Chicago-Kent Law Review

Volume 64
Issue 2 *The Seventh Circuit Symposium: The Federal Courts and the Community*
Article 7

June 1988

Remedying the Irremediable: The Lessons of Gautreaux

A. Dan Tarlock
IIT Chicago-Kent College of Law

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

 Part of the Law Commons

Recommended Citation
A. D. Tarlock, *Remedying the Irremediable: The Lessons of Gautreaux*, 64 Chi.-Kent L. Rev. 573 (1988).
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol64/iss2/7

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

REMEDYING THE IRREMEDIABLE: THE LESSONS OF *GAUTREAUX*

A. DAN TARLOCK*

The history of public housing in Chicago would have been different if all units had been built as small projects, integrated into residential communities.[1]

I. INTRODUCTION: FROM THE WARD HOUSE TO THE FEDERAL COURTHOUSE

Chicago is essentially a lawless city. The exercise of raw political power by elected officials to override legal constraints on political choice is the norm in a city where the culture of political power grips the imagination in a manner similar to the ultra chic in fashion in New York or self-fulfillment in San Francisco. The consequences are both comic and tragic. Political theater rivals watching the Cubs as a spectator sport, but one of the major consequences is entrenched racial segregation and polarization that creates festering social problems.

The roots of the problem lie in the evolution of political power in Chicago. Chicago never fully succumbed to the progressive notion of the moral and efficient city, although ironically it was a major innovator and exporter of the idea.[2] The Harrison administrations, supported by the city's then large German population, created a modest good government climate, but by and large the city remained free of the ideology of moral uplift through scientific government. As the twentieth century unfolded, the political power of the progressives diminished. By 1931 the Democratic Party had consolidated its power among both white ethnic and

* Professor of Law, IIT Chicago-Kent College of Law. A.B. 1962, LL.B. 1965, Stanford University.

1. D. BOWLY, JR., THE POORHOUSE: SUBSIDIZED HOUSING IN CHICAGO, 1895-1976, at 39 (1978).

2. Chicago became a model for the progressive notion of the grand, efficient city between the 1893 Columbian Exposition and the Burnham Plan for the city, which was drafted in 1905 and carried out through the 1920s. However, Chicago never had wholesale political reform during this period. As Professor Charles Merriam, a distinguished University of Chicago political scientist and Chicago politician, observed of the tenure of Mayor Carter Harrison during the civil service and reform period: "While he did not follow the lead of the reform forces, he did not as a rule antagonize them, and on the whole prevented the drift of the city into hands of the spoilsmen of the worst type." C. MERRIAM, CHICAGO: A MORE INTIMATE VIEW OF URBAN POLITICS 21 (1929). *See also* W. STUART, THE TWENTY INCREDIBLE YEARS (1935).

black voters,[3] and the city lapsed into a municipal version of a feudal society. Blacks and large blocks of white ethnic voters switched to the Democratic Party[4] to create the fabled and celebrated "machine."[5] Under the machine, power in Chicago has historically been exercised at the ward level by various ethnic chiefs. Ward prerogatives were somewhat curbed by Mayor Daley,[6] but this tradition cemented ethnic politics as the politics of the city. As Charles Merriam observed: "The feudal organization of Chicago and its feudal party system . . . present a unique picture of political organization and control, a background upon which strange political events might well be thrown."[7]

Chicago has paid a high price for the creation of a municipal federation. Racial discrimination, especially in housing, became an integral part of municipal policy, and the city's political institutions resisted pressures to project a more integrated city. As the political machine failed to respond rapidly enough to the changing racial character of the city,[8] the federal courts began to hear a number of law suits that challenged the traditional exercise of political power in the city. A series of well-planned cases pitted the national or aspirational[9] vision of constitutional rights for minorities, which were the victims of political discrimination,[10] against the tradition of the division of the city into ethnic enclaves. The sad history of public housing in Chicago is a prime example of this conflict and raises troubling questions about the use of "institutional" litigation to reallocate political power and the resources that support it.

In the past twenty years, courts have become vehicles for structural

3. *See* P. KLEPPNER, CHICAGO DIVIDED: THE MAKING OF A BLACK MAYOR 22-26 (1985). The switch of black voters from the Republican to the Democratic party was both a function of the fundamental political shift caused by the depression and the New Deal and the efforts of Mayors Cermack and Kelly to construct a parallel black political machine. *See also* R. BILES, BIG CITY BOSS IN DEPRESSION AND WAR: MAYOR EDWARD J. KELLY OF CHICAGO 89-102 (1984).

