existence of disproportionate impact is not irrelevant, but neither is it the sole touchstone for determining invidious racial discrimination forbidden by the Constitution. Thus, under *Davis* a showing of disproportionate racial impact alone will not invoke the rule that "racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."⁹⁶

In reaching his conclusion Justice White swept aside the case of *Palmer v. Thompson*.⁹⁷ In *Palmer* the Court had held that the legitimate purposes of an ordinance, which closed public swimming pools rather than desegregate them (under the guise of promoting peace) were not open to impeachment by evidence of racial motivation. Justice White had dissented in *Palmer* on the ground that the discriminatory motivation for the action required relief.⁹⁸ In *Davis* Justice White

433 (1951). Whether such a standard meets the exigencies of racially discriminatory employment practices is questionable, but hopefully of marginal importance given the coverage of Title VII. Cf. *Chandler v. Roudebush*, 96 S. Ct. 1949 (1976).

92. 42 U.S.C. § 2000e-16 (Supp. II, 1972), amending 42 U.S.C. § 2000e (1964).

93. Relying on the authority of *Bolling v. Sharpe*, 347 U.S. 497 (1954).

94. 96 S. Ct. 2040, 2050 n.12 (1976). See notes 83-84 *supra*.

95. 96 S. Ct. 2040, 2049 (1976).

96. *Id.*, citing *McLaughlin v. Florida*, 379 U.S. 184 (1964).

97. 403 U.S. 217 (1971).

98. *Id.* at 240-71.

distinguished *Palmer* by declaring that *Palmer* did not involve a statute having a neutral purpose but disproportionate racial consequences.⁹⁹ By so doing Mr. Justice White diminished the significance of *Palmer's* warning against "grounding decision on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor."¹⁰⁰ Yet Justice White did not take the opportunity in *Davis* to place greater emphasis on the operative effect of discriminatory action.¹⁰¹

Justice White, in a footnote, undercut several celebrated courts of appeals opinions¹⁰² of the last decade. The footnote in *Davis* ironically included dictum from an earlier stage of *Gautreaux*.¹⁰³ Justice White conceded that the cases impressively demonstrated that there is another side to the issue of whether discriminatory impact without proof of purpose may be the basis of a constitutional violation, but he promptly countered that "to the extent [that the footnoted] cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement."¹⁰⁴ Justice White's footnote portends a frightening impasse in the Court's approach to racial discrimination. The footnote drew a response from Mr. Justice Brennan in his dissent.¹⁰⁵ Justice Brennan attacked the propriety of the footnote in the Court's opinion by observing that one of the cases "disapproved" was scheduled for plenary consideration by the Court in the upcoming term. Justice Brennan considered the Court's disapproving reference to the court of appeals decision in *Arlington Heights* as constituting an attack upon the Court's grant of certiorari. He then noted that any case that the Court considers worthy of full briefing and argument should not be effectively reversed merely by its inclusion in a "laundry list" of lower court decisions.¹⁰⁶

The brief, but perhaps meaningful disapproval of *Arlington Heights* highlights the concern over the Court's posture toward less

99. 96 S. Ct. 2040, 2049 (1976).

100. *Id.*

101. Justice White's dissent in *Palmer* and his *Davis* opinion may be conceptually consistent, but their practical consequences are quite disparate. In *Palmer*, one of the grounds for dissent was the fact that the record indicated that Jackson, Mississippi closed its pools to thwart desegregation, which was unacceptable constitutionally even if whites as well as blacks were denied swimming opportunities since the effect of the closing was to stigmatize blacks as inferior. 403 U.S. at 266. But in *Davis*, Justice White sanctioned a disproportionate impact because discriminatory purpose was not proven even though the effect of the action was more adverse to blacks than whites. Also, it should be noted that the opportunity to work at issue in *Davis* was of greater consequence than the recreational outlet foreclosed in Jackson.

102. 96 S. Ct. 2040, 2050 n.12 (1976).

103. *Id.* referring to *Gautreaux v. Romney*, 448 F.2d 731, 738 (7th Cir. 1971).

104. *Id.* at 2050.

105. *Id.* at 2056 n.1.

106. *Id.* Mr. Justice Stevens, who filed a separate concurring opinion, expressly disassociated himself from the premature consideration of *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 96 S. Ct. at 2054.

overt forms of racial discrimination. The Court, since 1917, has condemned straightforward attempts at racial segregation in land use devices or housing laws.¹⁰⁷ The modern cases, however, present more difficult issues that entail complex and interwoven motivations. An action that may be well designed to achieve legitimate, necessary ends of the general welfare still may have effects that injure racial minorities and deny equal protection of the laws. The difficulty of determining the constitutionality of these actions is discerning whether an ostensibly neutral action denies equal protection. Most actions appear neutral on the surface, but involve diverse motivations within the mind of each decision-maker.¹⁰⁸

A test that requires even a minimal demonstration of motive to establish an equal protection violation is an obstacle that often may prove insurmountable. Justice Powell, who joined the *Davis* decision, expressly had recognized the intractable problems in litigating intent that are obvious to any lawyer.¹⁰⁹ Justice Powell warned that the results of litigating intent will be "fortuitous, unpredictable and even capricious."¹¹⁰ Certainly, persons rarely confess publicly that they entertain any racial bias or prejudice.¹¹¹ Given the unfathomable reaches of the human heart, the consternation that *Davis* has evoked among civil rights litigators¹¹² is not without some basis in the real world of land use practices. As the chart below indicates, a wide spectrum of land use related practices can operate disproportionately and discriminatorily against racial minorities.¹¹³ Sifting through the maze of facts

107. A string of cases beginning with *Buchanan v. Warley*, 245 U.S. 60 (1917) and continuing through *Hunter v. Erickson*, 393 U.S. 385 (1969) has condemned attempts to achieve racial segregation by use of housing and land use laws.

108. Amicus Brief of American Society of Planning Officials at 3, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 517 F.2d 409 (7th Cir. 1975), cert. granted, 423 U.S. 1030 (1975) (No. 75-616).

109. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 233 (1973).

110. *Id.*

111. *Dailey v. City of Lawton*, 296 F. Supp. 266, 268 (W.D. Okla. 1969). In affirming, the court of appeals also articulated the obvious: "If proof of a civil right violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection." 425 F.2d 1037, 1039 (10th Cir. 1970).

112. See *The Potomac Institute, Inc., Metropolitan Housing Program Memo 76-6*, at 4 (June 30, 1976) describing the *Davis* opinion as having "serious implications for future litigation alleging official racially discriminatory housing and zoning policies. . . ."

113. The literature of the problem, usually subsumed under the rubric "exclusionary land use practices," truly is massive. A three volume compilation of the material is in press by the URBAN LAND INSTITUTE, entitled *MANAGEMENT AND CONTROL OF GROWTH; ISSUES-TECHNIQUES-PROBLEMS-TRENDS* (1975). The seminal discussion is that of Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 *STAN. L. REV.* 767 (1969). Cf. the more recent discussions by Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 *U. ILL. L.F.* 1, and Rose, *Exclusionary Zoning and Managed Growth: Some Unresolved Issues*, 6 *RUTGERS CAMDEN L.J.* 689 (1975).

which typically characterize some of the situations set out in the chart in an effort to divine motive will pose a burden on litigants ranging from extraordinarily difficult to impossible.

Practices Which Can Lead to Exclusionary/Discriminatory Results With Respect to Equitable Opportunities in Housing¹¹⁴

	Exclusion by INTENT— Purposeful Practices	Exclusion by EFFECT— Byproducts of Action
Racial	Civil rights and fair housing violations in sales, leasing, rentals, or advertising; block-busting.	Existing misconceptions and lack of understanding by public regarding racial groups, and community/neighborhood consequences as property values, etc.; or outright hostility.
	Continued ghetto-area site selection and construction for public/subsidized housing.	Corporate relocation to outlying areas which lack appropriate housing and transportation facilities; (the impact is also felt by non-racial minority, low-income groups); the locating of governmental facilities without housing and employment "tie-ins" (given the commuting capabilities of the work force).
	Restrictive private covenants or informal agreements re housing and land use, to exclude minorities. Referenda methods, or administrative refusals, regarding low-income housing development plans or projects.	
Growth	Building moratoria (variations on the no-growth, close-the-doors approach) where not absolutely essential.	Crisis-oriented moratoria, which occur due to lack of prior planning or unwillingness to undertake the expenditures required to correct facility deficiencies.
	Pursuance of unilateral slow-growth policies in planning, etc., in defiance of or without regional housing need determinations.	Lack of housing element in comprehensive planning process, resulting in inability to accommodate to needs.
	Refusal to provide adequate capacity or funding for municipal services, as sewage or water systems.	Non-use of funding availability (as Federal/State aids), or of savings due to operating efficiencies (as double school sessions).
	Issuance of building permits only for high-cost housing which produces high tax ratables and low costs. Use of environmental excuses (where not clearly valid) to deny building permits, or to greatly limit densities.	Antiquated ordinances, codes, and regulations on local and state levels which effectively cause the market to respond inefficiently or inequitably to housing demand.

114. The chart is reprinted with permission from NAT'L COMM. AGAINST DISCRIMINATION IN HOUSING & URBAN LAND INSTITUTE, FAIR HOUSING & EXCLUSIONARY LAND USE 57 (1974). Copyright 1974 by Urban Land Institute and National Committee Against Discrimination in Housing.

	Exclusion by INTENT— Purposeful Practices	Exclusion by EFFECT— Byproducts of Action
Economic	Unreasonable large-lot zoning.	Additive result of items above and to the left, which effectively escalate costs of finished housing . . . including outmoded building codes, extravagant subdivision regulations, and non-use of efficient innovative design or land use approaches as PUD's, flexible zoning, etc.
	Prohibition against multifamily dwellings.	
	Limitation on number of bedrooms.	
	Large floor space requirements.	
	Exorbitant fee-schedules or land dedication requirements.	
	Low-income housing permit or zoning refusals (see also racial, by intent, above).	Bureaucratic and administrative delays, and undue complexities in processing.
		Miscellaneous: unequal municipal services; tax or methods to recover all "public" costs from the new homebuyers via "developer" fees, etc.

Whether the disproportionality of the racial impact is of constitutional significance is one of the most muddled areas of our constitutional jurisprudence¹¹⁵ and often may be a mixed question of purpose and effect. The confusion in this area of the law has achieved disastrous proportions.¹¹⁶ As Professor Brest has pointed out, the "impact of a law generally has had little or no constitutional significance independent of a suspect operative rule."¹¹⁷ For example, although rules that classify people on the basis of poverty and race are suspect, the adoption of a tax or fee that falls more heavily on the poor does not require a compelling justification. The Court similarly does not require a compelling justification to uphold the enactment and enforcement of criminal laws that disproportionately burden particular ethnic minorities. A requirement that decision-makers somehow assure that all decisions have an equal effect on rich and poor and on all races would be both impractical and undesirable.¹¹⁸ Nevertheless, under certain circumstances, impact alone may trigger the strict scrutiny demand for an extraordinary justification.¹¹⁹ The impact may fall so heavily upon one minority as to clearly establish, even without proof of intent, conduct that cannot be judicially approved.¹²⁰

115. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 99 [hereinafter cited as Brest].

116. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207 (1970).

117. Brest, *supra* note 115, at 110. Cf. *Washington v. Davis*, 96 S. Ct. 2040, 2051-52 and n.14 where Justice White makes the same point, citing Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 300 (1972).

118. Brest, *supra* note 115, at 110.

119. *Id.*

120. *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1172 (5th Cir. 1972).

Justice Stevens' concurring opinion in *Davis*¹²¹ presents a view that more accurately reflects the reason for the tortured course of the decisions in this area than does the opinion for the Court:

. . . [T]he extent to which one characterizes the intent issue as a question of fact or a question of law . . . will vary in different contexts.

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. . . .

. . . [T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. . . . [A] constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in *Gomillion* . . . or *Yick Wo*, it really does not matter whether the standard is phrased in terms of purpose or effect.¹²² (citation omitted).

Justice Stevens' formulation of the standard is more useful than that of the Court. The Court's standard that purpose, not effect, is the dominant constitutional concern will be easy to apply. Unfortunately, this standard does not recognize that effect may constitute the only objective evidence of intent. Justice Stevens' approach recognizes that the rejection of such objective evidence of intent is unrealistic. Indeed, Justice Stevens' view led him to concur in the Court's judgment that a neutral test to determine ability to undertake training as a policeman was constitutional. Justice Stevens, as did Justice White, reached this result even though cases under Title VII had held that the test should be job-related, rather than related to a program that prepared policemen to serve.

Although the Court in *Davis* emphasized that effect should be minimized as an operative concern in constitutionality, the Court clearly believed that the *Davis* test ultimately was relevant to performance and not discriminatory either in purpose or in effect.¹²³ The

121. 96 S. Ct. 2040, 2054 (1976).

122. *Id.*

123. Justice Stevens concurred in the view that the test was neutral, stating: [T]he test serves the neutral and legitimate purpose of requiring all applicants to

Court also seemed to be strongly influenced by the fact that the police department had systematically and affirmatively sought to enroll black officers, many of whom passed the challenged test but failed to report for duty.¹²⁴ In spite of these manifestations of good faith purpose, the *Davis* opinion looms as an attitudinal obstacle to invalidation of official action that is otherwise neutral but that has the effect of disadvantaging or discriminating against racial minorities. Although the ultimate result was arguably correct, the boldness of Justice White's opinion indicates, at the very least, that any disproportionate effect must be substantial before the Court will find an equal protection violation based upon effect alone. The *Davis* decision, therefore, may be a signal to lower courts that they must require, in addition to proof of impact, some evidence of purpose to discriminate—at least such purpose as might be inferred from the disproportionate impact itself. This requirement may also be yet another tolling bell for the "new equal protection"¹²⁵ as well as a confirmation of a new relationship between the court and racial minorities.¹²⁶

meet a uniform minimum standard of literacy. Reading ability is manifestly relevant to the police function, there is no evidence that the required passing grade was set at an arbitrarily high level, and there is sufficient disparity among high schools and high school graduates to justify the use of a separate uniform test.

Id. at 2054-55.

124. *Id.* at 2045.

125. One expression of the concept of "new equal protection" was articulated by the court of appeals in *Boraas v. Village of Belle Terre*, 476 F.2d 806, 814 (2d Cir. 1973) and ignored by Justice Douglas when the case reached the Supreme Court. 416 U.S. 1, 7-8 (1974). As expressed by Judge Mansfield, the test

. . . no longer [limits courts] to the either-or choice between the compelling state interest test and the minimal scrutiny test. . . . Faced recently with the issue under similar circumstances the Supreme Court appears to have moved from this rigid dichotomy, sometimes described as a "two-tiered" formula, toward a more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it. Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute. . . . If the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld. If not, it denies equal protection.

Judge Mansfield relied on a seminal discussion of the "new equal protection," in Gunther, *The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 10-20 (1972). But *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), decided a month after Judge Mansfield's embrace of equal protection activism, placed the Supreme Court's equal protection law back on a traditional footing, and largely undercut the more liberal tests. See Judge Timbers' dissent from the denial for rehearing *en banc* by a tie vote *Boraas v. Village of Belle Terre*, 476 F.2d 824-27 (2d Cir. 1973), and Judge Mansfield's reply to the dissent, *id.* at 827-29, which argues the meaning of *Rodriguez*, *supra*, and the Supreme Court's return to a less aggressive equal protection, vindicating such commentators as A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROCESS* (1970) and Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629 (1970).

126. See note 86 *supra*. Professor Karst prophetically noted that, "The best recent judicial explanation of this new solicitude for the disadvantaged has come not from the

The ambiguity of the reasoning behind Justice White's disagreement with the court of appeals cases "to the extent that those cases rested on or expressed the view that proof of discriminatory purpose is unnecessary in making out an equal protection violation,"¹²⁷ is puzzling. Justice White's opinion did not specify whether he disapproved the result of the cited decisions, whether he found the language of the opinions in the "laundry list"¹²⁸ footnote too sweeping, or whether he felt that the standard of proof for racial wrongdoing should be the criminal standard of "beyond a reasonable doubt." Thus, the precedential value of the cases in the "laundry list" footnote is nebulous.

Considering Justice Stevens' assertion that discriminatory purpose is not always easily distinguishable from discriminatory impact,¹²⁹ analysis of the specific cases cited by the Court suggests two possibilities. First, the activism of the last decade may have left the Court so enervated that it will grapple only with the most inescapable problems, those being only the most flagrant and unambiguous acts of racial discrimination. Alternatively, the *Davis* decision may constitute a signal to lower courts that an equal protection violation now requires both proof of discriminatory impact and proof of discriminatory purpose.

