The essential issue posed by institutional reform litigation is the capacity of courts to deal responsibly with remedial requests that in effect require them to reorganize significant institutions of government. Can courts assess and weigh the budgetary consequences of their decisions? Can they obtain and absorb the relevant social science materials? Can they supervise, and often administer, the remedial steps they order to be taken?

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

Gautreaux v. Chicago Housing Authority—a case that has lasted over two decades and has involved two of our major housing institutions, a large, central city public housing authority and the U.S. Department of Housing and Urban Development—would seem to be a suitable object upon which to focus the lens.

The Case Against Chicago Housing Authority

During the hot summer of 1966, Dr. Martin Luther King, Jr., marched for open housing in Chicago. Each day King was met by crowds of hecklers, sometimes with bricks and rocks. One day a mob of 4000 whites overturned marchers' cars into the Marquette Park Lagoon. On another, Dr. King was knocked to the ground by a rock thrown from a mob. As he stood up and regained his bearings, King was said to have remarked: "The people of Mississippi ought to come to Chicago to learn how to hate."

The threat that Chicago would be turned into a battlefield led to the so-called "Summit Meeting" held in Chicago's Episcopal Cathedral of St. James in August of that year. Participants included Mayor Richard J. Daley, Dr. King, and leaders of Chicago's civic and business establishments and of the Chicago Freedom Movement. After heated, on-again, off-again discussions, an agreement was reached that ended the marches and created a new organization, the Leadership Council for Metropolitan Open Communities, to oversee implementation of the Summit Meeting promises. One of those promises was that the Chicago Housing Authority ("CHA") would no longer build public housing exclusively in black neighborhoods.
The Summit Agreement's CHA plank derived from a long history. Before World War II, public housing had been rigidly segregated. In black neighborhoods, projects were for blacks; in white neighborhoods, for whites. After the war, the Housing Act of 1949 authorized a huge new public housing construction program. Because the black population of the central cities had grown enormously during the war years and had continued to increase in the 50s and early 60s, in the larger cities the new public housing would serve a heavily black clientele. In the mores of the times it was therefore put in black neighborhoods. Also in the mores of the times, many of the newer projects were high-rises; costs were to be kept low by putting more and more apartments into taller and taller buildings.

By the early 1960s this prescription for social disaster had been written in a number of Chicago neighborhoods. Thousands of high-rise public housing apartments were built in black communities, and tens of thousands of people, mostly blacks, moved in. The nine towers of Robert Taylor Homes, sixteen stories high, housing 20,000 people, were only the most noticeable.

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

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

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

Both cases were assigned to Judge Richard B. Austin, a former prosecutor with a direct manner. When the theory of the suits was first explained to him, Judge Austin immediately asked, "Where do you want them to put 'em [CHA projects]? On Lake Shore Drive?" The judge soon ruled that allegations of purposeful discrimination were required to sustain a cause of action under the fourteenth amendment. He therefore dismissed the "effect" counts of the complaint against CHA. He also apparently concluded that one such complicated case at a time was enough. In June 1967, on its own motion, the court stayed all proceedings against HUD until disposition of the CHA case.

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

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

Judge Austin found that the statistics alone proved a deliberate intention to discriminate, for "[n]o criterion, other than race, [could] plausibly explain" the location of CHA's projects. The testimony of CHA officials corroborated this conclusion, demonstrating that "CHA follows an unvarying policy...of informally [pre­] clearing each [potential] site with the Alderman in whose Ward the site is located and eliminating each site opposed by an Alderman."

Judge Austin specifically held that CHA could not escape liability on the ground that "practical politics...compelled CHA to adopt the pre-clearance [policy] which was known by [it] to incorporate a racial veto." The judge added, however, that even if CHA had not participated in this informal elimination of white-area sites, CHA officials were bound by the Constitution not to build on sites chosen by some other state agency on the basis of race.

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

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

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

CHA argued strenuously that an injunction against future discrimination, coupled with a “best efforts” undertaking to do what it could to remedy the discriminatory conduct, was the only type of order that should be entered against it. It protested vehemently against the remedial scheme advanced by the plaintiffs—to identify the predominantly white and predominantly black areas of the city and to direct CHA to build future public housing in both areas, in a ratio of three apartments in white neighborhoods to one in black. The plaintiffs’ goal was to redress, over time, the existing numerical imbalance in favor of public housing sites located in black neighborhoods.