4. This development is traced in Zikmund II, *Mayoral Voting and Ethnic Politics in the Daley-Bilandic-Byrne Era*, in AFTER DALEY: CHICAGO POLITICS IN TRANSITION 27 (S. Grove & L. Masotti eds. 1982) [hereinafter AFTER DALEY].

5. *See* M. ROYKO, BOSS (1971).

6. The best account of the Daley administration is M. RAKOVE, DON'T MAKE NO WAVES, DON'T BACK NO LOSERS (1975).

7. C. MERRIAM, *supra* note 2, at 100.

8. The sources of black voters who supported the Daley machine are described in Grimshaw, *The Daley Legacy: A Declining Politics of Party, Race and Public Unions*, in AFTER DALEY, *supra* note 5, at 57 and W. GRIMSHAW, BLACK POLITICS IN CHICAGO: THE QUEST FOR LEADERSHIP, 1939-1979 (1980).

9. Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531 (1988) (Professor Shane's article appears in this symposium issue).

10. This vision traces its roots to Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896). The basis of the Court's continued invalidation of racial segregation has been the subject of considerable debate, *see* G. GUNTHER, CONSTITUTIONAL LAW 639-41 (11th ed. 1985), but the idea that blacks remain at risk from the tyranny of the majority remains a central idea of modern constitutional law. *See* A. BICKEL, THE MORALITY OF CONSENT 133 (1975).

reform of society. The public law model advocates long-term judicial involvement in defining remedies for some of society's deepest injustices.[11] Public law litigation is brought on behalf of a large class of aggrieved individuals. As a result, the litigation often opens a large gap between the underlying right abridged and the necessary remedy to secure some meaningful enjoyment of the right by the injured class. This gap calls into question the wisdom of the public law litigation,[12] and the *Gautreaux* decision shows the pitfalls of trying to use a deeply flawed social program to achieve the broader goal of racial integration. Judicial approaches designed to promote racial equality work less well, if at all, when racial discrimination is intertwined with a flawed program of wealth redistribution.

Chicago is a perfect case study to evaluate institutional litigation because the public litigation analyzed in this Symposium vested a perhaps unprecedented amount of political power in a most unlikely unelected institution, the Seventh Circuit Court of Appeals and the Federal District Court for the Northern District of Illinois. The role of these courts in reforming the basic institutions of government is an especially interesting case study in the ability of public litigation to reform a community for three reasons. First, the degree of involvement by one court in one city is as great or greater than any other circuit and city in the country.[13] Second, among the institutions of the city, only the Seventh Circuit has consistently adhered to the progressive vision of an efficient, noncorrupt city governed by national constitutional norms. Third, in contrast to the other two Seventh Circuit reforms examined in this Symposium, the public housing litigation did not involve access to the political process but the redesign of a deeply flawed redistributive program.

II. *GAUTREAUX*: A CASE WAITING TO HAPPEN

Alexander Polikoff's[14] and Peter Shane's[15] reviews of the *Gautreaux* litigation to desegregate public housing in the city raise a particularly significant example of the limits of institutional litigation. The gap be-

11. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) is the classic exposition of the difference between the use of litigation to vindicate an individual interest and to advance the legal and thus political power of a disadvantaged group.

12. See Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 596-98 (1983) for a concise summary of the remedial limitations debate and literature.

13. The only other comparable instance is the role of the First Circuit in governing Boston. *See* J.A. LUCAS, THE COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985).

14. Polikoff, Gautreaux *and Institutional Litigation*, 64 CHI.-KENT L. REV. 451 (1988) (Mr. Polikoff's article appears in this symposium issue).

15. Shane, *supra* note 9.

tween the City's exercise of political power and constitutional norms is great, but an effective remedy has proved ever more intractable. The merits of the underlying claim are clear and uncomplicated. Chicago has long been a model for racial segregation. Before World War II private restrictive covenants confined the "Black Belt"—after the war, urban renewal and public housing location became national models for the control of racial migration[16] and the effort continues today.[17] The City's use of the public housing siting process is a classic and well-documented case of purposeful racial discrimination.[18] But, in the end, the *Gautreaux* litigation is a classic example of the inability of the judiciary to remedy effectively racial discrimination that is deeply rooted in the history and culture of a community.