Close examination of the "laundry list" of cases that Justice White discredited in *Davis* does not reveal any central theme which could have been the basis for the discrediting citation. The reference to these cases suggests that they found equal protection violations without requiring proof of motive, yet these cases all contained evidence of substantial discriminatory purpose. The holdings in the discredited cases, therefore, would have been the same whether or not the respective courts had found impact without proof of motive sufficient, because any discussion of impact without proof of motive in these cases would have been *obiter dictum*. Even if there had been no proof of motive in these cases, the discriminatory effects alone were so substantial that use of any standard of proof less than "beyond a reasonable doubt" would have resulted in the courts finding constitutional violations. Justice White's footnote in *Davis*, a case involving no discriminatory motive, discrediting dicta in cases in which both substantial discriminatory impact and discriminatory purposes had been established, reemphasizes the boldness of the *Davis* standard for a constitutional violation.¹³⁰ A

Supreme Court, but from Judge J. Skelly Wright in . . . *Hobson v. Hansen*." Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716, 742 (1969). Professor Karst's hopes for the adoption of a "sliding scale" of review now seem less justified, to put it mildly. In any case, Justice White's footnote disavowal of the "impact" cases in *Davis*, 96 S. Ct. 2040, 2050 n.12 (1976), suggests at least that a revisionist view commands the present court's perspective and that a purge of new equal protectionism continues apace.

127. *Washington v. Davis*, 96 S. Ct. 2040, 2050 (1976). See also note 126 *supra*.

128. Justice Brennan's barb. See note 106 *supra*.

129. 96 S. Ct. 2040, 2054 (1976).

130. See notes 86 and 126 *supra*.

brief survey of the facts of each of the cases disapproved by Justice White suggests how egregious the discriminatory impact may have to be before the Court will find an equal protection violation based solely upon impact.

In *Norwalk CORE v. Norwalk Redevelopment Agency*,¹³¹ the first housing decision in Justice White's "laundry list," the discriminatory effect was unusually severe. Norwalk's urban renewal program would have resulted in virtual exile of the city's minorities.¹³² The housing agency, in computing housing available as an alternative to the existing housing that was to be demolished, simply had inventoried existing rental vacancies and assumed that minorities would have equal access to the dwellings. The court of appeals found this approach impermissible in the face of a housing market characterized by racism. The urban renewal action also was directed solely at the minority community. The program did not operate in a neutral fashion, dislocating both whites and minorities. Rather, in the style of many urban renewal programs, the essence of the plan was minority removal more than it was urban renewal.¹³³ The plaintiff had alleged expressly that the housing agency intended, through the combination of the challenged project and the rampant housing discrimination, to drive minorities out of the city. The court of appeals held that proof of the allegation would establish a violation of the equal protection clause.¹³⁴ Thus, the court of appeals relied solely upon an examination of purpose in holding adequate the allegation of an equal protection violation.

The impact of the official action in *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*¹³⁵ was more severe than in *Norwalk CORE*. In *Kennedy Park Homes* the mayor of a Buffalo suburb refused to sign a sanitary sewer form that was a prerequisite for construction of a low income housing project in a predominantly white section of the city. The city had two other sections. One of the sections, with a population of 8,974, housed only one non-white person. The other section con-

131. 395 F.2d 920 (2d Cir. 1968). Several law reviews had favorably noted the decision. See, e.g., 69 COLUM. L. REV. 472, 494, 508-09 (1969); 20 SYRACUSE L. REV. 157 (1968); 43 N.Y.U.L. REV. 1257 (1963). The decision generally had been followed. See, e.g., M.M. Crockin Co. v. Portsmouth Redevelopment and Housing Authority, 437 F.2d 784, 788 n.5 (4th Cir. 1971). Cf. Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 PA. L. REV. 183 (1968).

132. 395 F.2d 920, 935 (2d Cir. 1968).

133. See McGee, *Urban Renewal in the Crucible of Judicial Review*, 56 VA. L. REV. 826, 859 (1970).

134. Procedurally, *Norwalk CORE* was on appeal from a grant of defendant's motion to dismiss for lack of standing, 395 F.2d 920, 925 (2d Cir. 1968). The district court opinion, by implication, raised the question of justiciability, *id.* at 927. In addressing the question of justiciability, the court of appeals had occasion to examine the adequacy of the plaintiff's allegations in support of a charge of violation of the equal protection clause. *Id.* at 931-32.

135. 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

sisted of 98.9 percent non-white citizens and contained the oldest, most dilapidated homes with the highest number of persons per dwelling unit in the city. The black ghetto was physically separated from the rest of the city by railroad tracks and was dominated by a steel plant. Traffic access to the ghetto was limited to a single bridge over the railroad tracks. The court of appeals found that the mayor's persistent refusal to sign the sewer permit was discriminatory in purpose. Justice Clark, in his opinion for the court, added that even if the "discrimination [had] . . . resulted from thoughtlessness rather than a purposeful scheme, the City [could] not escape responsibility for placing its black citizens under severe disadvantage" ¹³⁶ This dicta apparently drew Justice White's attention to the decision as one that should be discredited. Justice Clark, however, had expressly found that the city had involved itself in the mosaic of Lackawanna's discrimination. The city's involvement was sufficient to amount to specific authorization and continuous encouragement of racial discrimination, if not almost complete racial segregation. ¹³⁷ Because the plaintiffs sought to enjoy property rights free of discrimination, and because Lackawanna's action was inescapably adverse to the enjoyment of that right, the court of appeals required a showing of a compelling governmental interest to overcome a finding of unconstitutionality. ¹³⁸ The court thus relied upon the combined showing of purposeful discrimination and deleterious effect in holding the defendant to the "compelling governmental interest" standard of justification for its actions. ¹³⁹

Justice White's discrediting citation of *Southern Alameda Spanish Speaking Org. (SASSO) v. Union City* ¹⁴⁰ must be considered in light of his own parenthetical note that the discussion about effect is dictum. The case involved a Chicano non-profit housing sponsor who succeeded in obtaining passage of an ordinance rezoning a tract of land to permit construction of a federally subsidized multi-family project. The city council's rezoning action ultimately was nullified by a city-wide referendum. The court of appeals refused to enjoin the referendum, and

136. 436 F.2d 108, 114 (2d Cir. 1970).

137. *Id.* at 113, 114. Justice Clark cited *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Reitman v. Mulkey*, 387 U.S. 369 (1967) as completely undercutting Lackawanna's claim that no state action was involved.

138. 436 F.2d 108, 114 (2d Cir. 1970).

139. Of course, Lackawanna was unable to establish a compelling governmental interest in its refusal to grant a sewer connection permit. The city had claimed that the National Recreation and Park Association and the City's Master Plan had earmarked the land for the housing project for recreational use. Justice Clark demonstrated that the claim was "false," 436 F.2d at 113. The other substantial reason advanced by the City was the inadequacy of the sewer lines. But Justice Clark found that, although the sewer system had been grossly deficient for many years, the city had permitted nine subdivisions with some 450 homes in the predominantly white area of the city in which the housing project was planned to tie into the system. Justice Clark held that the city could not solve the sewer problem by denying blacks access to it. *Id.* at 114.

140. 424 F.2d 291 (9th Cir. 1970).

upon remand the district court judge held that the referendum did not deny equal protection of the laws. In refusing to enjoin the referendum, the court of appeals observed that the case would present a substantial question if, apart from voter motive, the result of the zoning by referendum was discriminatory.¹⁴¹ This allusion to a hypothetical presentation of a constitutional question not before the court was, as Justice White recognized in *Davis*, merely dictum. Although this dictum merely suggested that a constitutional question existed as to whether an equal protection violation could ever be based solely upon a showing of effect, Justice White viewed it as sufficiently dangerous to be discredited. Because the question of whether the city had a duty to develop a plan that accommodated the needs of its low income families was not before the court, the court did not offer an answer.¹⁴² The outcome in *SASSO* reflected a concern for free exercise of the franchise more than any indifference to racial impact.¹⁴³ Because of this emphasis on the franchise, inquiry into motivation was irrelevant.¹⁴⁴

Justice White's "laundry list" footnote in *Davis* also cites, disapprovingly, dictum in *Gautreaux v. Romney*.¹⁴⁵ This citation was to one of many decisions by the Court of Appeals for the Seventh Circuit in the litigation which lead to the Supreme Court's *Gautreaux* decision. In the case that drew Justice White's disapproval, the Seventh Circuit found that HUD had played a significant role in the administration of segregated public housing in Chicago, and that HUD was guilty of racially discriminatory conduct in its own right.¹⁴⁶ The effect of HUD's action was so egregious, that ultimately a unanimous Supreme Court (including Justice White) concurred in the affirmance of the Seventh Circuit's metropolitan area remedy.¹⁴⁷ Justice White, however, felt impelled to denounce the Seventh Circuit's conclusion that courts

141. *Id.* at 295-96.

142. *Id.*

143. Three other recent cases also deferred to the exercise of the franchise if the countervailing interest was racial impact. First, *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970), which was not cited by Justice White. *Ranjel* involved spot zoning by ordinance to permit a federally subsidized housing project for lower-income blacks and Mexican Americans in a white neighborhood. A general referendum procedure, not restricted to zoning, existed and was used to block the project. Second, *James v. Valtierra*, 402 U.S. 137 (1971) upheld a state constitutional provision that permitted public housing site selection to be subject to approval by referendum. See text accompanying notes 205-211 *infra*. Most recently, *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 2358 (1976) sustained a city charter provision requires referendum approval of any changes in land use, see text accompanying notes 217-222, *infra*.

144. The court of appeals in *Ranjel v. City of Lansing*, 417 F.2d 321, 324 (6th Cir. 1969) concluded that initiative and referendum are such an important part of the state's legislative process and are sufficiently grounded in neutral principles, that they should be exempt from constraints by the U.S. Constitution.

145. 448 F.2d 731 (7th Cir. 1971).

146. *Id.* at 739.

147. 96 S. Ct. 1538 (1976).

should not examine a purported good faith motive when the effect of discrimination was as pronounced as the effect in *Gautreaux*.¹⁴⁸

Crow v. Brown, another case which was partially disapproved by Justice White in *Davis*, stated in dictum that "in the absence of supervening necessity, any . . . action or inaction intended to perpetuate or which in effect does perpetuate" residential segregation with attendant school segregation and dislocations of jobs and housing cannot stand.¹⁴⁹ The result in *Crow*, however, did not depend upon the alternative phrase which suggested that the court could find a constitutional violation based solely upon the effect of certain actions. Officials of Fulton County, Georgia had refused building permits for two low-rent public housing projects in the Atlanta suburbs, *after* they learned of the type of housing involved, even though they had previously rezoned the parcels for apartment development. The district judge found that the officials refused to issue the building permits for the projects solely because the occupants of the developments would have been blacks.¹⁵⁰ Thus, the case was one involving both motive and impact.

The last case on Justice White's disapproval list in *Davis* is the widely noted and discussed *Hawkins v. Town of Shaw*.¹⁵¹ In this instance the discriminatory purpose was overshadowed by the severely

148. The Seventh Circuit relied on dictum in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1963), which announced that "[i]t is of no consolation to an individual denied the equal protection of the laws that it was done in good faith," 448 F.2d 731, 738 (7th Cir. 1971).

Because *Gautreaux* only addressed the permissibility of a metropolitan area remedy, Justice White's discrediting of dictum in an early stage of the *Gautreaux* litigation presents the possibility that the *Gautreaux* situation would not constitute a violation of equal protection under the *Davis* standard. Apparently Justice White does not feel that the circumstances surrounding the discrimination in Chicago by CHA and HUD were sufficiently egregious to make the racial impact, rather than the discriminatory purpose, the critical factor in a finding of unconstitutionality. See *Washington v. Davis*, 96 S. Ct. 2040, 2049 (1976).

149. 332 F. Supp. 382, 392 (N.D. Ga. 1971), *aff'd* 457 F.2d 788 (5th Cir. 1972).

150. In affirming, the court of appeals per curiam stated: "Of the 14,000 units of public housing, 55.7% are located in areas which are 90% to 100% black, and another 19.4% in areas which are 70% to 90% black." 332 F. Supp. at 383.

This policy causes and perpetuates residential racial segregation. The record is clear that the County officials denied building permits . . . for the purpose and foreseeable result of continuing the present pattern of racial segregation. 457 F.2d 788, 790 (1972).

151. 437 F.2d 1286 (5th Cir. 1972), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972). The case has been hailed as a seminal opinion, see Daye, *Role of the Judiciary in Community Development and Housing: A Suggested Analytical Method*, 52 J. URBAN LAW 689, 741 (1975). See also Note, *Equalization of Municipal Services: The Economics of Serrano and Shaw*, 82 YALE L.J. 89 n.8 (1972), describing the number of articles in the field as "legion"; Comment, *The Evolution of Equal Protection—Education, Municipal Services, and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103 (1972); and Note, *Hawkins v. Town of Shaw—Equal Protection and Municipal Services: A Small Leap for Minorities but a Giant Leap for the Commentators*, 1971 UTAH L. REV. 397, suggesting that "[A]lthough the commentators have heralded *Hawkins v. Town of Shaw* as a significant equal protection case, it adds little to established principles"—mainly because the court was able to find a suspect classification based on race.

discriminatory effects of the inaction of town officials. In *Hawkins* the defendant town had totally failed to provide municipal services to black sections of the municipality. The plaintiffs demonstrated by overwhelmingly conclusive statistical evidence that there was almost a complete lack of service to the black communities and almost total service in the white communities.¹⁵² The court of appeals, in commenting on the lack of proof of a purpose to discriminate in a suit alleging unconstitutional racial discrimination, noted that "actual intent or motive need not be directly proved"¹⁵³ But in Justice White's own words, "the discriminatory impact . . . for all practical purposes demonstrate[d] unconstitutionality because in [these] circumstances the discrimination [was] very difficult to explain on nonracial grounds."¹⁵⁴ Thus, Justice White's disapproving citation to *Hawkins* emphasized that he would not find a constitutional violation based solely on effect even in the clearest and most egregious case of neglect.

Finally, neither last nor least on Justice White's list in *Davis* was *Metropolitan Housing Development Corp. v. Village of Arlington Heights*.¹⁵⁵ The discriminatory impact in *Arlington Heights* was pronounced. Village officials in metropolitan Chicago's most segregated suburb¹⁵⁶ refused to rezone land leased by a religious group to an open-housing organization that planned the construction of a federally subsidized multi-family project. The open-housing organization planned the development as a cluster of two-story townhouses, no higher than the surrounding single family homes. Unfortunately, no classification for townhouses existed and the development, therefore, required rezoning by the Village. Arlington Heights already had rezoned 60 parcels of land for large commercial multi-family projects, 53 of them adjacent to single family homes. Prior to the open-housing organization's rezoning request the Village had amended its zoning plan "dozens of times to permit development of thousands of high-rent apartments adjacent to single-family neighborhoods,"¹⁵⁷ with many of those requests consisting of situations almost identical to the request at issue. The distin-

152. Approximately 98% of all homes fronting on unpaved streets and 97% of all homes not served by sanitary sewers in the town were in black neighborhoods, and the town had recently installed high intensity lighting fixtures exclusively in white neighborhoods, 437 F.2d 1286, 1288 (5th Cir. 1971). See also Note, 1971 UTAH L. REV. 397, 401.

153. 437 F.2d 1286, 1291-92 (5th Cir. 1971).

154. 96 S. Ct. 2040, 2049 (1976). As John Hart Ely has said of *Gomillion*, "it would have taken authenticated motion pictures of the coins being flipped or the computer running amok [to have demonstrated a lack of discriminatory motive]; surely no matter of legislative history, no matter how carefully doctored, could have served," Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1254 (1970).

155. 517 F.2d 409 (7th Cir. 1975), cert. granted, 423 U.S. 1030 (1975), on 1976-77 docket, 45 U.S.L.W. 3013 (July 27, 1976).

156. *Id.*, Respondent's Brief at 12.

157. *Id.*, at 3.

guishing characteristic of the developments for which the Village granted rezoning was that those developments were effectually for whites only.

The Village of Arlington Heights had been highly successful in maintaining its socio-ethnic homogeneity. The Seventh Circuit found that, among municipalities in the Chicago area with more than 50,000 residents, Arlington Heights was the most residentially segregated community and also contained the most racially exclusionary housing stock.¹⁵⁸ A 1970 population census revealed that less than 0.1 percent of Arlington Heights' residents were black. The percentage of blacks in Arlington Heights had declined between 1960 and 1970 while the percentage of blacks in the entire Chicago metropolitan area increased from fourteen percent to eighteen percent.¹⁵⁹ Evidence was offered that in the absence of racial discrimination in Arlington Heights, if the housing choice of blacks were based on cost alone, blacks would occupy five percent of the existing housing stock of the Village. Although this figure is significantly lower than the percentage of blacks in the Chicago metropolitan area, it would represent an increase of over 100 times the present number of black residents in the Village.¹⁶⁰ Thus the Village's rejection of the rezoning application for the low income housing development had the effect of perpetuating the existing housing segregation. Furthermore, the rejection of the rezoning application was clearly motivated by massive public opposition to the development—much of it thoroughly documented in racially explicit letters and petitions which sought to thwart efforts to integrate the community.¹⁶¹

The bare citation of *Arlington Heights* by the Supreme Court in *Davis*¹⁶² superficially indicates that the court of appeals held purpose somewhat less important than effect in ascertaining a constitutional violation. The Seventh Circuit's opinion, however, does not permit a simplistic classification as being on one side or the other of the tradi-

158. 517 F.2d 409, 414 (7th Cir. 1975).

