

Fall 1994

Rewriting Beginnings: The Lessons of Gautreaux, 28 J. Marshall L. Rev. 57 (1994)

Janet Koven Levit

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Consumer Protection Law Commons](#), [Housing Law Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Janet Koven Levit, *Rewriting Beginnings: The Lessons of Gautreaux*, 28 J. Marshall L. Rev. 57 (1994)

<https://repository.law.uic.edu/lawreview/vol28/iss1/2>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

REWRITING BEGINNINGS: THE LESSONS OF GAUTREAU

JANET KOVEN LEVIT*

We arrive at a historical juncture. A child of the sixties and seventies, the structural injunction approaches maturity. As the empirical results of structural reform efforts surface, we face a unique opportunity to reassess the remedial process from beginning to end.

Can happy endings resuscitate murky beginnings? When the *Gautreaux* litigation began in 1966, few believed that the courts could remedy the seemingly intractable racial discrimination plaguing Chicago's public housing system. As remedial efforts faltered throughout the 1970s, critics began to prey upon *Gautreaux* as a prototypical example of the legal problems inherent in court-ordered structural reform. Today, in contrast, the policies *Gautreaux* ultimately embraced are lauded nationally. The *Gautreaux* Program has effectively relocated over five thousand minority, low-income families in integrated areas throughout the Chicago metropolitan area. These families are reaping unanticipated economic and social benefits, including educational advancement and promising employment opportunities. While these policy successes are impressive, they do not squarely redress the legal criticisms of *Gautreaux*.

This Article will revisit *Gautreaux's* beginnings to discern precisely how, if at all, happy endings can be harnessed to recast its beginnings. This project assumes urgent significance as the courts in Hartford¹ and Westchester counties² craft remedies em-

* Law Clerk, Chief Judge Stephanie K. Seymour, U.S. Court of Appeals, Tenth Circuit. J.D. Yale Law School, 1994; M.A. Yale University, 1994; A.B. Princeton University, 1990. This author is grateful to Professor Owen Fiss and Professor George Priest for their guidance throughout the writing of this piece. A special thank you to Kenneth J. Levit for his loving assistance from this Article's inception to its publication.

1. In the case of *Sheff v. O'Neill*, a Connecticut Superior Court judge is expected to employ *Gautreaux*-type remedies to affect housing integration. See generally George Judson, *School Integration: Summing Up the Case; For the Plaintiffs: At Issue, Lack of an Equal Education*, N.Y. TIMES, Dec. 12, 1993, 13CN at 14; George Judson, *Step by Step, the State Moves Toward Integration*, N.Y. TIMES, June 13, 1993, 13CN at 1.

2. As part of the settlement in a housing discrimination suit, a federal district court judge approved a consent decree on September 28, 1993 which created a *Gautreaux*-like program. Joseph Berger, *Deal Reached in Westchester Housing Suit*,

ploying *Gautreaux*-type programs. To deflect challenges to their legitimacy, these courts may refer to *Gautreaux's* successes. Although this tactic may prove effective, it obscures the precise relationship between the legitimacy of the courts' remedial efforts and the efficacy of the ensuing policy. In rigorously dissecting *Gautreaux's* successes, this Article illustrates exactly how *Gautreaux's* endings bear on the legitimacy of its beginnings.

The courts employed a structural injunction to remedy Chicago's constitutionally unsound public housing policies. The structural injunction, which will be discussed in Part I, is the remedy that most frequently results from public law litigation, where a plaintiff class challenges a particular governmental policy. While the structural injunction has been used in a variety of contexts, including school desegregation, the environment, corrective justice, and housing desegregation, scholars question the legitimacy of such judicial action and the efficacy of the resultant policies. These critiques inevitably force the judge into the forefront of discussion, narrowly shaping the way in which the structural injunction is conceived by ignoring a host of inter-institutional relationships.

This Article proposes a vision of the structural injunction that is more robust than that previously offered. Traditionally, the structural injunction has been envisioned as a mere nexus between a judge and an institution implicated in some constitutional violation. But the judge's substantive ambition, rectifying constitutional violations, also sets a group of institutions into play, vying for power. Sometimes as an intended result, but more frequently as an unintended consequence, the judge's remedial efforts effect significant inter-institutional redistributions of power. Using *Gautreaux* as a case study, Part II of this Article will revive the inter-institutional dimension of the structural injunction.