Gautreaux was a case waiting to happen. The immediate cause was the termination of the Chicago Housing Authority's quota system for projects, but the roots lay in the bitter City opposition to the efforts of the Chicago Housing Authority to disperse project sites. After the defeat of Mayor Kelly, who protected the CHA, anti-CHA forces on the City Council succeeded in giving the City Council the power to approve project site selection.[19] Long before the litigation, two distinguished political scientists had documented the racial discrimination in their study of the aldermanic veto system that ensured (and continues to ensure) that nothing comes into a ward unless the alderman wants it there.[20] In short, through public housing site selection, Chicago practiced racial zoning for the poor. There was nothing novel about the claim that segregation violated the resident's right to equal protection. At the height of *Plessy v. Ferguson*,[21] the Supreme Court held that racial zoning was unconstitutional,[22] and racial segregation had no constitutional footing af-

16. The fullest development of this thesis is A. HIRSCH, THE MAKING OF THE SECOND GHETTO: RACE AND PUBLIC HOUSING IN CHICAGO 1940-1960 (1983). *See also* O. DUNCAN & B. DUNCAN, THE NEGRO POPULATION OF CHICAGO: A STUDY IN RESIDENTIAL SECESSION (1957).

17. The latest technique is home equity assurance which allows neighborhoods to tax themselves to establish insurance pools. The proceeds would be used to buy homes at prices set by an oversight committee when a home owner wants to sell but is offered a price lower than the value fixed by the oversight committee. 1988 Ill. Legis. Serv. 85-1044 (West).

18. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

19. *See* A. HIRSCH, *supra* note 16.

20. M. MEYERSON & E. BANFIELD, POLITICS, PLANNING, AND THE PUBLIC INTEREST: THE CASE OF PUBLIC HOUSING IN CHICAGO (1955).

21. 163 U.S. 537 (1896).

22. Buchanan v. Warley, 245 U.S. 60 (1917). Mr. Justice Day reasoned that "[t]he right which the ordinance annulled was the civil right of a white man to dispose of his property as he saw fit to do so to a person of color and of a colored person to make such disposition to a white person." *Id.* at 81.

ter *Brown v. Board of Education*.[23] Once the politics of public housing site selection were demonstrated, the finding of racial discrimination was easy.[24]

The sad conclusion of Mr. Polikoff's assessment of the litigation is that the Seventh Circuit's efforts to make the City comply with national constitutional norms has been, with the exception of the Section 8 dispersion program, a failure compared to their more ambitious attempts to govern the city through the control of patronage and the reapportionment of ward map boundaries. Both Mr. Polikoff and Professor Shane acknowledge the failure of the remedial approaches attempted by the court, but argue that the ability to remedy the remedy problem still lies with the courts. Mr. Polikoff identifies the failure of the Supreme Court to require metropolitan remedies for education and housing segregation as the major reason for the failure of the litigation.[25] Professor Shane seems to go further, arguing that the remedies failed because the courts did not intervene more aggressively to modify the behavior of the institutions that caused the discrimination.[26]

There is a different interpretation of the case. *Gautreaux* is a classic case of resistance to a remedial scheme by those with the most to lose from it—white ethnics who chose to or were forced to remain in the city when many of their kin fled to the suburbs. Classic constitutional law accords no weight to distaste for the exercise of constitutional rights[27] and Polikoff follows this tradition. Instead, he assigns the major weight for the failure of the litigation to the Supreme Court's refusal to reverse its decision in *Milliken v. Bradley*[28] and develop an effective metropolitan-wide remedy. *Gautreaux* produced a narrow exception to *Milliken*. *Hill v. Gautreaux*[29] approved a metropolitan remedy against the Department of Housing and Urban Development and the CHA, but the case did not provide a "realistic" metropolitan remedy. Polikoff is correct that the *Milliken* Court's theory of intrastate federalism has no foundation,[30] but this is only the starting point for the analysis of the remedial issue. One of the lessons of *Gautreaux* is that institutional litigation may require the plaintiffs and court to make a hard choice between goals. Pub-

23. 347 U.S. 483 (1954).
24. Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969).
25. Polikoff, *supra* note 14.
26. Shane, *supra* note 9, at 569-71.
27. *See* Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980's*, 58 S. CAL. L. REV. 947, 989-90 (1985).
28. 418 U.S. 717 (1974).
29. 425 U.S. 284 (1976).
30. *See generally* Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate Over Political Structure*, 59 S. CAL. L. REV. 449 (1986).

lic housing provides both an unacceptable level of housing quality and racially segregated housing, but the solution for the first problem may not produce the level of racial integration implicit in the aspirational vision of the fourteenth amendment.