159. *Id.*

160. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 517 F.2d 409 (7th Cir. 1975), *cert. granted*, 423 U.S. 1030 (1975), Respondent's Brief at 12-13, based on an exhibit prepared by demographer/urbanologist Pierre de Vise.

161. Among the letters was one printed in the *Arlington Heights Herald* while the hearings for the rezoning were underway before the Plan Commission. The reprinted letter contained this passage:

Concerning your editorial, "Housing: An Ignored Issue": It isn't ignored, it's unwanted. We do resist low-income housing because it is a ploy to export blacks from Chicago to integrate the suburbs.

The official minutes of the Plan Commission hearing revealed that a

Mr. Zviagzne . . . was placed under oath. He stated that they have the right to choose their friends. . . .

He explained that in Brazil there is a lot of mixing between colors and he hoped that someday we would live together like that, too, but not by being provoked—no shotgun wedding has lasted very long, and that is what he felt was happening. . . .

Id. at 17-19.

162. 96 S. Ct. 2040, 2050, n.12 (1976).

tional purpose/impact dichotomy.¹⁶³ In building upon an earlier opinion,¹⁶⁴ the Seventh Circuit held that the Village of Arlington Heights had exploited the problem of racial discrimination by allowing itself to become an almost 100 percent white community. Furthermore, by rejecting the project the Village barred the only present hope of making even a small contribution toward eliminating the pervasive problem of segregated housing.¹⁶⁵ The Village's conduct, therefore, was held to have discriminatory effects that required compelling justification. The Court of Appeals for the Seventh Circuit did not hold simply that racial disparity without more violated the fourteenth amendment.¹⁶⁶ The overall pattern of residential segregation in the Arlington Heights area was of prime importance to the court in its decision. The Village officials effectively were reinforcing private actions to perpetuate segregation. This reinforcement by the Village of private discriminatory action logically should result in a sharing of liability for the discriminatory effect.¹⁶⁷ The Supreme Court has expressly recognized that settled

163. Land use expert Fred P. Bosselman saw the Seventh Circuit's decision in *Arlington Heights* as evidence of the willingness of [m]idwestern federal appeals courts . . . to tackle the problem of metropolitan housing segregation while federal courts elsewhere in the country have been running for cover. . . .

* * *

This is in dramatic contrast to the 2d, 6th and 9th circuits, all of which have recently upheld local exclusionary zoning decisions on grounds that the communities had no obligation to look beyond their own boundaries in determining housing needs.

Bosselman, *Comment on Metropolitan Housing Devel. Corp. v. Village of Arlington Heights*, 27 LAND USE L. & ZONING DIGEST 12 (No. 7, 1975). The other midwestern circuit alluded to by Bosselman is the Eighth Circuit, see *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975). See text accompanying notes 249-57 *infra*. The "narrow view" cases are *Ybarra v. City of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974); and *Acevedo v. Nassau County*, 500 F.2d 1078 (2d Cir. 1974).

164. In *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974), the Seventh Circuit held that a builder had violated the prohibition against racial discrimination in 42 U.S.C. § 1982 (1970), by constructing and selling homes to blacks at prices inflated because the blacks were not able to purchase in white areas. The mere fact that the defendant did not create the problem, did not necessarily mean that he could ignore it or take advantage of it. The case is discussed in Note, *Curbing Exploitation in Segregated Housing Markets: Clark v. Universal Builders, Inc.*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 705 (1975).

165. 517 F.2d 409, 414-15 (7th Cir. 1975).

166. Indeed, the Court explicitly declared that *James v. Valtierra*, 402 U.S. 137 (1971), supported its analysis that "racial disparity alone as it relates to the project under consideration does not amount to racial discrimination," 517 F.2d at 413.

167. *Kushner & Werner, Metropolitan Desegregation After Milliken v. Bradley: The Case for Land Use Litigation Strategies*, 24 CATH. U.L. REV. 187, 208-12 (1975); see *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974) as evidence of the concept of "shared liability". For *Kushner & Werner, Clark* is a linchpin of the Court of Appeals opinion affirmed by *Gautreaux* in that the "widespread private residential segregation shown in *Clark* was used as support for the proposition that there was evidence of suburban discrimination. Thus public agencies were held liable for policies which perpetuated private discriminatory acts," *Kushner & Werner, supra* at 209.

practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior as effectively as legislative pronouncements.¹⁶⁸ Village officials' refusal to rezone, under circumstances in which they normally would have rezoned, effectively aborted a development that would have increased the number of minority residents by over 1,000 percent.¹⁶⁹ Their refusal clearly served to perpetuate existing racial segregation. Whether or not this action was motivated by antipathy towards blacks, a compelling justification was required to justify the interruption by Village officials of private efforts to desegregate. The record in *Arlington Heights*, which is currently on *certiorari* to the Supreme Court, clearly is not wanting for evidence of racial motive. Thus, the Seventh Circuit's opinion leaves open the opportunity for affirmance either on a theory of discriminatory effect or on a theory of discriminatory motive or both.

The Supreme Court, therefore, is at a crossroad, perhaps not unlike that reached in the post-reconstruction era—another time of declining national commitment to minority needs and concerns.¹⁷⁰ *Gau-*

168. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 168 (1969).

169. 517 F.2d 409, 414 (7th Cir. 1975).

170. Recent opinions of the Court that affect blacks have a quality of *deja vu* that is especially ironic in the bicentennial year and 100 years or so after a similar national reaction to minority progress. Speaking of the 1870's, Professor Bardolph has written:

In their program to frustrate the Fourteenth and Fifteenth Amendments, conservative southerners, especially after 1872, were aided by the Republican party and many northerners who had wearied of the Reconstruction fiasco, who had come to doubt that the earlier objects of Radical Reconstruction could—or even should—be realized, and who were more and more disposed to re-establish national harmony by sacrificing the Negro.

This new drift was powerfully assisted by the nation's highest tribunal. Decisions involving the amendments and legislation growing out of them steadily weakened the recently drafted guarantees of Negro rights. Moved partly by a determination to check the shift in power from the states to the nation, partly by a legalistic insistence upon the letter of the law and the clear commands of legal justice before the vaguer claims of social justice, and partly by public racial attitudes, the Court developed several principals [sic] of constitutional construction.

It decreed that the amendments applied only to measures taken by the states themselves, . . . that if a law was not on the face of it clearly discriminatory, the Court would not presume to determine whether it was in effect more burdensome to blacks than to whites; . . .

These doctrines were partially defined in a cluster of decisions beginning with the *Slaughter House Cases* of 1873 [83 U.S. (16 Wall.) 395 (1873)] and culminating in the Civil Rights cases ten years later.

* * *

Another long stride toward the restoration of white supremacy in the South during the twilight of the Reconstruction program came in the vigorous declaration by the Supreme Court in *United States v. Cruikshank* [92 U.S. 542 (1875)] that the Fourteenth Amendment did not put ordinary private rights under the protection of the nation except as against state action.

THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW, 1849-1970, 58-59, 62 (R. Bardolph ed. 1970).

Another outline of the Supreme Court's "nullification" of previous attempts to liberate blacks appears in Maslow & Robinson, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 370-73 (1953).

Additional discussion of this distant era that has a depressingly striking resemblance

treaux-type segregation probably (and hopefully) is on the wane. The metropolitan area remedy established in *Gautreaux* would be an empty promise were the Court to hold expressly, in the area of racially discriminatory housing practices, that discriminatory motive or purpose must be proven before relief will be extended. Further litigation will be fruitful in providing truly equal protection only if the Court is prepared to follow the lead of those circuits that have examined closely the reality of racial impact.

B. Standing Barriers to Desegregated Housing

The need for more expansive views of equal protection also has special force because of the Supreme Court's recent standing cases. The decisions in *Warth v. Seldin*¹⁷¹ and *Simon v. Eastern Kentucky Welfare Rights Org.*¹⁷² have reduced considerably the number of citizens entitled to prove the discriminatory nature or disproportionate impact of governmental action requisite to establishing a violation of equal protection. Thus, *Gautreaux's* promise of desegregation may be hollow not only because the discrimination necessary to trigger relief is difficult to prove, but because the Court has significantly reduced the class of persons entitled to raise the claim. Not everyone who is excluded from the suburbs is part of the relatively small percentage of residents in public housing projects.¹⁷³ *Warth* and *Simon v.*

of what was known in the 1972 Presidential campaign as the "Southern Strategy" or the search for a "new majority" appears in D. KING & C. QUICK, *LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT* 9-13 (1965) and *DISCRIMINATION AND THE LAW* 5-14 (V. Countryman ed. 1965). An excellent compilation of the relevant legal as well as historical material on the era and a summary of some of the more obscure decisions; is contained in EMERSON *et al.*, 2 *POLITICAL AND CIVIL LIBERTIES IN THE UNITED STATES* 1399-1402 (1967). Among the historical classics on the period is that of W. E. B. DU-BOIS, *BLACK RECONSTRUCTION IN AMERICA* (1955). See also MYRDAL, *AN AMERICAN DILEMMA* 226 (1944) and Gressman, *The Unhappy History of Civil Rights Legislation*, 50 *MICH. L. REV.* 1336, 1339 (1952), which describes the Supreme Court's "directed perversion of what the abolitionists tried to write into the Constitution" as a "judicial coup d'etat."

Cf. Justice White's dissent (joined by Mr. Justice Rehnquist) in *Runyon v. McCrary*, 96 S. Ct. 2586, 2604 (1976), for a very recent expression of the kind of legalistic view of the post Civil War legislation that resulted in the relegation of blacks to second-class citizenship. For an earlier expression of the same abstract legalism by Justice White, see his widely-criticized, indeed notorious, opinion in *Swain v. Alabama*, 380 U.S. 202 (1965), discussed in Comment, *The Case for Black Juries*, 79 *YALE L.J.* 531, 539-46 (1970).

171. 422 U.S. 490 (1975).

172. *Simon v. Eastern Kentucky Welfare Rights Org.*, 96 S. Ct. 1917 (1976) [hereinafter referred to as *Simon v. E.K.W.R.O.*].

173. As of June 30, 1969 there were 2.6 million public housing residents. HUD, *Justification of Low-Rent Public Housing, Renewal and Housing Assistance Programs*, reprinted in Hearings before Subcomm. of Comm. on Appropriations, House of Representatives, Independent Offices and Dept. of Housing and Urban Development Appropriations for 1971, 91st Cong. 2d Sess., pt. 3, at 191, 201 (1970). See generally *id.* at 166-203. *Cf.* MANDELKER, *HOUSING SUBSIDIES IN THE UNITED STATES AND ENGLAND*

E.K.W.R.O., and the court of appeals cases, like *Petaluma*¹⁷⁴ and *Evans v. Lynn*¹⁷⁵ may limit the Court's earlier efforts to provide a forum for racially and politically oppressed minorities.¹⁷⁶ Now plaintiffs not only must solve the conundrum of justiciability,¹⁷⁷ but they also must have suffered, in strictest terms, "injury in fact."¹⁷⁸

6 (1973): "Nationally, only about three or four percent of all rental housing is publicly owned. . . ."

Indeed, "the public housing program was never very large: since 1937, when it began, only about one million units have been built. The vast majority of poor people did not (and do not now) receive housing aid, other than through welfare. . . ." Gans, *A Poor Man's Home Is His Poorhouse*, N.Y. Times, March 31, 1974, § 6 (Magazine), at 20. This should be contrasted with England where two-thirds of all rental housing is publicly owned. MANDELKER, *id.* at 7.

174. *Construction Indus. Ass'n v. Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) was resolved in part on a standing analysis. In *Petaluma* a builders association was not permitted to assert third party claims by low income persons allegedly denied the right to travel by exclusionary municipal practices of Petaluma, which had imposed a 500-unit maximum on construction in the city.

175. 376 F. Supp. 327, *rev'd*, 537 F.2d 571, 573-80 (2d Cir. 1975), *aff'd on rehearing en banc*, 537 F.2d 571, 589-612 (1976). *Evans* denied standing to plaintiffs who lived outside the town of New Castle, N.Y. The plaintiffs sought to enjoin HUD water and sewer grants because of HUD's failure to evaluate racial residential segregation in the New Castle area. The court held that, even if the plaintiffs were in the "zone of interest" of the statute, they lacked the "injury in fact" required by article III of the U.S. Constitution, 537 F.2d at 590-98. In reaching this result, the court reasoned that injunctive relief would not improve the plaintiffs' housing status.

176. *Cf. United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) [hereinafter cited as *SCRAP*]; *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The decision in *SCRAP* was the occasion of a dissent by Justices White and Rehnquist, and Chief Justice Burger, who ultimately prevailed in *Warth v. Seldin*, 422 U.S. 490 (1975).

Dissenting in *Warth*, Justice Brennan said:

[The Court's decision] will be read as revealing hostility to breaking down even unconstitutional zoning barriers that frustrate the deep human yearning of low-income and minority groups for decent housing they can afford in decent surroundings.

Id. at 528-29.

177. What Justice Powell called "prudential limitations" on the exercise of federal jurisdiction, 422 U.S. at 498, Justice Brennan saw as "outmoded notions of pleading and justiciability." *Id.* at 520. *Cf. Sierra Club v. Morton*, 405 U.S. 727 (1972), especially the argument of the Solicitor General attacking "government by the Judiciary," *id.* at 753; and *Powell v. McCormack*, 395 U.S. 486 (1969), and A. BERLE, *THE THREE FACES OF POWER* vii (1967) viewing the Supreme Court as a "revolutionary committee."

178. Justice Douglas used the "injury in fact" test in *Association of Data Processing Service Org. v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970). In *Data Processing*, Justice Douglas stated that, in determining standing, "[t]he first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise," *id.* at 152. A majority of the Court required "allegations of individualized injury" as a limitation on the "injury in fact" concept in *Sierra Club v. Morton*, 405 U.S. 727, 736 (1972). However, it has been argued that "at least in its broadest form . . . it amounted to no more than a ruling on a technical defect of pleading. It would present no great difficulty for the Sierra Club to allege that it represents its members rather than the public, and to find among its members users of Mineral King who would regard it as despoiled by development" and thereby make the sufficient allegation of "individualized injury." Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 667 (1973) [hereinafter cited as *Scott*]. *Cf. Stewart, The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667,

By raising the barriers to standing, the Court commits plaintiffs attacking racially discriminatory exclusionary land use practices to protracted trench warfare—war that depends on a “Fifth Column” within the ranks of the suburban enclaves. In *Warth* several low income members of racial and ethnic minority groups filed suit against the town of Penfield, alleging that the town’s zoning ordinance effectively excluded persons with low and moderate incomes from living in the town. A local builders association sought to intervene, claiming that the exclusionary zoning deprived members of the association from the potential profits of constructing low and medium-income housing in Penfield. The Court found that neither group had standing to litigate the claims. None of the individual persons had demonstrated that the exclusionary zoning harmed them. Nor did any of the individuals show that they would benefit from the requested relief. The builders association failed to obtain standing because its members, with one exception, had not attempted to build in Penfield.

Thus, the Court’s standing test required both the excluded citizens of Buffalo, as well as the builders of low-income housing, to demonstrate that they could surmount all the various practical obstacles to the construction of housing developments. Ironically, many of the practical obstacles derive from the exclusionary zoning practices. Among the obstacles that the plaintiffs would have to show a strong possibility of overcoming to satisfy the Court’s standing requirement are bureaucratic obstacles such as successfully processing a subsidy application through HUD.¹⁷⁹ *Warth’s* requirement of a preliminary showing of success in completing highly technical and complex tasks raises a formidable barrier to obtaining judicial relief. The Court’s restrictive view of the proper scope of the article III¹⁸⁰ standing requirement will preclude full adjudication of many worthy claims.¹⁸¹

1737-47 (1975). Professor Scott’s suggestion that Sierra Club was not “a restrictive turn in the evolution of standing doctrine”, *id.*, now seems less than prescient after *Warth’s* exclusion of plaintiffs who cannot allege “a distinct and palpable injury” 422 U.S. at 501, and also that they “personally would benefit in a tangible way from the courts’ intervention,” *id.* at 508, [emphasis added]. However, as Professor Scott shows, “most of the concern over plaintiff’s standing in terms of the minimal requirements of Article III, or “pure” standing, is empty. . . . If plaintiff did not have the minimal personal involvement and adverseness which Article III requires, he would not be engaging in the costly pursuit of litigation.” Scott, *supra*, at 674.

179. Local municipalities interpose bureaucratic obstacles of their own, presumably not intended to be exclusionary. “Building industry studies show that governmental fees comprise 3% of the price of a home—and when governmental red tape delays the start of construction, inflation, holding costs and other expenses can force the price up another 2% a month. For the median-priced \$51,300 home, that’s \$1,026 for every month of delay.” Belinkoff, *Consumer Pays for Government Delays*, L.A. Times, June 6, 1976, Pt. VII, at 7, col. 1. The article describes the 18 months and 36 different offices it took to obtain approval for a 188-acre, 188-home hillside tract in Los Angeles.