Part II begins by sketching the institutional landscape of housing policy in Chicago as it existed immediately prior to *Gautreaux*. Although aimed primarily at integrating public housing, the *Gautreaux* remedy had the secondary effect of disrupting the institutional status quo and catalyzing a redistributive process that passed power from the Chicago City Council to the Chicago Housing Authority (CHA) to the U.S. Department of Housing and Urban Development (HUD) and, finally, to the private sector. In the end, the *Gautreaux* structural injunction forged a new institutional status quo.

In highlighting the inter-institutional and related temporal dimensions, this Article shifts the structural injunction's image from one that is unidimensional to one that is multidimensional,

from one that is static to one that is dynamic, and from one that is judge-centered to one that is equally institution-centered. In light of this reorientation, Part III will revisit the legitimacy and efficacy critiques. *Gautreaux's* critics frequently offered premature conclusions that discounted inter-institutional dynamics. To comport with the structural injunction's multidimensional complexity, each critique's temporal and peripheral frame of reference must be expanded. This realignment helps alleviate legitimacy concerns by emphasizing redistributive processes rather than particular moments of judicial intervention. Once the efficacy critique is recast, *Gautreaux* appears highly effective, forging a new institutional status quo that effectively sustained an innovative approach to public housing.

Efficacy and legitimacy are related. In providing a vantage point from which to make legitimacy assessments, effective reconfiguration of the institutional status quo is a necessary precursor to any legitimacy inquiry. The policy successes that spurred interest in this Article are legally relevant only to the extent that they helped solidify the new institutional status quo. Even then, such institutional reconfiguration merely provides the requisite foundation from which the legitimacy inquiry can progress. While happy endings may be an excuse to re-evaluate murky beginnings, these endings do not dictate the outcome of such inquiries.

I. PUBLIC LAW LITIGATION, THE STRUCTURAL INJUNCTION AND LEGITIMACY

The *Gautreaux* saga is an example of "public law litigation."³ This section will briefly compare traditional litigation and public law litigation, with particular emphasis on remedies. Scholars frequently question the legitimacy and efficacy of the structural injunction, and this section will also examine the substance of these critiques. But these critiques are also significant for the way they have framed the debate. In focusing on the judge's alleged usurpation of legislative prerogative and the judge's competency to effectuate such remedies, the debate has thrust the judge into the forefront of discussion and discounted the importance of the institutional backdrop.

A. *Public Law Litigation versus Dispute Resolution*

Public law litigation and dispute resolution are distinct models of adjudication.⁴ While courts employ dispute resolution to

3. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

4. See *id.* at 1284; Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAVIOR 121, 122 (1982) [hereinafter *Social and Politi-*

vindicate private rights, public law litigation vindicates public, constitutional rights. Public law litigation, therefore, becomes a means by which to effect normative change.⁵ This stands in stark contrast to traditional dispute resolution where the offending party makes the victimized party whole without disrupting the legal status quo.⁶

Dispute resolution involves two parties, a plaintiff and a defendant while the judge plays the role of "umpire."⁷ The relationship between the plaintiff and the defendant is adversarial, and the judge remains isolated from the dispute. In public law litigation, the party structure is not bipolar, but rather multipolar, with plaintiff classes defined by a common characteristic, such as race, sex, or interaction with a particular governmental institution.⁸ Defendant public institutions replace individual defendants.⁹ The trial judge plays an active role in the evolution of the litigation, frequently intermingling with the very institutions which are the sources of the alleged constitutional violation. For example, the judge actively participates in fact-finding efforts and even employs special masters, amici, or advisory councils to help with this task.¹⁰

Finally, the remedies differ dramatically. In traditional dispute resolution the remedy is retrospective and, therefore, is limited to the two individual parties. In public law litigation the remedy is prospective, commonly known as the structural injunction.¹¹ The structural injunction, as opposed to the traditional damages award, is not confined to the parties involved but rather seeks to avenge a constitutional violation by restructuring the public institution at the heart of the constitutional violation.¹² The structural injunction is usually negotiated between some or all of the parties and the judge and, in this respect, also differs from the judge-imposed remedy associated with more traditional forms of adjudication. Finally, the structural injunction does not terminate the lawsuit, as imposition of a damages award would.¹³ The

cal Foundations].