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

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

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

There then ensued two more lengthy periods of frustration. During the first, from 1974 to 1979, CHA—now freed of City Council restraints, but still fortified by public opposition—found one excuse after another for not producing housing. During the entire five-year period, only 117 new public housing apartments were provided in accordance with the court’s 1969 order. Angered by this snail’s pace, Judge Austin appointed a Special Master to “determine and identify the precise causes of the five-year delay in implementing my judgment orders, and to recommend a plan of action.” After several years of hearings, the Special Master issued a report that was strong on rhetoric lambasting CHA but lacking in specific enforcement recommendations.

In 1979, as part of an arrangement that changed the original three-to-one ratio, Chicago’s newly-elected Mayor Jane Byrne offered mayoral support for the scattered-site program. Nevertheless, despite this nominal support, little was accomplished during the next five years, thanks to continuing neighborhood opposition, a surreptitious mayoral go-slow policy, and incompetence at CHA.

So unhappy was the situation that twice the plaintiffs’ attorneys sought to have a receivership imposed upon the scattered-site program, once in 1979–80, and again in 1983–84. Though in each instance the judges roundly castigated CHA, a receivership was denied. (By now, Judge Austin had resigned because of a terminal illness and the case had been assigned first to Judge John Powers Crowley and, after his resignation from the bench, to Judge Marvin E. Aspen, whom the case remains.) Only a few hundred additional units were added to the scattered-site program during this five-year period, and, as it turned out, even these few units were accompanied by enormous waste because of CHA’s bungling of the rehabilitation work.

In mid-1984, with a new executive director under a new mayoral admin-
istration—Harold Washington's—which supported a scattered-site policy, CHA began for the first time to try in earnest to develop scattered site housing. Now, however, incompetence replaced intransigence. Although a number of units were provided under the new administration, primarily through rehabilitation of acquired buildings, CHA failed to get adequate authority from HUD for the large amounts of money it began to expend on the rehabilitation work. When the expenditures had amounted to almost $30 million, none of which HUD was willing to reimburse (primarily because of inadequate CHA documentation of its expenditures), CHA was forced to come to court and plead for permission to suspend the scattered-site work lest it bankrupt the agency.

This was the last straw. Acting against the background of the two previous receivership hearings, Judge Aspen now appointed a receiver to take over the development of CHA's scattered-site units. The receivership became effective on December 2, 1987. By the present writing, this chapter in the saga of "Waiting for Gautreaux" is about to begin.

The nineteen years since Judge Austin first ruled that CHA had violated the Constitution make the Gautreaux remedial story a fertile one for raising questions about institutional litigation. Although the court had relatively little housing in place to show for its efforts, it had nonetheless taken away a power granted to the City Council by state law. In its frustration, the court had also appointed a Special Master who held hearings for over four years to little effect. Finally, the court had conducted three separate receivership hearings before finally appointing a receiver to take over work that CHA should have completed long ago. Did the Gautreaux court attempt too much? Or did it merely perform poorly a task it properly undertook? How great was the cost to society of the spectacle of nearly two decades of frustration of court orders? How great would the cost have been had the court, having found a wrong, not tried to provide an effective remedy?

The Case against the Department of Housing and Urban Development

Before addressing those questions, the reader may wish to look at the other part of the Gautreaux remedial story, which is considerably different. For that we must return to the case against HUD which had been stayed in 1967 on Judge Austin's own motion.

Following entry of the judgment order against CHA in July 1969, the plaintiffs sought to take the HUD case out of the deep freeze into which Judge Austin's stay order had placed it. In October 1969, they moved for summary judgment against HUD, but Judge Austin dismissed the complaint instead, ruling—quite incorrectly—that he had no jurisdiction over a suit that rested not upon statutes but directly upon the Constitution. Perhaps the true ground of Judge Austin's thinking is captured in this paragraph of his opinion: "This Court does not have jurisdiction to direct and control the policies of the United States and the government must be permitted to carry out its functions unhampered by judicial intervention."

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

On remand the plaintiffs pointed out that in administering federal housing programs HUD employed the concept—and geography—of a "housing market area" which was not confined to a single local political jurisdiction such as Chicago. They argued that there were strong policy reasons for painting the Gautreaux remedial scheme on such a metropolitan canvas.