180. U.S. CONST. art. III, § 2.

181. Ironically, a Pennsylvania court, a state with judges in the vanguard of the assault on exclusionary zoning, also denied relief on grounds of nonjusticiability to low-

In *Simon v. E.K.W.R.O.*¹⁸² the "injury in fact" requirement was applied to plaintiffs arguably in the "zone of interests" of the Internal Revenue Code's preferential tax treatment provisions for hospitals that service disadvantaged patients. An organization of indigents argued that an Internal Revenue Service regulation, which granted preferential treatment to hospitals that provided indigents only with emergency services discouraged the institutions from meeting the entire needs of the poor. The Supreme Court reaffirmed *Warth* and dismissed the claim. Instead of dismissing the claim for lack of ripeness,¹⁸³ the Court unnecessarily stretched to dismiss the claim for lack of standing. In his opinion for the Court, Justice Powell explained that the plaintiffs had not shown that the alleged injury was fairly attributable to the I.R.S. regulations instead of to other factors. Although the I.R.S. regulation provided an incentive for hospitals to discriminate against indigents, the plaintiffs did not satisfy the injury in fact requirement for standing to litigate the validity of the regulation. In order to meet the standing requirement, the plaintiffs would have had to show that the elimination of the tax incentive would have resulted in some hospitals admitting indigents for non-emergency care so that they could continue obtaining preferential tax treatment. In the Court's view, "unadorned speculation will not suffice to invoke the federal judicial power."¹⁸⁴ Apparently, in order to be heard on the merits of a claim that attacks a complex structure of discrimination, a plaintiff must establish not only that the specific action being attacked is part of the structure, but also that it is the keystone, without which the entire structure will fall.

In short, the Court has taken such a restrictive view of standing that general assaults on segregated communities border on the impos-

income persons seeking access to a county by way of general rezoning in Commonwealth v. County of Bucks, 8 Pa. Commnw. 295, 302 A.2d 897 (1973), *cert. denied*, 414 U.S. 1130 (1974), *affg.*, 22 Bucks Co. L. Rep. 179 (1972). The case preceded but was not cited in *Warth*. The court reaffirmed Pennsylvania authority authorizing judicial invalidation of exclusionary zoning practices, but found that the Bucks County plaintiffs lacked the specific property interests present in such cases as *National Land and Investment Co. v. Easttown Township Board of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965) and *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970). The court also was reluctant to become a "superplanning agency" assuming oversight of the County planning commission and 54 separate municipalities, and making initial policy determinations of a "kind clearly for nonjudicial discretion" with an entire "lack of judicially discoverable and manageable standards" for the task. 22 Bucks Co. L. Rep. at 188, 302 A.2d at 904-05. *Bucks* and *Warth* are discussed in Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760, 779-783 (1976).

182. 96 S. Ct. 1917 (1976).

183. The decision was probably not ripe for judicial determination since respondents had failed to secure administrative determinations as to how the new regulation would be applied and what effect it would have on different categories of hospitals. Mr. Justice Brennan, joined by Mr. Justice Marshall, would have disposed of the case for lack of ripeness. Justices Brennan and Marshall dissented from "further obfuscation of the law of standing . . . unnecessary when there are obvious and reasonable alternative grounds upon which to decide this case." *Simon v. E.K.W.R.O.*, 96 S. Ct. 1917, 1928 (1976) (dissenting opinion).

184. 96 S. Ct. at 1927.

sible. The court appears to allow only "specific project" standing, in which someone within the enclave sells to an outside developer whose low-income housing project is stymied by a specific law or regulation. The obvious result is that those communities that "hang together" and that rely on a broad base of discriminatory actions are safe from center city intruders. Either the outsiders will be unable to establish that injury in fact does exist or they will be unable to relate the injury to a keystone action so that an injunction will be effective in terminating the discrimination. Mr. Justice Brennan, dissenting in *Warth*, vividly captured the anomaly of the Court's position:

. . . [t]he portrait which emerges from the allegations and affidavits is one of total, purposeful, intransigent exclusion of certain classes of people from the town, pursuant to a conscious scheme never deviated from. Because of this scheme, those interested in building homes for the excluded groups were faced with insurmountable difficulties, and those of the excluded groups seeking homes in the locality quickly learned their attempts were futile. Yet, the Court turns the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation. In effect, the Court tells the low-income minority and building company plaintiffs they will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of this suit.¹⁸⁵

The Court's increasingly restrictive standing requirements may be obscuring the underlying problem—that of a political question bar.¹⁸⁶ Justice Powell's suggestion in *Warth*, that citizens who are dissatisfied with provisions of zoning laws need not overlook the availability of the normal democratic process,¹⁸⁷ supports the contention that the Court may be disguising as a standing requirement a political bar to justiciability. Unfortunately, the democratic process which Justice Powell

185. *Warth v. Seldin*, 422 U.S. 490, 523 (1975).

186. See Sager, *Burnt Bridges: Retreat of the Federal Judiciary from Land Use Litigation*, 27 LAND USE L. & ZONING DIGEST 7 (No. 11, 1975) [hereinafter cited as Sager].

The question of standing as the sufficiency of the plaintiff's interest in the case is sometimes blended with discussions of justiciability, but "courts should talk about standing only when their decisions are based on standing considerations." Scott, *supra* note 178, at 684, citing K. DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 22.00-4, at 723 (Supp. 1970).

187. 422 U.S. at 508, n.18. Black despair at the available "normal democratic processes" has been encapsulated by S. CARMICHAEL & C. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 173 (Vintage ed. 1967): "Under the present institutional arrangements, no one should think that the mere election of a few black people to local or national office will solve the problem of political representation. . . . The fact is that the present political institutions are not geared to giving the black minority an effective voice."

suggests plaintiffs may utilize to obtain relief is the same unresponsive democratic process that ended in the urban uprisings of the 1960's.¹⁸⁸ Although the Court did not address the political question in *Simon v. E.K.W.R.O.*, the Court of Appeals for the Ninth Circuit in *Petaluma* impliedly recognized the political question barrier when it proclaimed that the pressing housing needs in metropolitan areas must be resolved in the legislature, not in the federal court.¹⁸⁹

Thus, while the Court sanctions a metropolitan area remedy in a federally funded racially segregated housing project, the Court is not likely to approve equally dramatic relief in litigation that has a greater chance of breaking down residential segregation. More pervasive and effective schemes of racial segregation that are perpetuated by exclusionary land use practices require, in the Court's view, proof of motive by a select group of plaintiffs.

III. THE CONTRADICTION BETWEEN DESEGREGATION ORDERS AND LOCAL LAND USE CONTROLS

The barriers of proving motive and of establishing standing to sue, though formidable, are dwarfed by the barriers created by the Court's deference to local autonomy. In recent years the Court has protected zealously the rights and powers that are accorded to local government entities either under federal or state housing statutes or under existing land use laws. The sweeping relief permitted in *Gautreaux*¹⁹⁰ appears to conflict with the manner in which the Court thus far has reacted to local land use practices. From *James v. Valtierra*¹⁹¹ in 1971 to *City of Eastlake v. Forest City Enterprises, Inc.*,¹⁹² which followed *Gautreaux* by only a few weeks, the Court's treatment of local land use practices has been one of abdication and abstention.

Very few land use controversies have been resolved by Supreme Court opinions. Out of the thousands of court decisions involving zoning disputes between 1926, the year of *Village of Euclid v. Ambler Realty Co.*,¹⁹³ and 1969,¹⁹⁴ the Supreme Court rendered only two such

188. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (1968): "The frustrations of powerlessness have led some Negroes to the conviction that there is no effective alternative to violence as a means of achieving redress of grievances, and of 'moving the system.'" Cf. WATTS: THE AFTERMATH 55 (P. Bullock ed. 1969).

Political and "community" leaders are targets of deep mistrust and suspicion [in the ghetto]. . . . Negro politicians, as a rule, are not trusted much more than are the white. The pervasive feeling is that the "leaders" and the "spokesmen" have drifted away from Watts, and that they serve their own interests before those of the community.

189. Sager, note 186 *supra*.

190. *Hills v. Gautreaux*, 96 S. Ct. 1538, 1550 (1976).

191. 402 U.S. 137 (1971).

192. 96 S. Ct. 2358 (1976).

193. 272 U.S. 365 (1926).

194. N. WILLIAMS, *AMERICAN LAND PLANNING LAW* Vol. I, at vii (1975) puts the number of zoning decisions in this period at more than 10,000.

decisions, both in 1928.¹⁹⁵ In 1974 the Court affirmed the constitutionality of sociological zoning in *Village of Belle Terre v. Boraas*.¹⁹⁶ During the 46-year silence on zoning issues, however, the Court decided other significant cases involving land use policies. In 1954 the Court upheld the power of local government entities to use eminent domain to condemn land for redevelopment.¹⁹⁷ Subsequently, in *James v. Valtierra*,¹⁹⁸ the Court affirmed the right of local communities to decide the fate of low income housing projects by referendum. Most recently, in *Eastlake*¹⁹⁹ the Supreme Court upheld the constitutionality of a mandatory referendum that subjected zoning variances granted by planning officials and the city council to approval by the electorate.

The Court's first zoning decision, *Village of Euclid v. Ambler Realty Co.*,²⁰⁰ was a carefully thought out accommodation between earlier conceptions that private property was subject to the police power only when such things as fire and disease required individual interests to be subordinated to the general security of the community and more modern views about regulation of the urban environment. *Euclid* sanctioned a flexible view of the police power. This expanded view of the police power allowed the exclusion of specified uses from various parts of a city if in accordance with a well-considered plan. The expanded police power was based upon both an extension of the power to protect against fire and disease and the new trend to exclude nuisances.

The Supreme Court's endorsement of segregation of uses caused a dramatic change in state court attitudes. State courts subsequently upheld not only height and area regulations, but also restrictions on use.²⁰¹ Limitations on the newly expanded police power, however,

195. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) and *Seattle Title and Trust Co. v. Roberge*, 278 U.S. 116 (1928). Indeed, during the six U.S. Supreme Court terms between the 1949-50 term and the 1954-55 term, appeals were dismissed or petitions were denied in 21 cases involving zoning and local planning. See Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199, 208 (1955). The period from 1971 through 1976 has also seen the Court's deferral to inferior tribunals. See chart at note 223 *infra*.

196. 416 U.S. 1 (1974).

197. *Berman v. Parker*, 348 U.S. 26 (1954). The decision was "but the culmination of more than a half century of judicial *laissez faire*-ism in eminent domain." McGee, *Urban Renewal in the Crucible of Judicial Review*, 56 VA. L. REV. 826, 832-33 (1970). See Dunham, *Property, City Planning and Liberty*, in LAW AND LAND 28, 35-37 (C. Haar ed. 1964) in which the argument is made that *Berman* liberated planning so that its decisions could be subjected to the tests of the market place.

198. 402 U.S. 137 (1971).

199. 96 S. Ct. 2358 (1976).

200. 272 U.S. 365 (1926).

201. E. BASSETT, ZONING 46-47 (1936). As state court attitudes shifted, so did state legislatures. "By the end of 1927, zoning laws had been enacted by some forty-five states. . . . At the close of 1930 authority for the adoption of zoning ordinances had been extended to municipalities in forty-seven states, and in the forty-eighth, the general home rule for provisions of the constitution had been judicially construed to grant authority for . . . zoning ordinances. . . ." C. HAAR, LAND USE PLANNING 173 (2d ed. 1971).

were promptly announced by the Court. In *Nectow v. City of Cambridge*²⁰² the Supreme Court declared a zoning ordinance unreasonable as applied to a particular tract of land. In *Seattle Title & Trust Co. v. Roberge*²⁰³ the Court struck down a consent provision in a zoning ordinance that delegated legislative power (and hence a veto) to the neighbors of a landowner who sought a particular use. Thus, the zoning power that first had been held constitutional in 1926 was well defined by two limits on its use by 1928.

The recent Supreme Court cases, however, have permitted local control of land use practices, even when the local law suggests a parochialism inconsistent with the planning and political premises of *Euclid*.²⁰⁴ For example, *James v. Valtierra* upheld the power of local communities to determine by referendum whether low-rent public housing could be constructed.²⁰⁵ The use of a referendum as a zoning device effectively permits the affluent, and usually white, citizens to decide whether low-rent public housing should be provided for less affluent, typically minority, citizens.²⁰⁶ Because the referendum in *Valtierra* did not contain an express racial classification, the Court declined

202. 277 U.S. 183 (1928).

203. 278 U.S. 116 (1928).

204. See Amicus Brief of Nat'l Ass'n of Home Builders, Am. Soc'y of Planning Officials, and Am. Inst. of Planners, at 4-11, *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 2358 (1976). Among the contributors to the exceptionally well-written and documented, but unavailing, brief was Richard F. Babcock, author of *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966) and (with E. Bosselman) *EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970's* (1973).

Although *Euclid's* "rationale is the basic source of the philosophy of zoning as a protectionist device," J. BEUSCHER *et al.*, *CASES AND MATERIALS ON LAND USE* 529 (2d ed. 1976), the Standard State Zoning Enabling Act published by the U.S. Department of Commerce in 1922 and adopted by 45 states within a year of *Euclid* required that zoning regulations conform to a comprehensive plan. See note 201 *supra*. The master plan requirement has been interpreted to have "intercommunity" requirements, *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954). "Under such a theory, it would be necessary to consider conditions in adjoining municipalities and adjust planning and zoning activities in accordance with these conditions." Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1163 n.28 (1955). State high courts in Pennsylvania and New Jersey recently have required that developing municipalities regulate land in a manner "which permits residential development for a 'fair share' of its region's housing need." Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1, 2. See, e.g., *Urban League of Greater New Brunswick v. Borough of Cateret*, 142 N.J. Super. 11, 359 A.2d 526 (1976). Cf. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

205. 402 U.S. 137 (1971).

206. One commentator has taken a less dim, perhaps even sanguine, view of *Valtierra*, arguing that the case suggests "a greater concern to distinguish laws that are easily dubbed racist from those with no more to condemn them than that they happen at times to affect racial minorities disproportionately." Lefcoe, *The Public Housing Referendum Case, Zoning and the Supreme Court*, 59 CAL. L. REV. 1384, 1457 (1971). A similarly benign view of *Valtierra* is contained in Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61, 73-75 (1971). For a more critical and somewhat more realistic view of *Valtierra* see *The Supreme Court 1970 Term*, 85 HARV. L. REV. 3, 122, 126-134 (1971).

to extend to the poor the protections previously extended to racial minorities²⁰⁷ who are more disproportionately represented in the ranks of the poor.²⁰⁸ Though *Valtierra* has been regarded as an attempt by the Court to avoid the thicket of economic inequality,²⁰⁹ a position later reinforced by *San Antonio Independent School Dist. v. Rodriguez*,²¹⁰ the impact of the case clearly will be greater on non-white households than on white households.²¹¹

In *Village of Belle Terre v. Boraas*,²¹² the Court's first zoning decision in 46 years, the Court expanded the scope of *Euclid* to approve sociological zoning. The Court upheld an ordinance which restricted land use to one-family dwellings and defined the term "family" to ex-

207. The Court distinguished *Hunter v. Erickson*, 393 U.S. 385 (1969), which invalidated an Akron, Ohio city charter amendment requiring that fair housing ordinances be subject to electorate approval before becoming law—a practice required by the city only for anti-discrimination legislation. *James v. Valtierra*, 402 U.S. 137 (1971).

208. "The data on family incomes according to ethnic origin reveal only three major groups with incomes below average—blacks, people of Spanish heritage and American Indians." Thurrow, *The Economic Progress of Minority Groups*, CHALLENGE, March-April, 1976, at 21. This situation is not improving.

The upgrading of income levels of black families which was associated with the narrowing income gap which occurred in the 1960's was not as evident within the last four years. From 1969 to 1973, the median income of black families . . . did not grow. . . . The overall income position of black families relative to white families, as measured by the income ratio, has declined within recent years. U.S. Dept. of Commerce, *THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES 1-2* (1973). This report also indicates that 19 percent of all non-white families make less than \$3,000 per year, while only 7 percent of white families fall in this income group. Moreover, only 12 percent of non-white families make more than \$15,000, while 26 percent of white families fall in this group. *Id.* at 19. See also NATIONAL COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 45 (1968), stating: "In 1967, 41 percent of the nonwhite population was poor, compared with 12 percent of the white population. Nonwhites thus constitute a far larger share of the poverty population (31 percent) than of the American population as a whole (12 percent). Moreover, the nonwhite proportion of the poverty population has been increasing, slowly but steadily, since the first racial count was made in 1959: it was 28 percent then, and 32 percent by 1967."

209. See, e.g., NAT'L COMM. AGAINST DISCRIMINATION IN HOUSING AND URBAN LAND INSTITUTE, *FAIR HOUSING & EXCLUSIONARY LAND USE* 35 (1974); Comment, *James v. Valtierra: Housing Discrimination by Referendum?*, 39 U. CHI. L. REV. 115, 120-124 (1971).