5. Fiss, *Social and Political Foundations*, *supra* note 4, at 124.

6. *Id.*

7. See generally Donald L. Horowitz, *The Judiciary: Umpire or Empire?*, 6 LAW & HUM. BEHAVIOR 129 (1982) [hereinafter *Umpire or Empire?*] (discussing the functions that courts can reasonably be expected to perform).

8. Chayes, *supra* note 3, at 1302; Fiss, *Social and Political Foundations*, *supra* note 4, at 122-23.

9. Fiss, *Social and Political Foundations*, *supra* note 4, at 122-23.

10. Chayes, *supra* note 3, at 1297-98.

11. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 7 (1978); OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 528 (2d ed. 1984).

12. Chayes, *supra* note 3, at 1302.

13. FISS & RENDLEMAN, *INJUNCTIONS*, *supra* note 11, at 528; see generally FISS, *THE CIVIL RIGHTS INJUNCTION*, *supra* note 11.

structural injunction marks the beginning of a long relationship between the judge and the implicated institutions—a relationship that will last until reorganization of the institution is completed in conformity with the structural decree.

B. *The Structural Injunction's Critics*

Scholars often critique the structural injunction in terms of legitimacy and efficacy. These critiques respectively ask: Is the judge exceeding her constitutionally prescribed role in ordering the structural remedy? Can the judge effectuate the remedy she chooses to impose? The following section will examine the substance of these critiques.

1. *The Legitimacy Critique*

Critics question the legitimacy of the structural injunction by arguing: 1) the judge violates separation-of-powers principles; and 2) the judge employs countermajoritarian tactics.

The structural injunction frequently is viewed as an illegitimate judicial foray into legislative or executive terrain.¹⁴ According to these critics, the courts engage in legislative functions by altering policy direction and setting budgetary requirements. Professor Donald Horowitz contends that “[i]n the shaping of new rules to govern a variety of institutional settings, courts have been engaged in legislation without the benefit of a legislative process.”¹⁵ Likewise, Professor Robert Nagel argues that the courts have exercised “legislative functions by setting policy standards for the operation of federal programs, including the setting of budgetary requirements.”¹⁶ Courts encroach upon executive functions in appointing officers that are directly accountable to the judge, administering programs and/or bureaucracies, and delineating detailed administrative procedures. Nagel contends

14. Chayes recognized that separation of powers principles would fuel the attack when he first articulated his model of public law litigation, noting that “[o]ne response to the positive law model of litigation would be to condemn it as an intolerable hodge-podge of legislative, administrative, executive, and judicial functions addressed to problems that are by their nature inappropriate for judicial resolution.” Chayes, *supra* note 3, at 1304.

For the purposes of this Article, I assume that separation of powers can be violated by the federal judiciary intruding on a state's legislative or administrative domain. See Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 673 (1978).

15. Horowitz, *Umpire or Empire?*, *supra* note 7, at 136; see also Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1289 [hereinafter *Decreeing Organizational Change*] (discussing, particularly, the resource-oriented foray into the legislature's functions).

16. Nagel, *supra* note 14, at 662.

that by "appointing executive and quasi-executive officers responsible to the judiciary and by determining administrative processes in elaborating detailed decrees," the judge has usurped executive powers.¹⁷

While these scholars believe the structural injunction illegitimately empowers the judiciary at the expense of other branches of government, they do not believe that the structural injunction is inappropriate in all circumstances. A structural injunction used as the remedy of last resort¹⁸ or promulgated with due deference to the other branches¹⁹ can be legitimate.

Scholars also argue that the structural injunction heightens the "counter-majoritarian difficulty."²⁰ In exercising quintessentially legislative functions, the judiciary imposes the will of a few judges on issues designed for majoritarian policymaking.²¹ In other words, legislating via judicial decree is inherently anti-democratic. When the federal judiciary invades state or local legislative functions, this anti-democratic claim is often invoked to decry the removal of decision-making power from "grass roots" levels of government.²²

2. *The Efficacy Critique*

A prospective efficacy critique is often intertwined with questions of legitimacy. Efficacy critics believe the judge is ill-equipped to effectuate a structural injunction, arguing that while the courts may have certain comparative advantages, management of complex, institutional reform is not one of them.²³ These critics argue

17. *Id.* at 662; see also Horowitz, *Umpire or Empire?*, *supra* note 7, at 137.