The plaintiffs contended that the predominantly suburban location of employment opportunities was an important factor an equity court had to take into account in determining the form of relief to be provided. Similarly, they argued, the district court could take into account educational and other considerations. Citing a report of the respected Advisory Commission on Intergovernmental Relations, the plaintiffs pointed out that children of the plaintiffs' class attended largely
segreted Chicago schools while most suburban schools remained overwhelmingly white, noting that “on the educational front, the central cities are falling further behind their suburban neighbors with each passing year... [and] urban children who need education the most are receiving the least.”

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

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

As the Gautreaux case against HUD worked its way through the courts, litigation raising an analogous issue of metropolitan relief had been proceeding in the Federal District Court for the Eastern District of Michigan. Having found Detroit’s public schools to be unlawfully segregated and the State of Michigan partly responsible, the district judge in Bradley v. Milliken ordered the participation of suburban school districts—as agencies of the defendant state—in remedying the segregation in Detroit schools. He did so by establishing a desegregation panel and ordering it to prepare a remedial plan consolidating the Detroit school system and fifty-three suburban school districts. Shortly before Judge Austin’s 1973 judgment order against HUD, the Sixth Circuit Court of Appeals affirmed the district court decision in Milliken saying, “Like the District Judge, we see no validity to an argument which asserts that the constitutional right to equality before the law is hemmed in by the boundaries of a school district.”

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

This doctrine, it was argued, stemmed from Ex parte Virginia, in which the Supreme Court had said that whoever denied equal protection of the laws by use of a state governmental position, acting in the name of and for the state, was clothed with the state’s power and therefore “his act is that of the State.” Were this not so, Virginia reasoned, the state would have “clothed one of its agents with power to annul or to evade [the constitutional prohibition].” More recently, in Avery v. Midland County, the Supreme Court had reaffirmed this principle, stating that “although the forms and functions of local government and the relationships among the various units are matters of state concern... actions of local government are the actions of the State.”

In June 1974, the Supreme Court reversed the Milliken decision by a 5-4 vote. Saying that school district lines could not be “casually ignored or treated as a mere administrative convenience” because they created separate independent governmental entities responsible for the operation of autonomous public school systems, the Court held that there had to be either an “interdistrict violation” or “interdistrict effect” before a federal court could order the crossing of district boundary lines.

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

The federal government's petition for certiorari posed the issue succinctly: "Whether, in light of Miliken v. Bradley ... it is inappropriate for a federal court to order inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation." In the argument before the Supreme Court, then Solicitor General Robert Bork said: "It is very dangerous to say that any time a federal agency does anything wrong in any locality, because the federal agency has jurisdiction over a very wide area, the federal agency can be asked to sweep in the residents of that entire area, although they were not involved in any wrongdoing in any shape or form."

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

The Court's opinion, however, made clear that government agencies other than HUD and CHA—housing authorities as well as municipalities—could not be forced by such an order to participate in remedial arrangements: "[A] metropolitan relief order directed to HUD would not consolidate or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land-use laws. The order would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system created by CHA and HUD." 

Miliken, as explained in Gautreaux, may come to be regarded as a watershed decision not just in the history of federal remedial jurisprudence, but in the history of post-World War II America. The problems facing cities today necessitate metropolitan solutions. By precluding federal courts from addressing those problems in a realistic way, Miliken and (by virtue of its refusal to limit Miliken to its school district consolidation context) Gautreaux made a historic, limiting choice that has undoubtedly shaped the development of our metropolitan areas in a critical way.

The stated rationale for Miliken's result is opaque. The Supreme Court's affirmation (per curiam) of Hall v. Saint Helena Parish School Board appeared to solidify the doctrine that the state could not avoid its federal constitutional responsibilities by fragmentation of decision making, or "carve-outs" of local governmental units. Yet in Miliken, as explained in Gautreaux, the Court imposed limits "on the federal judicial power to interfere with the operation of state political entities that were not implicated in unconstitutional conduct." Prior cases defining such limits, according to Miliken and Gautreaux, "had established that such [constitutional] violations are to be dealt with in terms of 'an established geographic and administrative school system.' ..." However, the "prior cases" referred to by the Court were school desegregation cases in which remedial measures were discussed without reaching the Miliken question concerning the propriety of involving "innocent" subordinate entities (e.g. school districts) of a "guilty" state. It was of course true, as the Miliken opinion said, that each of these cases "addressed the issue of a Constitutional wrong in terms of an established geographic and administrative school system." But it was distinctly not the case, as Gautreaux now implied, that these cases required the issue of constitutional remedy to be dealt with within that self-same system.