210. 411 U.S. 1 (1973).

211. *James v. Valtierra*, 402 U.S. 137, 141 (1971). *Valtierra* was relied on by Judge Friendly in *English v. Town of Huntington*, 448 F.2d 319 (2d Cir. 1971), an opinion that refused to halt the eviction (and consequent exile) of black and Puerto Rican residents in an urban renewal-related code enforcement effort that did not provide for relocation. With characteristic detachment, Judge Friendly observed:

It is an unpleasant fact of life that [substandard housing] will be occupied by poor people, and a still more unpleasant one that black and Puerto Rican citizens are over-represented in that group. Yet the Supreme Court [in *Valtierra*] held that the mere fact that a requirement, otherwise proper, may have a greater impact on the poor, does not render it invalid under the Equal Protection Clause.

Id. at 324.

But for a more narrow reading of *Valtierra*, confining it to referendum, see *Sisters of Providence of St. Mary of the Woods v. City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971).

212. 416 U.S. 1 (1974).

clude entities having more than two unrelated persons living and cooking together as a single housekeeping unit. According to the opinion, the police power is not confined merely to the elimination of filth, stench, and unhealthy places. In the Court's view, the police power is ample to allow designation of zones where family values and the blessings of quiet seclusion and clean air operate to create a sanctuary for people.²¹³ In *Belle Terre* the Court went far beyond *Euclid's* conclusion that the assessment of comprehensive regulatory schemes requires the evaluation of a wide range of factual and technical data.²¹⁴ Although *Belle Terre* involved an issue in which the ends-means question could have been competently assessed by the Court without it sitting as a "zoning board of appeals,"²¹⁵ the opinion is extraordinarily permissive given the impact, if not the burden, on the first amendment freedom of association and the constitutionally guaranteed right to privacy imposed by the Village's land use law.²¹⁶

Any thought that *Belle Terre* might have reflected concessions to a "one-zone" community²¹⁷ was quashed by the Supreme Court's decision in *Eastlake*.²¹⁸ In that decision the Court returned to the majoritarian premises of *Valtierra* by upholding the right of voters in the community to pass on the validity of every proposed land use change. The Ohio supreme court found that the requirement of voter ratification of land use changes constituted an unlawful delegation of legislative

213. 416 U.S. at 9. Ironically, the decision was authored by Justice Douglas—one of the great champions of first amendment rights. His devotion to the environment may explain in part his deference to local efforts to plan and/or curb growth at the sacrifice of values of privacy and self-expression. Justice Douglas also wrote *Berman v. Parker*, 348 U.S. 26 (1954), discussed in note 197 *supra*.

214. *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 119, 128 (1974).

215. 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). Justice Marshall conceded that the court should "afford zoning authorities considerable latitude in choosing the means by which to implement" the purposes of zoning laws, but added that "deference does not mean abdication." *Id.* at 14.

216. *Id.* at 15.

"The *Belle Terre* decision [was] a bitter disappointment to those who have opposed parochial land use regulation and the exclusionary impact such regulation necessarily entails." Comment, *Village of Belle Terre v. Boraas: Belle Terre Is A Nice Place to Visit—But Only "Families" May Live There*, 8 URBAN L. ANNUAL 193, 195 (1974). "Especially distressing to proponents of expanded housing opportunity was the cavalier manner in which the Court disregarded the new equal protection reasonableness test the Second Circuit panel had employed to invalidate the ordinance." Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1. For a discussion of the new equal protection test adopted by the Second Circuit Court of Appeals, see notes 125-26 *supra*. Land use law and planning commentator, Donald Hagman has called *Belle Terre* his "least favorite U.S. Supreme Court Case," Hagman, *Petaluma: A Comment*, 27 LAND USE L. & ZONING DIGEST 11, 12 (No. 11, 1975). See also Hagman, *Village of Belle Terre v. Boraas: A Comment by Dale Hagman*, 26 LAND USE L. & ZONING DIGEST 3 (No. 6, 1974).

217. As suggested by Judge Jasen in *Berenson v. Town of New Castle*, 38 N.Y.2d 102, —, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 n.2 (1975).

218. 96 S. Ct. 2358 (1976).

power that denied the landowner due process of law.²¹⁹ Justice Stern of the Ohio supreme court, however, noted the exclusionary dimensions of the ratification procedure. In a concurring opinion Justice Stern recognized that zoning provisions such as those in *Eastlake* have the single motive of building walls against the ills, poverty, racial strife, and even the people of urban areas. Numerous suburbs of Cleveland had adopted requirements of mandatory referendums for approval of zoning changes in a thinly veiled attempt to perpetuate the existing de facto divisions between black and white, rich and poor.²²⁰ Justice Stern also found that the purpose of the referendum provision was an attempt to render change difficult and expensive under the guise of popular democracy—an attempt that he characterized as being “crudely apparent on its face.”²²¹ In spite of Justice Stern’s comments, not a single Justice of the United States Supreme Court addressed the exclusionary aspects of the Ohio referendum procedure. Chief Justice Burger, speaking for the Court in *Eastlake*, found that the referendum process, as a basic instrument of democratic government, does not violate the due process clause of the fourteenth amendment when applied to a rezoning ordinance.²²² Thus, the Court preserved the sanctity of the franchise; but it did so at the cost of the minority groups that frequently seek, and desperately need, to change the status quo, but who, by definition, cannot muster the votes needed to win a referendum.

Whenever the Court has had occasion to consider land use practices with exclusionary, and hence discriminatory implications, it has supported the power of local communities to bar access to minorities. Unfortunately, the Court’s disclaimers of any purpose to bar minority access do not alter the exclusionary, discriminatory effect of the decisions. Since *James v. Valtierra* was decided in 1971, the Court has had opportunities to address land use issues in at least 18 cases.²²³ Of

219. *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

220. *Id.* at 200, 324 N.E.2d at 749 (Stern, J., concurring).

221. *Id.* at 199, 324 N.E.2d at 748.

222. 96 S. Ct. 2358 (1976).

223. The chart below outlines the activity of the Supreme Court in land use related cases involving the growth, or lack thereof, of municipalities. Because a denial of certiorari purportedly has no precedential value, the Court’s disposition of many of these cases may indicate no more than the Court’s deference in this area.

<u>TERM & DISPOSITION</u>	<u>CASE</u>	<u>SUMMARY</u>
1970-71 Opinion	<i>James v. Valtierra</i> , 402 U.S. 137 (1971).	Supreme Court affirmed constitutionality of holding referendums to approve zoning changes.
Cert. Denied	<i>Kennedy Park Homes Ass'n v. City of Lackawanna</i> , 436 F.2d 108 (2d Cir. 1970), <i>cert. denied</i> , 401 U.S. 1010 (1971).	Court of appeals required municipality to permit low income housing for blacks in predominantly white area.

those 18 opportunities, the Court has rendered decisions in only five cases, *Valtierra*, *Belle Terre*, *Warth*, *Gautreaux*, and *Eastlake*. *Gau-*

1971-72		* * * NO CASES * * *	
1972-73	Schere v. Township of Freehold, 119 N.J. Super. 433, 292 A.2d 35 (1972), <i>cert. denied</i> , 410 U.S. 931 (1973).	Cert. Denied	Superior Court of New Jersey, Appellate Division, invalidated minimum lot size restriction found to be beyond practical, reasonable utilization.
1973-74	Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).	Opinion	Supreme Court upheld validity of one-family zoning of an entire municipality.
	Commonwealth v. County of Bucks, 8 Pa. Cmwlth. 295, 302 A.2d 897 (1973), <i>cert. denied</i> , 414 U.S. 1130 (1974).	Cert. Denied	Commonwealth Court of Pennsylvania denied standing to nonresident low income individuals who challenged exclusionary zoning ordinance.
	Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973), <i>cert. denied</i> , 414 U.S. 1144 (1974).	Cert. Denied	Court of appeals held that district court may properly order housing authority to disregard state law requiring city council approval of low income housing sites.
1974-75	Warth v. Seldin, 422 U.S. 490 (1975).	Opinion	Supreme Court interpreted article III standing requirement to bar nonresidents from challenging validity of exclusionary zoning ordinance.
	Cornelius v. City of Parma, 374 F. Supp. 730 (N.D. Ohio 1974), <i>vacated</i> , 506 F.2d 1400 (6th Cir.), <i>cert. granted</i> , 422 U.S. 1052 (1975) <i>remanded</i> 521 F.2d 1401 (6th Cir. 1975).	Cert. Granted, Remanded	Supreme Court vacated and remanded in light of <i>Warth</i> . District court originally found that white plaintiffs did not have standing to challenge denials of building permit to low income blacks. <i>See also</i> Cornelius v. Parma <i>infra</i> .
	Mahaley v. Cuyahoga Metropolitan Housing Authority, 500 F.2d 1087 (6th Cir. 1974), <i>cert. denied</i> , 419 U.S. 1108 (1975).	Cert. Denied	Court of appeals held that municipalities may decide if they need low income housing, and need not accept proffered federal funds for low income housing.
	Mahoney v. Board of Appeals of Winchester, 316 N.E.2d 606 (Mass. 1974), <i>appeal dismissed</i> , 420 U.S. 903 (1975).	Appeal Dismissed	Supreme Court of Massachusetts upheld constitutionality of a statute providing for relief from local restrictions hampering construction of low income housing.
	Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), <i>cert. denied</i> 421 U.S. 948 (1975).	Cert. Denied	Court of appeals held that, because low income status is not a suspect classification and there is no constitutional right to a certain quality of public housing, a municipality need not justify a decision not to proceed with low income housing with a compelling state interest.
	United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), <i>cert. denied</i> , 422 U.S. 1042 (1975).	Cert. Denied	Court of appeals held that a zoning ordinance which bans multiple family housing has a racial effect and violates the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 801 (1970).
1975-76	Hills v. Gautreaux, 96 S. Ct. 1538 (1976).	Opinion	Supreme Court approved metropolitan wide remedy against HUD and local housing authority.
	City of Eastlake v. Forest Enterprises, Inc., 96 S. Ct. 2358 (1976).	Opinion	Supreme Court upheld constitutionality of local referendum held to exclude low income housing.
	Constr. Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), <i>cert. denied</i> , 424 U.S. 934 (1976).	Cert. Denied	Court of appeals upheld growth-limiting zoning restrictions.

treaux was the only opinion of the five that did not have an exclusionary effect.²²⁴

A *Gautreaux* order in a public housing or other subsidized housing case is, as the Court confesses in *Gautreaux*, at the mercy of local communities. Local communities already may have, or may enact, constitutional zoning laws that bar the very kind of housing essential to desegregating the metropolis, low-income and multifamily developments. A housing authority properly may discharge its constitutional duty by deciding to locate low-income housing in a community bordering a metropolis. If the community, however, has a *Valtierra* or *Eastlake*

Cert. Denied	County Bd. v. God, 216 Va. 163, 217 S.E.2d 801 (1975), cert. denied, 423 U.S. 1088 (1976).	Virginia supreme court upheld finding of arbitrary and capricious refusal to rezone property for apartment building.
Cert. Denied	Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975), cert. denied, 96 S. Ct. 300 (1975).	Virginia supreme court upheld finding that county board's refusal to rezone for apartment was unreasonable.
Appeal Dismissed	Southern Burlington County v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 appeal dismissed, 423 U.S. 808 (1975).	New Jersey supreme court held that a municipality may not, by a system of land use regulation, make it physically and economically impossible to provide low income housing.
Cert. Denied	Cornelius v. City of Parma, 521 F.2d 1401 (6th Cir. 1975), cert. denied, 424 U.S. 955 (1976).	Court of appeals remanded to district court in light of <i>Warth</i> .
Cert. Granted	Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 517 F.2d 409 (7th Cir.), cert. granted, 423 U.S. 1030 (1975).	Court of appeals held that failure to rezone for low income housing constituted a violation of equal protection. See text accompanying notes 155-70 <i>supra</i> .

224. During the last term, probable jurisdiction was noted in a variation on *Belle Terre*. *Moore v. City of East Cleveland*, 96 S. Ct. 1723 (1976), an appeal from a \$25.00 fine and a 5 day jail sentence imposed on a grandmother because she permitted her two sons and her two grandsons to live in her home. The presence of her 7 year old grandson John Moore, Jr. was held to violate an ordinance which defined "family" so as to restrict occupancy in a single-family dwelling to "not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child." In an unpublished opinion, an Ohio court of appeals affirmed the conviction 2-1, holding that the case was controlled by *Belle Terre*. The dissent held that *Belle Terre* was not applicable and that the definition of family was so restrictive that it was suspect because it invaded the family's privacy. The Ohio supreme court affirmed without opinion.

The case is yet another opportunity for the Court to impose some limit on the power of municipalities to regulate land use. The Court did not find freedom of association impinged by the Village of *Belle Terre*, but an ordinance that imposes a restriction on the number of related persons who may live under the same roof may bring into play a combination of rights that may cause the Court to take more than the passing look it gave the *Belle Terre* law. Indeed, in *Belle Terre* Justice Douglas expressly found that the case involved no fundamental right such as a right of privacy, 416 U.S. 1, 7 (1974). Thus, though the Court rejected the freedom of association argument presented in Justice Marshall's dissent, the Court may require a compelling justification before it will permit a city to determine which lineal descendant may or may not live in the same house. See, *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 119, 122-123 (1974).

plebescite, or has the kind of restrictive zoning upheld in *Belle Terre*, then the promise of desegregation is at the pleasure of the community whose very existence often is a reaction to inner-city desegregation. Even if the suburb's actions and ordinances are clearly in violation of the equal protection clause, *Warth* and its progeny may terminate litigation of a desegregation dispute at an early stage.

IV. THE PROMISE OF THE CIVIL RIGHTS STATUTES

Despite the "Catch-22"²²⁵ effect of the Court's zoning and land-use decisions, the possibility still exists that although the Constitution may not by itself prove to be a significant instrument of metropolitan desegregation, the Civil Rights Statutes of the Reconstruction era and of the 1960's may open both the courthouse as well as the suburban door. These statutes may answer both the problems of standing and of substance posed by the Court's decisions in housing and in land use.

The recent Supreme Court decision in *Runyon v. McCrary*²²⁶ may be a signal that the Court applies a different set of assumptions in situations that bear on racial discrimination—whether covert or overt—depending upon whether the claim is constitutional or statutory. In *Runyon* the Court held that 42 U.S.C. § 1981²²⁷ prohibits racial discrimination in contracts for private school education.²²⁸ The defendant private school in *Runyon* had denied plaintiffs admission solely on the basis of their race. In holding such action to be proscribed by § 1981, the Court followed the rationale and spirit of § 1982 as expressed in *Jones v. Alfred H. Mayer Co.*²²⁹ *Jones* had established that sections 1981 and 1982 were designed "to prohibit all racial discrimination whether or not under color of law, with respect to the rights enumerated therein. . . ."²³⁰ The Court in *Runyon* expressly adopted this language and applied it to § 1981.²³¹ Justice Stevens filed a separate concurring

225. See generally J. HELLER, *CATCH-22* (1961), describing a proviso or condition which renders a right or privilege meaningless or void.

226. 96 S. Ct. 2586 (1976).

227. 42 U.S.C. § 1981 (1970) provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

228. 42 U.S.C. § 1982 (1970) provides that:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The common derivation of both § 1981 and § 1982 from the Civil Rights Act of 1866, 14 Stat. 27, mandated this result, *Runyon v. McCrary*, 96 S. Ct. 2586, 2593-94 (1976).

229. 392 U.S. 409 (1968) (42 U.S.C. § 1982 held to prohibit private discrimination in the sale or rental of housing).

230. 392 U.S. 409, 436 (1968).

231. 96 S. Ct. 2586, 2594 (1976).

opinion in *Runyon*²³² in which he perhaps captured the essence of both *Jones* and *Runyon* when he stated:

. . . [E]ven if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.

The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society.²³³

The Court's liberal reading of sections 1981 and 1982, and Justice Stevens' reliance on the policy and the *mores* of modern society²³⁴ reflect an approach to statutory claims which contrasts sharply with the Court's treatment of equal protection claims.²³⁵ Such liberal construction, however, is consistent with the Court's pronouncement that the courts will give Reconstruction era civil rights legislation "a sweep as broad as [the] language."²³⁶

Liberal construction of civil rights legislation, however, has not been limited to civil rights legislation of the Reconstruction era. In 1972 the Supreme Court, in *Trafficante v. Metropolitan Life Ins. Co.*,²³⁷ accorded liberal construction to Title VIII of the Civil Rights Act of 1968, a statute written in language as broad as Congress could have made it.²³⁸ In *Trafficante* a unanimous Court upheld the right of housing complex tenants to sue under Title VIII because blacks were excluded from the complex.²³⁹ The district court and the court of appeals held that only the objects of discriminatory housing practices (i.e. excluded blacks) could sue under Title VIII.²⁴⁰ Justice Douglas' opinion for the Court found that the language defining an aggrieved person as "any person who claims to have been injured by a discriminatory housing practice"²⁴¹ encompassed whites who had not been discrim-

232. *Id.* at 2603. (Justice Stevens concurred in the result of *Runyon* and a reaffirmance of *Jones* although he expressed the belief that *Jones* had been incorrectly decided.)