18. PETER H. SCHUCK, *SUING GOVERNMENT* 189 (1983).

19. Nagel, *supra* note 14, at 719. The degree of deference is measured by: the depth of the intrusion into another branch's activities, the breadth of the intrusion, the level of detail included in the structural decree, and the length of time over which a particular decree governs. *Id.* at 720-21.

20. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (2d ed., Yale Univ. Press, 1986) (1962).

21. See, e.g., Paul S. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 958 (1978) ("[Institutional litigation] can be used essentially to bypass majoritarian political controls. . . . What I am referring to here is the use of litigation by parts of the majoritarian government in order to bypass the legislature or even the electorate").

22. Nagel argues, for example, that "[t]he substitution of government by the federal judiciary for local self-government involves dangerous disproportionality; it sacrifices fundamental democratic values in order to vindicate particular constitutional rights." Nagel, *supra* note 14, at 664.

23. Not surprisingly, these efficacy concerns have generated prescriptive scholarship aimed at maximizing the courts' effectiveness. See generally Robert E. Easton, Note, *The Dual Role of the Structural Injunction*, 99 YALE L.J. 1983 (1990); Karla Grossenmacher, Note, *Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist*, 80 GEO. L.J. 2227 (1992); Robert A. Katzmann,

that the judiciary simply does not have the infrastructure, resources, or data-collecting capacity to craft remedies effectively, only causing disappointment and frustration during implementation. Horowitz claims, "There is no reason to expect . . . that the least bureaucratized of the branches of government—and the most accustomed to automatic unswerving obedience to orders—will be particularly adept at management tasks."²⁴ Other observers argue that "the courts are incapable of collecting and interpreting the data needed to determine whether and how to alter the programs and processes of public bureaucracies."²⁵ The courts can, and do, employ the help of special masters, receivers, and advisory councils, but the effectiveness and efficiency of such auxiliaries have also been the subject of dispute.²⁶ Others argue that the judge, comfortable with dispute resolution, does not ask sufficiently broad questions in fashioning remedies and, therefore, imposes an improper remedy: "[B]ecause adjudication is concerned with legal relationships—rights and obligations—judges generally overlook the feasibility of remedies and thus do not try to ascertain how decisions will affect, or be affected by, the broader social and political milieu."²⁷ The efficacy critics focus on empirical outcomes and conclude that the results are sub-optimal.

C. Deflating the Structural Injunction

The efficacy and legitimacy critiques mask an important dimension of the structural injunction. In asking questions of judicial propriety and judicial efficacy, the critics have forced the judiciary into the forefront of scholarly debate, narrowly sculpting the essence and meaning of the structural injunction. Horowitz writes, for example, that the structural injunction demands that governmental bodies "comport with standards announced in the underlying *judicial decisions*."²⁸ Others have characterized struc-

Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513 (1980).

24. Horowitz, *Decreeing Organizational Change*, *supra* note 15, at 1304; see also Horowitz, *Umpire or Empire?*, *supra* note 7, at 134 (claiming that structural injunctions "tend to tax the machinery of the courts up to, and frequently beyond, its present limits").

25. Katzmann, *supra* note 23, at 514-15 (citing DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* 48 (1977)).

26. See generally David L. Kirp & Gary Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313 (1981) (discussing the legitimacy of utilizing the services of a master in an institutional reform case).

27. Katzmann, *supra* note 23, at 515 (citing DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* 34-35 (1977)); see also SCHUCK, *supra* note 18, at 185 (arguing that courts will not think strategically about intrusive remedies).

28. Horowitz, *Decreeing Organizational Change*, *supra* note 15, at 1266-67 (em-

tural litigation as that in which "[f]ederal judges mandate basic reordering of bureaucratic institutions."²⁹ Even those scholars, such as Professor Owen Fiss, who champion the structural injunction, view the remedy as "the formal medium through which *the judge* directs the reconstruction of a bureaucratic organization."³⁰ The judge-centered approach to the structural injunction, focusing on the ability or propriety of the judge's actions, obscures an equally important inter-institutional dimension. As the following discussion of *Gautreaux* will illustrate, the structural injunction can and should be viewed through an institutional, as well as a judicial, lens, focusing not only on the relationship between judge and institution, but also on the relationship among the various institutions themselves.