The Gautreaux Housing Program

Following the Supreme Court's opinion, HUD and the plaintiffs agreed on a plan that forestalled further litigation in the district court. In June 1976, they entered into a written agreement, later extended and modified, under which HUD was to create and fund a demonstration program using the Section 8 rental subsidy program to provide "Gautreaux families" with subsidized housing opportunities throughout the metropolitan area. The essential framework of the understanding was that the Leadership Council for Metropolitan Open Communities (the very organization created by the Summit Meeting ten years earlier) would be funded by HUD to provide counseling and related assistance to Gautreaux families to enable them to take advantage of the Section 8 program, and to persuade landlords to make Section 8 housing opportunities available to Gautreaux families. An allocation of Section 8 certificates was to be provided for this purpose.
In a subsequent modification of the agreed-upon arrangements, HUD took the important additional step of agreeing that all Section 8 funding in the Chicago metropolitan area for the construction or rehabilitation of apartments would be conditioned on the requirement that developers agree to make a percentage of the apartments in each proposed new development available to the Leadership Council for Gautreaux families. This had the important effect of opening up a "pipeline" of new units to Gautreaux families throughout the metropolitan area, for few developers were willing to forgo federal funding even though to receive it they had to make apartments available to public housing families. Eventually, these arrangements matured into a consent decree with HUD, approved by the district court in June 1981, which formalized and somewhat expanded the informal arrangements. The consent decree was affirmed on appeal in September 1982 and has been in effect ever since.

Under the Gautreaux Demonstration Program, as it was initially called, and the consent decree arrangements which followed, the Section 8 Gautreaux program administered by the Leadership Council has now been in effect for almost twelve years. During that time over 3,500 Gautreaux families have been placed in Section 8 apartments throughout the metropolitan area, slightly more than half of them in the suburbs. The experience of the families has been studied, first by HUD in 1979, then several years later by researchers from Northwestern University who focused upon the educational experiences of Gautreaux family children in their new suburban schools. The evaluations were surprisingly positive. HUD's study concluded that "most of the families (84 percent) who moved to the Chicago suburbs with rental assistance from HUD were satisfied with their moves, pleased with their new neighborhoods, their housing, public services, and particularly their schools, and felt the quality of their lives had improved."

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

In the more recent study by Northwestern University, the researchers concluded that the children of Gautreaux families were by and large doing much better than would have been expected in their new educational environments. Despite occasional bigotry, they were doing satisfactorily in academics and were well motivated. A Chicago Tribune editorial on the Northwestern report said:

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

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

A number of mothers did give up and returned to the city. But a very high percentage did not. By contrast with the stereotypical image of the welfare mother, many of these women have made incredible sacrifices so that their children would have opportunities they themselves had lacked.

Though a small number in relation to the size of the Gautreaux class, the 3,500 families who have so far received Section 8 relief under Gautreaux, as many as 10,000 persons, constitute a non-negligible provision of effective relief to Gautreaux families. The experience of these families contrasts signif-
Incidently with the long period during which the CHA scattered-site program produced virtually no relief at all.

**Reflection**

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

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

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

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

It is a prudential question for judges to decide in each case where to strike the balance between trying too much and trying too little. But it may come at some cost to the judiciary, and to society, if the decision is never to try at all. Though courts may preserve respect by not undertaking what they are ill-fitted to do, they may lose respect by appearing to be powerless to undertake any remedy of adjudicated wrongs. Democracy cannot thrive in a bed of cynicism, and a perception of powerlessness to undertake remedies may undermine respect for the judiciary just as much as a perception of inability to carry out remedial undertakings. The issues may be particularly acute in housing discrimination, an area that poses an especially challenging problem for America. We may close by putting the *Gautreaux* case into this somewhat larger frame.

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

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

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

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

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

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

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

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