233. *Id.* at 2604 (Stevens, J., concurring).

234. *Id.*

235. See text accompanying notes 85-170, *supra*.

236. *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

237. 409 U.S. 205 (1972).

238. *Zuch v. Hussey*, 366 F. Supp. 553, 557 (E.D. Mich. 1973). The 1968 Civil Rights Act, passed within a week of the assassination of Dr. Martin Luther King, Jr., declared "fair housing" to be the national policy of the United States. 42 U.S.C. § 3601 (1970). Title VIII of the 1968 Civil Rights Act outlawed discrimination in the sale, rental, and financing of housing. 42 U.S.C. § 3604 (1970). The Congressional declaration of intention to stamp out racist housing practices ended almost 100 years of silence by Congress on the issue. The Supreme Court's far-reaching decision in *Jones v. Alfred H. Mayer*, 392 U.S. 409, 415-417 (1968) has held Title VIII and the 1866 Civil Rights Act to be alternative paths to the goal of fair housing. The subsequent case of *Hunter v. Erickson*, 393 U.S. 385, 388 (1968) established that Title VIII did not preempt state and local remedies.

239. 409 U.S. 205, 212 (1972). The plaintiffs were a white tenant and a black tenant of the housing complex charged with discriminatory rental policies. *Id.* at 206.

240. *Id.* at 208.

241. 42 U.S.C. § 3610(a) (1970).

inated against. Justice Douglas liberally construed legislative history, which he characterized as "not too helpful,"²⁴² in reaching the conclusion that the proponents of the legislation had recognized that parties who were not the direct objects of discrimination also had an interest in ensuring fair housing.²⁴³ Although discriminatory housing practices damage members of minority groups most severely, the "person on the landlord's blacklist is not the only victim of discriminatory practices; it is . . . 'the whole community.'"²⁴⁴ Justice Douglas' broad construction of legislative history compelled the result in *Trafficante* of a liberal standing requirement under Title VIII.²⁴⁵

The standing limitations imposed by the Court in 1975 in *Warth v. Seldin*²⁴⁶ do not change the result in *Trafficante*. Justice Powell's opinion in *Warth* conceded that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."²⁴⁷ *Warth* also recognized that Congress may create a right of action, either expressly or by clear implication, by which persons may have standing to enforce the legal rights and interests of others.²⁴⁸ Furthermore, Congress may allow persons to invoke the general public interest in support of their claim. Because *Trafficante* holds that anyone who can complain to HUD about housing discrimination can sue in the courts, Title VIII suits provide a means to assure that attacks on discriminatory land use practices are heard on the merits. Whether Title VIII provides a viable alternative to constitutional claims, however, depends on the substantive provisions of Title VIII and whether the discriminatory actions thwart the national policy.

The Eighth Circuit's opinion in *United States v. City of Black Jack*²⁴⁹ establishes evidence of the substantive potential of Title VIII. In *Black Jack* the court of appeals held that a Missouri city had violated Title VIII by passing a zoning ordinance prohibiting development of multiple family dwellings.²⁵⁰ The ordinance was passed shortly after area residents had petitioned the county council to incorporate what was previously an unincorporated part of St. Louis County. Incorporation of the area and passage of the ordinance were clearly the result of an attempt to halt a low to moderate income integrated housing development. The court of appeals stated that under Title VIII

242. 409 U.S. 205, 210 (1972).

243. *Id.* at 210-11.

244. *Id.*

245. *Id.* at 212 (White, Blackmun, Powell, JJ., concurring) (the concurring opinion noted that plaintiffs would not have standing under article III, absent the Civil Rights Act of 1968).

246. 422 U.S. 490 (1975). See also text accompanying notes 171-89 *supra*.

247. 422 U.S. 490, 501 (1975).

248. *Id.*

249. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). For some unknown reason *Black Jack* has been largely unnoticed in the legal literature.

250. *Id.*

"effect, and not motivation is the touchstone, in part because clever men may easily conceal their motivations."²⁵¹ Although the record contained evidence to support the Government's contention that the ordinance was enacted for the purpose of excluding blacks, the court did not base its finding of a violation of Title VIII on the evidence of improper purpose.²⁵² The court premised its holding on the effect the action had in depriving blacks of access to housing on a nondiscriminatory basis. The limitations of the ordinance would have foreclosed 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack. This limitation would have been especially harsh because 40 percent of the blacks in the metropolitan area were then living in substandard or overcrowded units.²⁵³ The court found this effect to be particularly egregious because segregated housing in the St. Louis metropolitan area was found to be the result of deliberate racial discrimination in the housing market both by the local real estate industry and by agencies of the federal, state, and local governments.²⁵⁴ The record contained ample proof that many blacks would have lived in the development that the ordinance prohibited. The ordinance would have acted to perpetuate segregation in a community that was currently 99 percent white.²⁵⁵ In light of these factors, the court held that the plaintiffs had established a *prima facie* case under Title VIII and that the burden shifted to the City of Black Jack to demonstrate that the ordinance furthered a compelling government interest.²⁵⁶ A shifting of the burden of proof upon a showing of discriminatory effect provides Title VIII claims a major advantage over equal protection claims.²⁵⁷

In *Arlington Heights*²⁵⁸ a theory similar to that applied in *Black*

251. *Id.* at 1185.

252. *Id.* at n.3.

253. *Id.* at 1186.

254. *Id.*

255. *Id.*

256. It should not go unreported that though the city lost the battle in the court of appeals, it apparently won the war to halt housing integration. In the companion case of *Park View Heights Corp. v. City of Black Jack* (E.D. Mo., No. 71-6-15(A)), discussed in *The Potomac Institute, Inc., Metropolitan Housing Program*, Memo 76-1, at 2 (Jan. 28, 1976), an agreed order was entered January 5, 1976 obligating the city to pay the non-profit sponsor of the proposed interracial development \$450,000. In turn, the sponsor is conveying the site of the development to the city. The sponsor's capitulation apparently was influenced by HUD's notice that its 1970 § 236 set-aside for the proposed project would expire in January, 1976. However, the city is prohibited from changing the multi-family zoning on the site without Justice Department consent. Thus, there is the possibility that a new developer might come forth, and, if ever-soaring construction costs permit, construct units similar to those originally planned. But once again serious questions arise about the practical adequacy of judicial relief in exclusionary land-use litigation. See Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976).

257. See text accompanying notes 85-170, *supra*.

258. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, — U.S. —, was argued before the Court on October 13, 1976, 45 U.S.L.W. 3302 (U.S. Oct. 19,

Jack has been urged upon the Supreme Court, an alternative theory to the equal protection violation found by the court of appeals.²⁵⁹ *Washington v. Davis*²⁶⁰ suggests that motivation might be important in determining whether a party has violated the equal protection clause. Under the rationale of *Black Jack*, however, violations of Title VIII, like violations of Title VII, may be established by a demonstration of discriminatory impact without evidence of motivation. According to Justice Powell, the purpose of Title VII is "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."²⁶¹ The prohibition on discriminatory employment practices applies to all devices that operate to exclude blacks, no matter how neutral those devices are on their face.²⁶² The relevant language of the Fair Housing Act and Equal Employment Opportunity Act are similar—Title VIII prohibits all housing practices performed "because of race"²⁶³ and Title VII prohibits employment practices performed "because of such individual's race."²⁶⁴ These statutory similarities and the arguments that prevailed in *Black Jack* may persuade the Court in *Arlington Heights* to require a compelling justification for the refusal of the Village to rezone the controversial parcel, solely because of the segregative effect of the action (or inaction). The refusal of the Village of Arlington Heights to rezone for the low income development when it had rezoned similar parcels "dozens of times to permit development of thousands of high-rent apartments" for whites,²⁶⁵ clearly contravenes § 817 of the Fair Housing Act of 1968 which prohibits interference with the right to equal housing.²⁶⁶ If the Court adopts the alternative theory argued in *Arlington Heights* and finds a violation of Title VIII without a showing of motivation, then Title VIII will encompass both the elements of liberal standing and of substantive law necessary to become a major tool for the elimination of discriminatory housing practices. If, how-

1976), reviewing 517 F.2d 409 (7th Cir. 1975). See text accompanying notes 94, 155-69, *supra*.

259. Respondent's Brief at 38-49, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, — U.S. —, reviewing 517 F.2d 409 (7th Cir. 1975).

260. 96 S. Ct. 2040 (1976). See text accompanying notes 85-170, *supra*.

261. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

262. *Id.* at 806, interpreting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

263. See 42 U.S.C. § 3604 (1970).

264. See 42 U.S.C. § 2000e-2(a)(1), (2) (1970). Section 2000e-2(a)(2) was amended in 1972 to cover applicants for employment. 42 U.S.C. § 2000e-2(a)(2) (Supp. V, 1975).

265. Respondent's Brief at 3, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, — U.S. —, reviewing 517 F.2d 409 (7th Cir. 1975).

266. 42 U.S.C. § 3617 (1970) provides:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

ever, the Court interprets the substantive scope of Title VIII narrowly, then suits under Title VIII are likely to be no more advantageous to the victims of discrimination than are suits brought under the equal protection clause.

V. THE COURT, REGIONAL PLANNING, AND RACIAL DISPERSION

Although the Supreme Court's barriers to standing and general unwillingness to intervene in local zoning decisions may undercut the significance of *Gautreaux*, the Court has taken a positive view of the benefits and importance of regional planning and racial dispersion. The Court's opinion in *Gautreaux*, if not an imprimatur, is at least an accession to federal policy designed to desegregate housing in metropolitan areas. *Gautreaux* also appears to foster regional planning schemes²⁶⁷ that encourage "fair-share"²⁶⁸ strategies to integrate pre-

267. Regionalism—the consideration by a community in its land use planning of its relationship to nearby or surrounding areas—has been defined as "... the area from which, in view of the available employment and transportation, the population of the township would be drawn, absent invalidly exclusionary zoning." *Oakwood at Madison, Inc. v. Madison Twp.*, 128 N.J. Super. 438, 441, 320 A.2d 223, 224 (1974).

The most common application of regional considerations to local land use controls has involved a three-step procedure: first, an appropriate housing region is defined encompassing the areas under challenge, and other relevant housing supply areas; second, the housing needs of members of households working and living in this region are approximated and compared with actual and potentially available housing supplies; and third, disparities are identified, and responsibility for eliminating or ameliorating them allocated to the challenged areas through some implicit or explicit notion of fair share.

Burchell, Listokin & James, *Exclusionary Zoning: Pitfalls of the Regional Remedy*, 7 URBAN LAWYER 262, 267-8 (1975) [hereinafter cited as Burchell, *et al.*]. The seminal cases are *Concord Twp. Appeal*, 439 Pa. 466, 268 A.2d 765 (1970); *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970), and *National Land and Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965). The recent landmark case of *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) marks the current highwater mark of judicial sanction of regionalism. The most important, indeed pathbreaking, scholarly discussion of regionalism is contained in Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969). A flood of literature has followed. See, e.g., Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1.

268. The concept of "fair-share" has evolved from planning funded by the federal government under the Comprehensive Planning Assistance Program for Non-Federal Public Works, known commonly as the Section 701 program, 40 U.S.C. § 461 (1970), as amended, 40 U.S.C. § 5461 (Supp. IV, 1974). Section 701 of the Housing Act of 1954 led to the creation of regional planning bodies which, as a result of the Housing and Urban Development Act of 1968, must include a housing element as part of comprehensive land use plans, 40 U.S.C. § 461(a) (1970) (Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 601, 82 Stat. 528), amending 40 U.S.C. § 461(a) (1964) (Housing Act of 1954, ch. 649, § 701, 68 Stat. 640). Allocation plans to disperse minority housing opportunities throughout the planning body's domain have emerged from these housing elements. Since the initial plan was adopted in the Dayton, Ohio area in 1970 by the five-county Miami Valley Regional Planning Commission, several plans have been developed by regional planning agencies. A recent discussion of a fair-share case history is contained in Moskowitz, *Regional Housing Allocation*

dominantly white suburbs. Indeed, one important aspect of *Gautreaux* may be the extent to which it affirms the present day popularity of "regionalism" in urban planning, particularly as a strategy to alleviate racial segregation.²⁶⁹ Despite the Court's position in cases that disproportionately, although arguably without motivation, disadvantage racial minorities,²⁷⁰ when the Court was confronted in *Gautreaux* with unalloyed racism in public housing it effectually lent its considerable weight to federal policies to breakup inner city racial concentrations. To restate an old aphorism: never underestimate the power of a United States Supreme Court decision—no matter how apparently modest.²⁷¹

Plans: A Case History of the Delaware Valley Regional Plan, 7 URBAN LAWYER 292 (1975). See also Listokin, *Fair-Share Housing Distribution: Will it Open the Suburbs to Apartment Development?*, 2 REAL EST. L.J. 739 (1974) and Rubinowitz & Dennis, *School Desegregation Versus Public Housing Desegregation: The Local School District and the Metropolitan Housing District*, 10 URBAN L. ANNUAL 145, 152 n.32, 152-157 (1975) [hereinafter cited as Rubinowitz & Dennis].

According to H. Franklin, D. Falk, & A. Levin, authors of *IN-ZONING, A GUIDE FOR POLICY MAKERS ON INCLUSIONARY LAND USE PROGRAMS* 158-159 (1974), fair-share formulas are comprised of the following factors in determining housing obligations within a given area or region: (1) number of low and moderate-income households in a subjurisdiction; (2) available employment or employment growth; (3) population; (4) extent of deficient housing; (5) per capita fiscal capacity of a subjurisdiction through valuation or wealth; (6) capacity of school system within a subjurisdiction to absorb additional children; (7) opportunity for growth as measured by land, size, or availability of water and sewer facilities; and (8) growth in residential units.

A fair share plan does not assure, however that subsidized housing will be built in or dispersed throughout every community. High land costs and restrictive land use regulations may still render subsidized construction financially impractical in many areas.

Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A.L. REV. 1432, 1436 (1974).

269. ". . . [R]egionalism is increasingly being viewed as the 'St. George' slayer of the exclusionary zoning 'dragon.'" Burchell, *et al. supra* note 267, at 262. The exclusionary zoning dragon "has been accused of producing a cornucopia of social evils, e.g., denying blacks suburban employment opportunities, intensifying inner-city school segregation, jointly reinforcing and furthering the social, racial, and cultural schism of American society," *id.*

270. See text accompanying notes 85-170 *supra*.

271. Often an opinion has an impact beyond the problem before the Court. In B. BITTKER, *THE CASE FOR BLACK REPARATIONS* 124 (Vintage ed. 1973), the point is made that proposed legislation to compensate blacks for past slavery and discrimination finds some support in "the Supreme Court's endorsement of racial classifications in its recent school desegregation opinions which goes a long way—an unexpectedly long way—toward the acceptance of a 'remedial' racial code." Professor Bittker's book, of course, preceded the Court's procedural disposition (indeed evasion) in *DeFunis v. Odegaard*, 416 U.S. 312 (1974) and its recent apparent willingness to grapple anew with the problems of affirmative action programs in *Bakke v. Regents of Univ. of Calif.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *order stayed pending petition for certiorari*, 45 U.S.L.W. 3362 (U.S. Nov. 16, 1976). On the general problem of preferential, compensatory and/or remedial governmental action for blacks, cf. Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U.L. REV. 363 (1966); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971); and Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1315 (1969), which argues that *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968), "would seem to raise special treatment for Negroes to the level of a 'neutral principle' in the Constitution."

The unanimity of the judgment in *Gautreaux* and Justice Stewart's significant use of federal regulations has highlighted the impropriety of HUD's appeal²⁷² from the Seventh Circuit's decision and has rebutted the erroneous assertion in the Solicitor General's brief that federally subsidized housing programs depend on local community approval.²⁷³ The opinion provides federal housing and planning officials with added force to overcome prior assertions about the lack of wisdom of desegregation policies in urban planning, such as were made by Secretary Hills when she proclaimed that:

The undue concentrations of poor people in a central city may only be capable of mitigation on a region-wide basis.

* * *

. . . [T]he Act itself embodies a concept of regionalism, necessitated by the modern realities of regional growth and development.²⁷⁴

Gautreaux could have a catalytic effect on the implementation of federal statutes and administrative regulations fashioned to widen the housing opportunities of racial minorities. Title VI of the Civil Rights Act of 1964²⁷⁵ prohibiting racial discrimination in federally assisted programs and Title VIII of the Civil Rights Act of 1968²⁷⁶ directing the administration of HUD programs in a manner that affirmatively furthers fair housing are fundamental to federal policy.²⁷⁷ As the Court noted, the 1964 Civil Rights Act was implemented by 1967 HUD regulations controlling siting of low-rent housing so as to expand the op-

272. See note 51 and accompanying text *supra*.

273. Petitioner's Brief at 29-34, *Hills v. Gautreaux*, 96 S. Ct. 1538 (1976). The contention was thoroughly rebutted by Respondent's Brief at 53-55. See text accompanying notes 294-303 *infra*.