II. THE GAUTREAUX DECISION

By the early 1960s, public housing in Chicago was highly segregated.³¹ The CHA's unyielding commitment to high-rise public housing aggravated the concentration of minority residents.³² Despite frequently voiced opposition to such discriminatory practices throughout the late 1950s and early 1960s, the CHA responded by expediting construction of high-rise units in black neighborhoods.³³ This prompted Dr. Martin Luther King, Jr. to lead a march for open housing in Chicago during the summer of 1966. Such tension, set against the powerful backdrop of *Brown v. Board of Education*,³⁴ culminated in the *Gautreaux* litigation, filed in August, 1966.

In *Gautreaux*, a class of black applicants for and residents of Chicago public housing, represented by named plaintiff Dorothy Gautreaux, filed simultaneous 42 U.S.C. § 1981 and § 1983 suits against the CHA and HUD. The plaintiff class alleged that the CHA violated the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964³⁵ by "intentionally" choosing sites "for the purpose of maintaining existing patterns of residential separation of

phasis added).

29. Robert A. Shapiro, Note, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 YALE L.J. 231 (1989) (emphasis added).

30. Fiss, *Social and Political Foundations*, *supra* note 4, at 121 (emphasis added).

31. See, e.g., Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451, 452 (1988) (discussing the practice of the CHA of building public housing in areas predominantly populated by African-Americans).

32. See generally DEVEREUX BOWLY, JR., *THE POORHOUSE: SUBSIDIZED HOUSING IN CHICAGO, 1895-1976* (1978); ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960* (1983).

33. Polikoff, *supra* note 31, at 453.

34. *Brown v. Board of Education*, 347 U.S. 483 (1954).

35. Civil Rights Act of 1964, Title VI, § 601, 42 U.S.C. § 2000d (1988).

racism.³⁶ The plaintiff class further alleged that “in funding and approving CHA’s racially discriminatory programs,” HUD violated the Due Process Clause of the Fifth Amendment and Title VI of the Civil Rights Act of 1964.³⁷ The district court stayed all proceedings in the HUD case pending a final disposition of the companion CHA case.³⁸

In both suits, the court found the relevant housing agency liable for discriminatory housing practices. Judge Austin found that the CHA had deliberately chosen sites in a discriminatory fashion, in violation of the Fourteenth Amendment,³⁹ and that “[n]o criterion other than race [could] plausibly explain” the location of CHA projects.⁴⁰ Once he reopened the case, Judge Austin dismissed the charges against HUD. The Seventh Circuit reversed his decision, concluding that “HUD’s knowing acquiescence in the CHA’s admitted[ly] discriminatory housing program” violated the Due Process Clause of the Fifth Amendment.⁴¹ While these decisions resolved questions of liability, the question of remedy remained.

The courts chose to employ a structural injunction. But the judiciary’s substantive efforts to redress constitutional wrongs also dislodged the existing institutional status quo, forcing a redistribution of power and ultimately forging a new institutional status quo.

A. *Pre-Gautreaux Institutional Status Quo*

Pre-Gautreaux, when public housing policy was synonymous with the notorious high rise projects, most power rested with local governments. For the purposes of this Article, power means control over decision-making processes. Decision-making power can be disaggregated into three general categories: policy decisions, financing decisions, and implementation decisions. Housing policy decisions, in turn, demand answers to the following questions: Will housing be made available for low-income families? What type of housing will be made available for low-income families? Where will that housing be located? In what quantities will the

36. *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 908 (N.D. Ill. 1969).

37. *Gautreaux v. Romney*, 448 F.2d 731, 733 (7th Cir. 1971).

38. *Hills v. Gautreaux*, 425 U.S. 284, 287 (1976); *Gautreaux v. Romney*, 448 F.2d at 733. Following the district court’s decision to bifurcate the suit, this Article will disaggregate *Gautreaux* into its CHA and HUD components. The “CHA remedy” will refer to the remedy in the CHA prong of the suit—the court-ordered scattered-site program. The “HUD remedy” will refer to the various market-based policies, solidified in the consent decree, that came to be known as the *Gautreaux Demonstration Program*.