III. SOME CONSTITUTIONAL HERESY ON REMEDIES

Gautreaux raises questions about the relationship between a proposed remedy and the institutional setting that both caused the discrimination and must remedy it. Exclusionary zoning litigation has made us acutely aware of the limitations of the judiciary to impose structural remedies that require the redistribution of wealth. *Gautreaux* was premised on the assumption that federal housing subsidies would create a real alternative to the high-rise ghettos and the subsidies failed to materialize in the amounts necessary. *Gautreaux* is at bottom a case about the redistribution of wealth; the limitations of constitutional adjudication to do this remain central to understanding the failure of the litigation to achieve its objective. In addition to this familiar and over-arching problem, the litigation reveals a series of related problems that advocates of institutional litigation must confront.

The major lesson that one can draw from *Gautreaux* is that we must recognize the concept of imperfect remedies. Roman law recognized the concept of an imperfect obligation, a principle that expressed the desires of political superiors but carried with it no sanction. Modern jurisprudence does not recognize such obligations; we have agreed with John Austin that "an imperfect law is not so properly a law."[31] This is especially so in the United States as our distinctive contribution to modern jurisprudence has been to make judges rather than legislators the principle source of the law.[32] The idea of perfect judge-made law led directly to the notion that any right declared by a court can be remedied by it. *Gautreaux* suggests a need to reexamine our rejection of these conceptions of law when the issue is more wealth distribution than access to the political process.[33]

The root of the problem is that remedial resistance to institutional

31. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Weidenfeld & Nicolson 3d ed. 1968) (1st ed. 1832).

32. The idea can be traced to Bodin, *see* C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 62 (1958), but the idea was given its first full expression by John Chipman Gray in THE NATURE AND SOURCES OF THE LAW (1909).

33. See Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1988) for a rearticulation of the argument that the primary function of much of constitutional rights adjudication is to remove barriers to participation in the political process.

litigation must be considered relevant. Otherwise, the remedy will not vindicate the right. There has been a tendency for courts to trim the right to fit the remedy, thus diluting the force of the underlying right.[34] Community avoidance becomes easier, in part, because the unconstitutional conduct has been limited and incentives for bolder political responses have been lessened. Institutional litigation must be distinguished from other types of constitutional adjudication such as free speech cases. In the latter, the hostility of the audience to the message is largely irrelevant[35] unless the audience is a captive.[36] The celebrated march by neo-Nazis in the northern suburb of Skokie, where many holocaust survivors live, exemplifies this. A judicial order allowing the march can be enforced, with the usual police protection, no matter how intense the opposition to the march.[37]

Even in the free speech area there is precedent for considering the relevance of resistance. For example, as the force of the right decreases, the audience reaction to the exercise of their right becomes relevant in deciding how much of the speech to permit.[38] The principle, debatable as it is at the right declaration stage, takes on greater legitimacy at the remedy selection stage of the litigation. Unless the political institutions become involved in the problems that caused the litigation and the need for an institutional remedy, in the end the inherent limitations of the judicial power will produce a superficial solution.

Gautreaux raises at least four limitations that are inherent in the effort to remedy any truly bad social problem—both from the general fiscal concerns raised by any institutional litigation as well as from the special nature of low income housing policies. Some limitations may be peculiar to Chicago but, by and large, the problems will be faced by attempts to use litigation to reform the provision of public subsidies in any metropolitan area.

34. *See* Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L.J. 1741 (1985).

35. Not surprisingly, the leading case, Gregory v. City of Chicago, 394 U.S. 111 (1969), arose from the decision by the Chicago police to control a school segregation protest demonstration by ordering the demonstrators to disperse.

36. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

37. This is the ultimate lesson of the state and federal litigation precipitated by the efforts of the Village of Skokie to prevent the marches. See G. GUNTHER, *supra* note 10, at 1237-40 for a review and analysis of the litigation.

38. The prime example is the regulation of obscenity, Miller v. California, 413 U.S. 15 (1973), but the Court has also applied the concept to offensive speech such as protected "adult entertainment," Young v. American Mini Theaters, 427 U.S. 50 (1976), and comic monologues filled with "dirty" words, FCC v. Pacifica Found., 438 U.S. 726 (1978).