274. HUD News Release, May 28, 1975, Remarks Prepared for Delivery by Secretary Carla A. Hills to Annual Meeting of the National Association of Regional Councils at 2, in Boston, Mass.

Mrs. Hills' statement has as a precedent a declaration by Richard M. Nixon which ordained that HUD "and other agencies administering housing programs . . . will administer their programs in a way which will advance equal housing opportunity for people of all income levels on a metropolitan areawide basis," statement of President Richard M. Nixon, Federal Policies relative to Equal Housing Opportunity, June 11, 1971 which appears in 7 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 892, 901 (1971).

Indeed, in one phase of *Gautreaux*, HUD itself submitted a statement by then Secretary George Romney stating that,

[T]he impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding communities. The city and the suburbs together make up what I call the 'real city.' To solve problems of the 'real city,' only metropolitan wide-solutions will do.

Record Document 283, Attachment 6, Memorandum 2, at 2, *Gautreaux v. Romney*, 363 F. Supp. 690 (N.D. Ill. 1973).

275. Section 601, Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970) (78 Stat. 252).

276. Section 808(e)(5), Civil Rights Act of 1968, 42 U.S.C. § 3608(d)(5) (1970) (82 Stat. 84).

277. See text accompanying notes 225-66 *supra*.

portunities of racial minorities to locate outside urban ghettos.²⁷⁸ The 1968 Civil Rights Act was implemented both with project selection criteria which gave priority to proposals that promised to alleviate racial impact in housing and also with affirmative marketing requirements for developments aided by HUD.²⁷⁹ Significantly, the Court in *Gautreaux* interpreted the 1974 Housing and Community Development Act in a manner that complements and supports prior legislation in this area. First, the Court acknowledged the Congressional findings that urban communities face critical problems which stem partly from the concentration of lower income persons in central cities and that spatial deconcentration of housing opportunities for lower income persons is a primary objective of the law.²⁸⁰ Second, the Court declared that the Housing and Community Development Act "significantly enlarged HUD's role in the creation of housing opportunities"²⁸¹ through the Section 8 Lower-Income Housing Assistance Program.²⁸² In the Court's

278. *Hills v. Gautreaux*, 96 S. Ct. 1538, 1548 (1976), citing 1967 site approval rules in DEPT. OF HOUSING AND URBAN DEVELOPMENT, LOW-RENT HOUSING MANUAL § 205.1, ¶ 4(g) (Feb. 1967 rev.).

279. The Court mentioned the project selection criteria in Evaluation of Rent Supplement Projects and Low-Rent Housing Assistance Applications, 37 Fed. Reg. 203 (1972), 96 S. Ct. at 1548.

The eight project selection criteria were, at least in part, judicially impelled. Cf. *Shannon v. H.U.D.*, 436 F.2d 809 (3d Cir. 1970) and *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969). The fourth criterion reflects regionalism, its objectives including the development of housing consistent with "officially approved State or multijurisdictional plans." This criterion calls for the development of "areawide plans which include a housing element relative to needs and goals for low- and moderate-income housing as well as balanced production throughout a metropolitan area." 24 C.F.R. § 200.710 (1976).

Though not mentioned by Justice Stewart, the 1968 Fair Housing Act was also implemented with affirmative fair housing market regulations requiring, in Secretary Romney's words, "that users of our housing programs take affirmative steps to make minority citizens aware of the availability of that housing." Hearings on H.R. 13337 Before the Subcomm. on Housing of the House Comm. on Banking & Currency, 92d Cong., 2d Sess., pt. 1, at 39 (1972) (statement of HUD Secretary George Romney). See also *Implementational Affirmative Fair Housing Marketing Regulations*, H.U.D. HANDBOOK, § 8030.2 (June, 1973 rev.).

280. 96 S. Ct. at 1548, citing 42 U.S.C. §§ 5301(c)(6), 5304(a)(4)(A), (C)(ii) (Supp. IV, 1974); H.R. REP. No. 1114, 93d Cong., 2d Sess. 8 (1974). Among the implementing HUD regulations are those which direct that sites be chosen to "promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons." 24 C.F.R. §§ 880.112(d), 883.209(a)(3) (1976).

281. 96 S. Ct. at 1549.

282. HUD is empowered by Section 8 of the Housing and Community Development Act to make assistance contracts with private and public sponsors of newly constructed and substantially rehabilitated housing. Existing housing, the major program currently operational, may be owned by private lessors and contract authority for such shelter lies with local housing authorities in most cases, 42 U.S.C. § 1437f(c) (Supp. IV, 1974). Pursuant to the agreements, HUD pays the difference between the monthly rent required of the family (ranging between 15% and 25% of its gross income), and the monthly rent assigned by the contract to the housing unit. Income, number of children, medical expenses, etc., control the amount paid by the family, 42 U.S.C. § 1437f(c)(3) (Supp. IV, 1974). Families with incomes that do not exceed 80% of the median income of the

view Congress has continued its pursuit of desegregated living patterns that began with the passage of the 1968 Civil Rights Act and has at the same time given HUD additional devices with which to achieve fair housing goals.

These strategies reflect an increasing emphasis in federal housing programs on regionalist planning.²⁸³ The Housing and Community Development Act makes federal funds available for a wide variety of community development projects, including the acquisition of deteriorating property or property that is appropriate for conservation activities, the restoration of historic sites, and the conservation of natural resources and scenic areas.²⁸⁴ Federal HCDA funds also may be used for installation of public works and facilities, such as senior citizen centers, historic properties, and water and sewer facilities. The benefits of federal funds for such a wide range of projects attracts many communities that would not otherwise consider providing low-income housing. The Housing and Community Development Act, however, prohibits the grant of HCDA funds unless the application includes a housing assistance plan.²⁸⁵ In planning for the needs of lower income persons, a community seeking federal HCDA funds not only must include the needs of its existing citizens but also must calculate the needs of those "expected to reside" in the community.²⁸⁶ The Housing and Community Development Act thus requires communities, when assessing their housing needs in pursuit of HCDA funds, to look beyond the needs of their current residents to include the needs of those who can be expected to reside in the community.²⁸⁷

The "expected to reside" formula may prove to be more than hortatorical. In *City of Hartford v. Hills* a federal court enjoined seven suburban towns in the Hartford, Connecticut area from spending approximately \$4 million in community development grants approved by

area are eligible for the program, and 30% of all § 8 units each year must serve households with incomes not exceeding 50% of the area's median income, 42 U.S.C. § 1437f (c)(4), (c)(7), and (f) (Supp. IV, 1974). A fair market rent established by HUD for a project's housing area controls the amount of rent a landlord can charge for each unit, but contracts provide for annual up-dating of fair market rents. Contract rents should not exceed fair market rents by more than 10%, but 20% is sometimes permissible, 42 U.S.C. § 1437f(c) (Supp. IV, 1974). Contracts may be long-term, (up to 15 years for existing units) but only up to 20 years for new or substantially rehabilitated units, a period that is not as long as that of the usual mortgage periods, a factor which has diminished private sector interest in the program, 42 U.S.C. § 1437f(e) (Supp. IV, 1974).

Despite the Court's opinion in *Gautreux*, the statutes, and the regulations, the program has been less than a success. See note 20 *supra*, and Note, *Federal Leased Housing Assistance in Private Accommodations: Section 8*, 8 MICH. J.L. REFORM 676 (1975).

283. See generally, the well-documented and invaluable analysis of the regional focus in federal housing programs contained in Rubinowitz & Dennis, *supra* note 268.

284. 42 U.S.C. § 5305(a) (Supp. IV, 1974).

285. *Id.* at § 5304(a)(4).

286. *Id.* at § 5304(a)(4)(A) (Supp. V, 1975).

287. H.R. REP. NO. 1114, 93d Cong., 2d Sess. 7 (1974).

HUD.²⁸⁸ HUD had allocated the funds even though six of the towns had submitted applications indicating that "zero" additional persons were "expected to reside" and the seventh town had advanced a token figure. The court concluded that the Housing and Community Development Act does not permit HUD to waive any portion of the statutory requirement for a complete Housing Assistance Plan. Because a waiver is impermissible, the housing assistance plans, which are prerequisites for the grant of community development funds, were inadequate. The court found that the "expected to reside" information is the "keystone to the *spatial deconcentration objective*" of the Housing and Community Development Act.²⁸⁹

In *Gautreaux* Justice Stewart sought to demonstrate that his opinion was compatible with local control of the planning process,²⁹⁰ discussing ways in which HUD may consider local views before implementing a housing assistance plan.²⁹¹ In a footnote, however, the

288. *City of Hartford v. Hills*, 408 F. Supp. 889 (D. Conn. 1976). Other proposals for HCDA expenditures have come under attack. The Western Center on Law and Poverty, Inc. of Los Angeles settled a lawsuit in June, 1976 in which the legal services program had sought to prevent the City of Alhambra, California from spending community development block grant funds for a golf course expansion. The June settlement climaxed lengthy negotiations and led to an arrangement by which the City's first year plan remains unchanged in exchange for second and third year applications to HUD that call for spending \$1,161,000 (previously earmarked for a golf course expansion) on projects vital to the needs of low-income residents, including \$400,000 on housing rehabilitation, Newsletter, Western Center on Law and Poverty, Inc., July 7, 1976, at 4. See 10 CLEARINGHOUSE REVIEW 53 (May, 1976). Another lawsuit challenging HUD approval of HCDA funds for parkland purchase is described in N.Y. Times, Oct. 26, 1975, News of New Jersey at NJ1, col. 2.

Since the Hartford challenge, HUD has altered its "expected to reside" regulations. See 24 C.F.R. § 570.303(c)(2)(ii) (1976), which provides that the assessment of the needs of households "expected to reside" shall include estimates of the number of lower-income families with workers already employed in the community, currently living elsewhere, who would *reasonably* be expected to reside in the community if housing were available which they could afford. The applicant for HCDA funds must use federal census data, or local data if it is more recent. The regulation sets forth a detailed five step method that applicants *must* follow in deriving the number of low-income families "expected to reside," *id.*

289. 408 F. Supp. at 901.

290. 96 S. Ct. at 1550.

291. The HCDA permits a municipality to prepare a "housing assistance plan," 42 U.S.C. § 5304(a)(4) (Supp. IV, 1974). The plan is necessary to applications for community development revenue sharing funds which may be used for a broad range of non-housing development, redevelopment, and renewal activities as well as housing programs, 42 U.S.C. §§ 5304(a), 5305 (Supp. IV, 1974). Once the plan has been filed, it provides the basis for assessing proposals for housing assistance. Units of local government may comment on any application for housing funds on the ground that it is inconsistent with the approved plan. However, the project may proceed if the HUD Secretary determines that the application is consistent with the plan, 42 U.S.C. §§ 1439(a)-(c) (Supp. IV, 1974). If there is no plan for the local unit of government, the HUD Secretary must still give the local governmental entity 30 days to comment on the proposal. Thereafter approval may be granted, 42 U.S.C. § 1439(c) (Supp. IV, 1974). In short, the local community draws a housing assistance plan pursuant to HUD guidelines, but HUD administers the new and substantially rehabilitated housing programs of the Act's section

Court acknowledged that once a housing assistance plan was submitted by a locality and approved by HUD, specific projects could be funded if consistent with the plan despite subsequent objections by the local governmental entity to the character of the project.²⁹² The Court also noted that the housing assistance plan "must assess the needs of lower-income persons residing in or expected to reside in the community"²⁹³

Although the tenor of the *Gautreaux* opinion suggests that no low-income housing would be approved without substantial input by affected communities,²⁹⁴ the 1974 Housing and Community Development Act eliminates local governmental approval as a prerequisite for federally subsidized housing provided under the programs established by the Act.²⁹⁵ At least on its face, the Section 8 program, which has largely replaced the older federal low-income housing programs,²⁹⁶ permits HUD approval of an application even where a community has sought to block federally aided housing by not applying for HCDA funds and thus not filing a housing assistance plan as part of the process.²⁹⁷ Furthermore, if the number of proposed units is twelve or less,

8. The existing housing program is administered by local housing authorities under policies largely influenced by HUD.

292. 96 S. Ct. at 1549 n.21.

293. *Id.*

294. The Supreme Court did note that "the local comment and objection procedures do not apply to applications for assistance involving 12 or fewer units in a single project or development," *Id.* One commentator has argued that "[a] municipality can block any subsidized housing proposal by claiming that it is inconsistent with its housing assistance plan," and that "a municipality which is able to gain HUD acceptance of a meager housing assistance plan can exclude from its boundaries most proposed Section 8 projects." Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1, 41. Professor Ackerman's typically astute comments are at the very least politically realistic even if, in bare technical terms, they sweep somewhat broadly.

295. Respondent's Brief at 53, *Hills v. Gautreaux*, 96 S. Ct. 1538 (1976).

296. 96 S. Ct. at 1549. The major rent subsidy directly administered by HUD prior to the passage of Section 8 was authorized by the National Housing Act § 236, 12 U.S.C. § 1715z-1 (1970). Section 236 did not require local approvals and provided for mortgage insurance and interest reduction payments on behalf of owners of rental housing projects occupied by low-income families. The transition to Section 8 and a description of Section 236 is contained in McGee, *Book Review, Housing Subsidies in the U.S. and England*, 22 U.C.L.A.L. REV. 734, 739-45 (1975).

Because sections 235 and 236 of the National Housing Act are the only subsidy programs that require no local approval other than the usual zoning and building code clearances, they are the housing programs most often ensnared in zoning controversies. In order to halt public housing or rent supplements, a city council need only refrain from passing the necessary enabling resolutions, while exclusionary zoning, on the other hand, may be their only defense against 235 and 236 housing. Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CAL. L. REV. 1384, 1447 n.210 (1971). See the discussion of the snarl caused by a Section 236 program, in the Village of Arlington Heights, Illinois, text accompanying notes 155-70 *supra*.

297. 42 U.S.C. § 1439 (Supp. IV, 1974). The local unit, however, does have 30 days to comment on the proposal which as a practical matter gives it additional time to mobilize political opposition to the project. The effect of the opposition will vary

HUD may fund the project without even permitting the local community an opportunity to comment or object.²⁹⁸ In assessing applications, HUD may use its own data to estimate housing need, thereby avoiding reliance on coerced or reluctantly drawn "expected to reside" calculations advanced by exclusionary communities.²⁹⁹ After establishing housing need independently of a local community's projections, HUD's area offices can solicit applications for housing funds from private owners and developers.³⁰⁰ Both public housing authorities and private owners may submit applications for funding of new construction or substantially rehabilitated units.³⁰¹ Although HUD has presently designated subsidies for rental units in existing housing (the major operational Section 8 program) for public housing authorities, Section 8 allows applications to be submitted for such housing by private owners.³⁰² Most importantly, HUD has the power to determine site location in implementing its goal of dispersal of low-income groups.³⁰³ In many cases the sites must inevitably be located in all white, often suburban, areas.³⁰⁴

In summary, the essence of the Housing and Community Development Act is its command that local housing needs be assessed and met on an area-wide basis before federal funds are awarded for any community development. To implement this policy the Act has sufficient mechanisms to permit housing development without local assent. Thus, those communities that regard the provision of low-income shelter (and significant racial integration) as too high a price to pay for federal community development assistance may still be subject to some housing

with the need for the project and the political situation of the community involved. No doubt, as the Court observed in *Gautreaux*, 96 S. Ct. 1549 n.21, the size of the project will be important, not only because if it is less than 13 units the local comment provisions do not apply, but also because the smaller the project (in the eyes of many communities) the less significant is the threat.

298. 42 U.S.C. § 1439(b) (Supp. IV, 1974). Even the small ceiling on projects which do not require local comment may be seen as a significant breakthrough (or foot in the door). As the entry for October, 1975 in the Appendix to this article suggests, *infra* at 1014-15, a plan by the Chicago Housing Authority and HUD to scatter 84 units over 15 different sites, with no site larger than 8 units, triggered a law suit that was appealed all the way to the Supreme Court. The court of appeals upheld the district judge's finding that the evidence did not support the claim "that prospective tenants of public housing are more likely to engage in anti-social conduct than present community residents." *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 372 F. Supp. 147, 150 (N.D. Ill. 1973), *aff'd*, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976). Perhaps the opposition was in part due to the fact that the projects were conventional public housing, but contrast the last paragraph of note 42, *supra*.

299. 24 C.F.R. § 882.202 (1976).

300. 42 U.S.C. § 1439(c) (Supp. IV, 1974). 24 C.F.R. §§ 882.121(a), 882.203(b) (1976).

301. 24 C.F.R. § 882.203(a) (1976). 42 U.S.C. § 1437f(f)(4) (Supp. IV, 1974).

302. 24 C.F.R. §§ 882.121, 882.102 (1976).