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

40. *Id.* at 912.

41. *Gautreaux v. Romney*, 448 F.2d at 737.

housing be made available? Financing decisions involve allocating scarce resources to underwrite the cost of the policy decisions. Implementation decisions concern the matching of those in need of low-income housing with the low-income housing available, as well as day-to-day administration of the public housing.

Before the *Gautreaux* suit, public housing authorities (PHAs) and local legislative bodies controlled all policy and implementation decisions, while the federal government controlled financing decisions. This institutional arrangement was explicitly sanctioned in the Housing Act of 1937: "It is the policy of the United States to . . . vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs."⁴²

Virtually unconstrained by federal statute, the CHA enjoyed broad discretion over public housing policy. The CHA's power to "prepare" and "carry out" housing projects,⁴³ coupled with its power to determine housing needs,⁴⁴ provided the CHA with significant leeway to answer all the crucial policy questions. Before a housing project could be built, the following had to be completed at the CHA's initiative: 1) selection of sites and development of an accompanying proposal; and 2) submission of sites and proposal to the local legislature for approval. The CHA's site selection policies were governed, in part, by HUD regulations, but these regulations were relatively broad and served merely to limit rather than determine site selection.⁴⁵ Once the CHA chose a particular site, it compiled a housing project proposal.⁴⁶ The ability to choose the initial pool of potential sites gave the CHA significant discretion over the location of public housing. Through crafting housing project proposals, the CHA determined the size and nature of the project and, therefore, the number of low-income families to be served.

The CHA needed Chicago City Council (City Council) approval for all initial housing project proposals. An Illinois statute, in compliance with federal guidelines,⁴⁷ required that the municipal

42. Housing Act of 1937, 42 U.S.C. § 1437 (1988).

43. Illinois Housing Authority Act, 310 ILCS 10/8.2 (1992).

44. 310 ILCS 10/8.1 (1992).

45. The site a PHA chooses must be adequate in size for the proposed project, must comply with the 1964 and 1968 Civil Rights Acts, must be free from adverse environmental conditions, etc. See 24 C.F.R. § 941.202 (1994) for a complete list of requirements.

46. Guidelines governing the content of proposals can be found at 24 C.F.R. § 941.404 (1994). A proposal must contain the following: 1) project description; 2) site information; 3) cost estimates; 4) zoning information; 5) assessment of existing and proposed facilities; 6) information concerning displacement of site occupants; 7) financial feasibility statements; 8) copy of proposed contracts; and 9) project development schedule. *Id.*

47. Title 42 U.S.C. § 1437c(e) (1988). This statute provides in relevant part:

governing body approve all "acquisition of real property" or "interest in real property" before the CHA submitted a housing project proposal to the federal government.⁴⁸ The City Council, therefore, enjoyed a veto over the CHA's housing policy decisions.

Most significantly, the CHA and the City Council determined *whether* any public housing would be constructed. If the CHA did not select sites, no housing construction would ensue. Likewise, if the CHA did not submit sites to the City Council for approval, or if the City Council did not approve the submitted sites, the housing project proposal would evaporate before reaching HUD.

Once the CHA developed a proposal and secured City Council approval, it sent the proposal to HUD. HUD played the role of financier and regulator, but did not have authority to substantively change the application.⁴⁹ As regulator, HUD assured that the proposal met certain environmental,⁵⁰ site,⁵¹ and design⁵² standards, as well as federal civil rights guidelines.⁵³ As financier, HUD provided two types of funding, loans⁵⁴ and assistance payments, designed to make up the difference between the income received from the project and the cost of running the project.⁵⁵

In recognition that there should be local determination of the need for low-income housing to meet needs not being adequately met by private enterprise,

(1) the Secretary shall not make any contract with a public housing agency for preliminary loans . . . unless the governing body of the locality involved has by resolution approved the application of the public housing agency . . .

(2) the Secretary shall not make any contract for loans or for annual contributions pursuant to this chapter unless the governing body has entered into an agreement with the public housing agency providing for the local cooperation required by the Secretary.

Id.