A. The Depth of Structural Defects in the Program

Post-World War II public housing suffers from two major defects that to date defy solution. Originally public housing was intended as a way station for those on their way out of poverty. Yet the program soon became a permanent way of life by those unable to escape the trap of poverty. Putting tenants in high-rises made the problem worse. The early decision to build stark uniform buildings separated from the surrounding neighborhood reached its apogee in Chicago with the construction of projects such as the Robert Taylor Homes (the largest public housing project in the world), Cabrini Green and the Henry Horner Homes, that represent the perversion of every ideal of the welfare state.[39] The result was to concentrate the poor in new ghettos that aggravated every preexisting social problem. As the 1968 Douglas Commission observed, "[i]n most instances, a project has become little more than an institution for the ill and subnormal, but without the institutional care they need."[40]

Gautreaux was an honorable effort to return public housing to its original purpose, but the structure of the public housing program was too flawed to permit any reform. Scattered site housing is intended to integrate low income families into a neighborhood, but by the time of *Gautreaux*, public housing had become so associated with publicly financed ghettos that the idea of any type of public housing had become unacceptable to all neighborhoods.[41] Public housing represented a powerful, alien force to the surrounding community; its image could not be easily manipulated by changing the design of the structures. No federal housing subsidy or other program was designed to deal realistically with the reasons for neighborhood resistance.

B. The Sophistication of the Remedy

The deeper the underlying social problem, the more sophisticated the remedy must be. This poses a paradox for courts because effective remedies must often violate the basic norms of equality and neutrality that constrain courts. This is illustrated by the difference between what Mr. Polikoff would have liked the court to do and other housing reme-

39. *See* D. BOWLY, JR., *supra* note 1, at 111-35; R. STRUYK, A NEW SYSTEM FOR PUBLIC HOUSING: SALVAGING A NATIONAL RESOURCE (1980).

40. NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 111 (1968).

41. See Williams, *The Dual Housing Market in the Chicago Metropolitan Area*, in HOUSING: CHICAGO STYLE 38 (U.S. Comm'n on Civil Rights 1982) for a brief discussion of the limited efforts of *Gautreaux* orders and related efforts to scatter public housing and federally subsidized housing throughout Chicago and the suburbs.

dies. Mr. Polikoff is, of course, correct to identify residential segregation as a metropolitan-wide problem and metropolitan remedies would meet Professor Shane's third criteria for an effective remedy, the "implicat[ion of] groups other than the plaintiff group in the fate of the plaintiff group," as well as his fifth and sixth.[42] The rub is that any judicial remedy is unlikely to meet Professor Shane's other criteria which are necessary conditions for an effective remedy.

In 1973, the respected political economist and real estate developer Anthony Downs responded to the mounting concern over the lack of racial integration in the suburbs with a provocative book, *Opening Up the Suburbs*.[43] To integrate the suburbs, he proposed an ingenious but perhaps "ethically outlandish"[44] decentralized plan to overcome the social objections to the dispersion of racial minorities. Metropolitan areas would be divided into equal commuting zones so that each community would have to take its share of an assigned risk pool. The number of low income children attending public school in each zone would be limited to twenty-five percent of the total school population. Relocated families would be screened to minimize problem families. Interestingly, the most successful program to spur the construction of low and moderate income housing has taken the Downs assigned risk idea one step further.

New Jersey has had almost two decades of experience dealing with judicial mandates ordering communities to provide low and moderate income housing, *i.e.*, racial and social integration, and the state's experience illustrates the sophistication required for an effective remedy. In two path-breaking decisions, the New Jersey Supreme Court held that each municipality must take its fair share of regional growth,[45] including needed low and moderate income housing. Little was done until the state legislature struck an innovative compromise between aspirational equality and the reality of the problem. A community may partially opt out of its fair share obligation for money. A municipality may enter into a Regional Contribution Agreement with another under which the "host" municipality agrees to accept one-half of the "exporter's" fair share obligation.[46] Newark is undergoing a significant construction boom as a result. Whatever the moral objections, such bribes are an effective way of solving the key defect in any judicial remedy. Courts can-

42. Shane, *supra* note 9, at 566.

43. A. DOWNS, OPENING UP THE SUBURBS (1973).

44. Tarlock, *Book Review*, 83 YALE L.J. 637, 639 (1974).

45. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

46. N.J. STAT. ANN. §§ 52:27D-301, 312 (West 1986).

not directly and systematically distribute wealth, but this is exactly what the regional cooperation agreements do in a manner superior to indirect judicial attempts to do so.