303. 24 C.F.R. § 882.203(b) (1976).

304. Sites must be chosen to "promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons," 24 C.F.R. §§ 880.112(d), 883.209(a)(3) (1976).

for excluded groups if a political subdivision that encompasses the community seeks HCDA funds.³⁰⁵

Finally, if the "expected to reside" calculation does not make the regional planning emphasis clear, the Housing and Community Development Act provides for review of the application by an area-wide agency.³⁰⁶ The area-wide agency reviews the application to evaluate the consistency of the community's application for federal funds with pre-existing regional plans and policies. This approach supports the observation by commentators that the Housing and Community Development Act "dramatically demonstrates Congress's increased concern that local planning designed to meet housing needs be carried out on a regional basis."³⁰⁷ The entire community development application may be rejected if the regional agency finds the housing assistance plan inconsistent with regional plans and policies.³⁰⁸

By interpreting the Housing and Community Development Act to complement and support prior fair housing and low-rent housing legislation, the Court in *Gautreaux* may have buttressed the already powerful forces that seek to disperse racial minorities. This approach is necessary as the nature of the race problem increasingly becomes a problem of socio-economic class.³⁰⁹ Even though some commentators view

305. HCDA grants may be made to states and to local units of governments, 42 U.S.C. § 5303(a)(1) (Supp. IV, 1974). Local communities that seek to avoid desegregation thus may be specified as sites for low income housing by the state or any local governmental unit, *id.* at § 5302(a)(1), which seeks HCDA funds and must, therefore, submit a plan which "avoids undue concentration of assisted persons in areas containing a high proportion of low-income persons," 24 C.F.R. §§ 880.112(d), 883.209(a)(3) (1976).

306. 42 U.S.C. § 5304(e) (Supp. IV, 1974) requires that the housing assistance plan be submitted to a regional "clearinghouse" for comment. The "A-95" review process was developed by the Office of Management and Budget to ensure regional planning and implementation of housing programs. BUREAU OF THE BUDGET, CIRCULAR No. A-95, July 24, 1969, revised in OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR No. A-95 REVISED, Feb. 9, 1971, and described in OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR No. A-95: WHAT IT IS, HOW IT WORKS (1973). The local governmental unit that seeks federal funds notifies the regional clearinghouse that reviews the application and solicits comments from other governmental units such as civil rights agencies or other municipalities.

In turn the regional clearinghouse forwards the application with its comments to HUD, which, according to Secretary Hills, "looks hard at [the] comments in judging the local plans against the realities of regional development." HUD News Release, May 28, 1975 Remarks Prepared for Delivery by Secretary Carla A. Hills to the Annual Meeting of the National Association of Regional Councils at 4, in Boston, Mass. In the same address, Secretary Hills encouraged the regional agencies to:

Draw an areawide housing plan for your metropolitan area which is factually unassailable in assessing the housing needs of workers in relation to the locations of their employment. Then, use your metropolitan plan as the A-95 standard against which to measure local [housing assistance plans]. *Id.* at 7.

307. Rubinowitz & Dennis, *supra* note 268, at 161.

308. 42 U.S.C. § 5304(c) (Supp. IV, 1974).

309. Bayard Rustin, President of the A. Philip Randolph Institute of New York City and long-time civil rights activist, has stated that:

After the Watts riot and the other riots of the 1960's, . . . the Kerner Commis-

regionalism as a two-edged sword that may be used to speed desegregation or that affluent areas may employ to impede economic and racial integration,³¹⁰ and while dispersal may not be an unmixed blessing for blacks,³¹¹ the Court seems, all things considered, to have endorsed a planning theory that will enjoy popularity for some time to come.³¹² The Court's apparent approval of regionalism and racial dispersion may provide the necessary impetus for overcoming the barriers which cur-

sion warned that the United States was in danger of becoming two nations—one black and one white. This is a wrong definition of the threat. The danger is that we are moving toward a nation divided between those who have it and those who cannot make it. That cuts across black-white lines.

In other words, the future advancement of blacks and other poor in this country has very little to do with the color of their skin.

Ten years ago there was indeed wide-spread discrimination against blacks in work. Now there is still some, but discrimination is not the main enemy where work is concerned. The problem now has to do with the nature of production. We are no longer a society prepared to buy the muscle power of the poor. For every black who cannot get a job because of his race, there are ten blacks who cannot get a job because this society is not buying muscle power as it did when the immigrants were arriving from Europe.

Donovan, *The Black Problem Is Now a Class Problem*, L.A. Times, Aug. 11, 1976, Pt. II, at 5, col. 1.

310. See, e.g., Burchell, *et al.*, *supra* note 267, at 268, where it is argued that:

. . . The popular depiction of suburbia as an exclusive *cordon sanitaire* surrounding the inner city is absurdly far from the mark. Today most suburban workers reside in suburban areas and there is increasing evidence that viewed from the appropriate regional scope, substantial quantities of housing are available for all classes of suburban workers. The case study presented here demonstrates this fact for one housing market within the New York metropolitan area. If the results presented here can be generalized to other areas, it is clear that the regional approach to the analysis may backfire, and work to justify the status quo.

The authors concede, by the way, that "minority workers face much different problems in penetrating the suburbs than do low-income workers in general, and the discussion of the particular problems of racial segregation should be examined separately from the general question of exclusion on the basis of income." *Id.* at 266 n.15.

311. Alexander Polikoff, principal attorney in *Gautreaux*, has written that the spectre of overwhelmingly black inner cities

. . . is not uniformly viewed as the end of the world. As thoughtful an observer as Nathan Glazer has opined that, although the apartheid prospect at one time appeared 'disastrous', experience suggests that growing black economic capacity may enable our metropolitan areas to avoid self-destructive confrontations. Others, for example Anthony Henry of the National Tenants Organization, espouse black cities, or at least black cores of cities, as a means to black political and economic power, and ultimately, perhaps, to the only valid basis for a coming together of black and white society—interaction between groups that have become true equals. A sizable literature now argues that view.

Polikoff, *Housing and Race: An Urban Dilemma*, THE BPI MAGAZINE, 1976, at 9-10 (A publication of the Business and Professional People for the Public Interest, Chicago, Illinois). Some of the problems of dispersal mentioned by Mr. Polikoff are discussed in McGee, *Power(lessness) and Dispersion: Comments on Chester McGuire's "The Urban Development Act of 1974, Community Development Funds and Black Economic Problems"*, V BLACK L.J. — (1976), reprinted in EMERGING ISSUES IN BLACK ECONOMIC DEVELOPMENT (Bobo and Osborne eds., 1976). A fresh look at the problems of school desegregation that questions dispersal for dispersal's sake so far as it affects the quality of education for black school children is contained in Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

312. Listokin, *Fairshare Housing Distribution: An Idea Whose Time Has Come?*, NEW JERSEY TRENDS, cited in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 174, 336 A.2d 713, 733 (1975).

rently preclude full implementation of these conceptions of planning and social policy.

CONCLUSION

The Supreme Court's decision in *Gautreaux* may be less important than the long struggle in which it was a milestone. The decade of legal trench warfare in which lawyers struggled to desegregate Chicago public housing may instead constitute a far more meaningful chapter in American legal history. By perseverance, diligence, and intelligence, Dorothy Gautreaux's attorneys "raise[d] issues of value to [their] clients irrespective of the preferences of government officials,"³¹³ and defeated efforts by the political establishment in both Chicago and Washington to pander to segregationist sectors of American society. The importance of the Court's decision is that it lends prestige to the legal, moral, and policy arguments advanced on behalf of blacks with respect to housing which is a necessity of life.³¹⁴ *Gautreaux*, therefore, is an additional manifestation that the Court continues to serve as the ultimate refuge of minorities, vindicating James Madison's view that

If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.³¹⁵

Placing pyrrhic victories to the side, though, the Court has only "grasped the nettle" in a case in which racial discrimination was conceded by all the litigants. The Court's continuation as a major force in contemporary social controversy, however, is questionable if its decisions

313. E. JOHNSON, *JUSTICE AND REFORM; THE FORMATIVE YEARS OF THE O.E.O. LEGAL SERVICES PROGRAM* 279-80 (1974).

314. *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (Holmes, J.). Since Holmes' dictum, Mr. Justice White, while refusing to "denigrate the importance of decent, safe, and sanitary housing," declared for the Court that "the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality. . . ." *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

315. 1 *Annals of Congress*, 439, quoted by Mr. Justice Black in H. BLACK, *A CONSTITUTIONAL FAITH* 19 (1968), where he added his belief that "such judicial power is an essential feature of our type of free government, and . . . it ill behooves the courts to restrict their usefulness in protecting constitutional rights by creating artificial judicial obstacles to the full performance of their duty." Indeed *Gautreaux* supports Professor Louis Henkin's assertion that "[s]ince Frankfurter and Black wrote [during the New Deal era], judicial review has had a new birth, its character and content reformed, and its place established as a hallmark of American political life, even a birthright of every inhabitant." Henkin, *Is There a "Political Question" Doctrine?* 85 *YALE L.J.* 597, 625 (1976).

in cases like *Washington v. Davis*³¹⁶ and *Eastlake*³¹⁷ are indications of its unwillingness to enter the battleground of racial and socio-economic conflict. The Court's judgment on the planning strategems of the Village of Arlington Heights³¹⁸ may pursue the morality, if not the logic and reasoning of *Gautreaux*, and disapprove of efforts, much too late in the nation's history, to perpetuate the division of Americans along racial lines.

316. See text accompanying notes 85-126 *supra*.

317. See text accompanying notes 217-22 *supra*.

318. See text accompanying notes 155-70 *supra*.

APPENDIX

THE SAGA OF DOROTHY GAUTREAUX

A history of the litigation leading to the Supreme Court decision in *Hills v. Gautreaux*, 96 S.Ct. 1538 (1976), would consume an article by itself. The skeletal chronology below is one example of the tortuous process public housing tenants may have to follow to vindicate their Constitutional rights.

- 1966: Dorothy Gautreaux and other tenants in and applicants for public housing sue charging the Chicago Housing Authority with violating their rights under the fourteenth amendment by intentionally selecting sites and assigning apartments to maintain existing patterns of racial separation. Another count charged that 42 U.S.C. §§ 1981 and 1983 were violated regardless of intent by failing to select sites to alleviate residential segregation. Simultaneously suit was filed against the Secretary of the Department of Housing and Urban Development charging that HUD had violated the fifth amendment due process clause in assisting CHA in its racial segregation efforts. The suit against HUD was stayed pending resolution of the action against the housing authority. The two cases were consolidated after the court of appeals, in September of 1971, held that HUD was complicitous in the scheme to segregate Chicago's public housing, *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971).
- March, 1967: CHA's motion for summary judgment denied. *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967).
- February, 1969: Plaintiffs' motion for summary judgment granted, district court Judge Austin holding that CHA had discriminated in its site selection and tenant assignment practices. *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969).
- July, 1969: Judgment order entered enjoining CHA's construction of public housing units in census tracts more than 30% black unless it constructed at least 75% of the total units planned outside those areas. A voluntary provision permitted up to one-third of any housing constructed under the order to be within suburban Cook County if arrangements were made with the Housing Authority of Cook County. *Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736 (N.D. Ill. 1969).
- July, 1970: District court judge entered unpublished order modifying July, 1969 order that had included a "best efforts" provision obligating CHA to increase the supply of housing units. The new order imposed a timetable for submission

of public housing units for approval by the city council. Prior to July, 1970, supplemental orders had been entered on September 12, 1969, September 15, 1969, October 20, 1969, October 23, 1969, and November 24, 1969. In May, 1970 plaintiffs' lawyer sought to determine why new sites had not been submitted to the Chicago city council in accordance with Illinois law, but was advised that none would be submitted until after the mayoral election in April of the next year. Five conferences were then held with the district court judge culminating in the July 20, 1970 order. See summary of December, 1970, court action *infra*.

- September, 1970: HUD's motion to dismiss for lack of jurisdiction and failure to state a claim granted by the district court judge in unpublished memorandum opinion. See summary of September, 1971, court action *infra*.
- December, 1970: The court of appeals affirmed the order of July, 1970 imposing a timetable on the CHA for submission of sites for 1500 units to the Chicago city council, finding that the arguments against submission were "based on political considerations and community hostility." *Gautreaux v. Chicago Housing Authority*, 436 F.2d 306, 313 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).
- September, 1971: Finding that HUD spent \$350 million "in a manner which perpetuated a racially discriminatory housing system in Chicago" in violation of the fifth amendment, the court of appeals reversed the district court dismissal of the complaint against HUD and ordered summary judgment for the plaintiffs under the Constitution and § 601 of the Civil Rights Act of 1964. *Gautreaux v. Romney*, 448 F.2d 731, 739 (7th Cir. 1971).
- October, 1971: In the district judge's words, "with a gun to [the CHA's] head," 20 months after the first decree and 8 months after the second, "sites for seventeen hundred odd units were finally disgorged and submitted to the City Council for its approval." But although the mayor and various city officials signed a letter of intent to process the submitted sites to induce HUD to grant 26 million dollars in Model Cities Program funds, the district judge enjoined distribution of the money "until . . . minimum compliance" with the letter of intent and decrees was achieved. *Gautreaux v. Romney*, 332 F. Supp. 366, 368, 370 (N.D. Ill. 1971).
- March, 1972: The court of appeals reversed the order enjoining HUD distribution of Model Cities Program money because of a lack of relationship between public housing program discrimination and model cities activity. *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972).
- April, 1972: Because the city council persisted in its refusal to approve the CHA submitted sites, the district judge joined the

City of Chicago and city council members as defendants and suspended the state law that required their approval before construction could commence. The court ordered the sites submitted directly to HUD. *Gautreaux v. Chicago Housing Authority*, 342 F. Supp. 827 (1972). See summary of October, 1975, court actions, *infra*.

- May, 1973: The court of appeals affirmed the district court order suspending state law requiring submission of sites to the city council because the "City by its earlier discriminatory action and later by its inaction has made itself a party to the discrimination 'as a joint participant.'" *Gautreaux v. City of Chicago*, 480 F.2d 210, 214 (7th Cir. 1973), *citing* *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Louisiana v. United States*, 380 U.S. 145 (1965).
- September, 1973: The district judge refused to grant metropolitan area relief, because "the wrongs were committed within the limits of Chicago and solely against residents of the City." Yet a metropolitan area remedy would involve political entities which previously had nothing to do with the lawsuit. *Gautreaux v. Romney*, 363 F. Supp. 690, 691 (N.D. Ill. 1973).
- August, 1974: The court of appeals reversed the district judge and remanded for consideration of a "comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago . . . but will increase the supply of dwelling units as rapidly as possible." *Gautreaux v. Chicago Housing Authority*, 503 F. 2d 930-39 (7th Cir. 1974).
- November, 1974: A United States magistrate was appointed to serve as a master because "for the past five years and four months, no public housing construction has been completed by either party," the master was charged "to study and review the existing patterns of racial segregation in Chicago public housing, to determine and identify the precise causes of the . . . delay." *Gautreaux v. Chicago Housing Authority*, 384 F. Supp. 37, 39 (N.D. Ill. 1974).
- January, 1975: The court of appeals denied a writ of mandamus to vacate the appointment of the master, finding no abdication of judicial decision-making responsibility by the district court judge. *Chicago Housing Authority v. Austin*, 511 F.2d 82 (7th Cir. 1975).
- October, 1975: Pursuant to the April, 1972 order bypassing the city council, the CHA and HUD instituted an 84-unit scattered-site project (15 different sites with no more than 8 units per site) in predominantly white areas. A suit which had been filed in 1972 by an incorporated coalition of residents sought an injunction on the ground that HUD had

failed to file an environmental impact statement pursuant to § 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, (1970), assessing the impact of siting low-income public housing in middle and working class neighborhoods. In November, 1973, senior district court Judge Julius J. Hoffman (of "Chicago Seven" fame) had held that the evidence did not support the claim "that prospective tenants of public housing are more likely to engage in anti-social conduct than present community residents." *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 372 F. Supp. 147, 150 (N.D. Ill. 1973). The court of appeals affirmed the judgment for HUD holding, *inter alia*, that the agency had considered "the impact of the scattered-site housing on the social fabric of the recipient communities," and that "there is little reason to believe the influx of new CHA tenants will drastically alter the character of a neighborhood." *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 231 (7th Cir. 1975), *cert denied*, 96 S. Ct. 1462 (1976).

April, 1976: *Hills v. Gautreaux*, 96 S. Ct. 1538 (1976).

June 7, 1976: Attorneys for HUD and the tenants agreed to postpone, at least until April 1, 1977, their request for a metropolitan area order and to undertake a metropolitan area demonstration program for approximately 400 plaintiff-class families under HUD's Section 8 Existing Housing program. The families were to be dispersed throughout the six-county Chicago standard metropolitan statistical area. Up to 100 of the units would be in Chicago or minority areas outside the city. Copy of letter of understanding on file with the University of Illinois Law Forum. *See also Gautreaux Case Prompts Chicago Demonstration*, 33 J. HOUSING 282 (1976).