C. *The Comparative Advantage of Market Solutions*

Market solutions are not appropriate for many constitutional violations, but they are for racial discrimination in the location of public housing. The reason is simply that absent government subsidization of low income housing, they are the only attractive alternative. Market solutions also have the advantage of getting to the root of the problem. For example, the recent report of the President's Commission on Privatization concludes "that it no longer makes sense to maintain public housing at some sites. Demolition of some projects will save the government unacceptably high future costs of rehabilitation."[47] The revenues from the sale of existing public housing projects, many of them in the path of rapidly revitalizing areas, could be used to support a housing voucher system to relocate those displaced by project demolition and sale.

Any market solution must, of course, be closely monitored. Public urban renewal in the 1950s and 1960s largely ignored the relocation problem until it was too late. It would be a tragedy to repeat this mistake. Thus, market solutions have to be carefully evaluated to ensure that those displaced by a solution actually receive a subsidy, through vouchers or otherwise, that make some degree of housing choice possible. Public approval of private projects built on the demolished sites would be an appropriate occasion to use "linkage"[48] to provide replacement housing.

D. *The Stickiness and Perverseness of Political Resistance*

Political resistance to racial integration is a given; almost every remedy will have to be enforced in the face of hostile opposition. The problem is to decide which remedies to enforce in light of the impact of the remedy on the fabric of other political institutions. It is appropriate for a court to penalize resistance, as a federal district judge did in the Yonkers,

47. REPORT OF THE PRESIDENT'S COMM'N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 22 (1988).

48. Linkage refers to the widespread practice of tying government land use approvals, zoning and subdivision controls, to the developer's willingness to agree to conditions imposed by the city to redistribute wealth. Cities have long used linkage to compel developers to set aside a percentage of units in a project for low and moderate income families. *See generally Exactions: A Controversial New Source for Municipal Funds*, 50 LAW & CONTEMP. PROBS. 1 (1987).

New York housing desegregation litigation,[49] but subsequent developments in Chicago raise the question of whether the judicial stance should be the same if the resistance comes also from the protected minority. At a minimum, twists such as this suggest the need for the court to monitor and reevaluate any complex remedy that it implements.

After *Gautreaux* other suits were filed in Chicago to open up the political process to blacks and Hispanics. These suits along with population trends accomplished the transfer of political power to the very minorities victimized in *Gautreaux*. Ironically, this ballot box remedy seems to have made the underlying problem worse. In late August of 1988, the Chicago Tribune reported that a plan to replace an existing high-rise project with a new 6000 unit townhouse and low-rise project (combining 900 publicly owned units scattered among the other 5100 units) was opposed by the ward's alderman, a candidate for mayor.[50] He wants the existing project rehabilitated to keep an existing solid black voting block in place; the fear is that blacks will be partially displaced by whites.

IV. CONCLUSION

The *Gautreaux* litigation suggests that the law of constitutional remedies that require fundamental modification of the culture, political power and resources of a community must explicitly recognize that the community's political institutions must play a major role in the implementation of the remedy. This is constitutional heresy to those schooled in the role of the Supreme Court in confronting segregation because it could allow political resistance to override fundamental rights. However, this is not a theory of judicial abdication of judicial responsibility to hold government to the highest standard of the constitutional ideal of racial neutrality. Instead, it is a plea for a notion of remedies that take account of the full institutional limitations of what a court is being asked to do.

Courts have a major role to play in the process of defining basic community norms through the administration of justice. Ultimately, however, when the issue is more complex than the declaration of a fundamental right, decisions about how to share power and resources among different constituencies must come through the political process. A community's political institutions, no matter how imperfect and corrupt they

49. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985). The contempt order is unpublished.

50. McCarron, *Votes Give CHA Slums a Reason for Life*, Chi. Trib., Aug. 30, 1988, at 1, col. 2.

may be, have the primary responsibility to support the commands of the Constitution with action and resources. Thus, in some institutional litigation settings the judiciary must act more like the old testament prophets. Courts are a voice of national moral vision when they adjudicate cases of racial discrimination, but ultimately they are *a* voice forcing the community to confront and remedy its short-comings rather than a complete engine of rectitude.