48. 310 ILCS 10/9 (1992). The text of the statute reads:

[N]o real property or interest in real property shall be acquired in such municipality by the housing authority until such time as the housing authority has advised the governing body of such municipality of the description of the real property, or interest therein, proposed to be acquired, and the governing body of the municipality has approved the acquisition thereof by the housing authority.

Id.

49. HUD does not have the authority to change a proposal unilaterally. Of course, HUD could reject the application, but, thereafter, the application would be returned to the PHA for reworking. The new proposal would, of course, require approval. *See generally* 24 C.F.R. § 941.405 (1994).

50. 24 C.F.R. § 941.202(e) & (j) (1994).

51. 24 C.F.R. § 941.202(a) (1994).

52. 24 C.F.R. § 941.203 (1994).

53. 24 C.F.R. § 941.202(b) (1994) (compliance with Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968).

54. HUD is authorized to make loans to the PHAs to "help finance or refinance the development, acquisition, or operation of low-income housing projects by such agencies." 42 U.S.C. § 1437b(a) (1988).

55. HUD delineates its annual contribution obligations in an Annual Contribu-

Furthermore, provided that a PHA met certain preconditions and complied with certain regulations,⁵⁶ PHA bonds were granted tax-exempt status. All PHA obligations carried the full faith and credit of the United States government.⁵⁷

When HUD approved funding for a project, the CHA reasserted control over major implementation decisions. The CHA, given certain regulatory constraints,⁵⁸ was responsible for execution and construction of the project.⁵⁹ Once a housing project was constructed, the CHA was charged with its operation and, most importantly, tenant selection.⁶⁰

Thus, immediately prior to the *Gautreaux* suit, the balance of power among housing institutions rested decisively with local government: 1) the City Council and the CHA shared policy-making power; 2) HUD held financial power; and 3) the CHA controlled implementation decisions. The following sections trace the dislocation and reconfiguration of this institutional landscape.

B. CHA Remedy: Redistribution of Power from the Chicago City Council to the CHA

The City Council exercised formal and informal veto power over CHA site selection processes. Before formally submitting sites for City Council approval, the CHA informally precleared sites with respective aldermen.⁶¹ Aldermen in predominantly white districts would invariably "veto" project proposals, precluding formal submission to the City Council.⁶² Those sites that survived this racially charged preclearance procedure were presented to the City Council, which then enjoyed a formal, statutory veto.⁶³ Remedial efforts initially focused on mitigating the pernicious effects of the City Council's veto power.

The courts first tried to break the aldermen's informal veto.

tions Contract (ACC) which guarantees payment. 42 U.S.C. § 1437c(a) (1988). The annual contribution cannot exceed the annual amount of principal and interest payable on obligations issued by the public housing agency to finance the development or acquisition cost of the low-income project involved. *Id.* at § 1437(a)(1).

56. See 24 C.F.R. § 811.103-811.118 (1994).

57. 42 U.S.C. § 1437i(a) (1988).

58. See 24 C.F.R. § 941.502 (1994) (project design and execution of contracts); 24 C.F.R. § 941.503 (1994) (construction requirements).

59. 42 U.S.C. § 1437(a)-(x).

60. 42 U.S.C. § 1437d(c)(2) (1988) provides that a PHA shall select tenants. For guidelines on tenant selection, see 24 C.F.R. §§ 960.201-960.409 (1994). Overall income limits for eligible tenants are set by the federal government. 42 U.S.C. § 1437a(b)(2) (1988) states that HUD shall set income ceilings. The PHAs determine specific ceilings based on median income levels. See 24 C.F.R. § 913.101-913.110 (1994).

61. *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 913 (N.D. Ill. 1969).

62. *Id.* at 914.

63. 310 ILCS 10/9 (1992).

The district court, in grounding the CHA's liability, stated, "[B]y incorporating as an automatic step in its site selection procedure a practice which resulted in a racial veto before it performed its statutory function of formally presenting the sites to the City Council, CHA made those policies its own and deprived opponents of those policies of the opportunity for public debate."⁶⁴ As such, the district court's order explicitly enjoined the CHA from "invidious discrimination on the basis of race in the conduct or operation of its public housing system, including without limitation the 'preclearance procedure.'⁶⁵ Furthermore, the district court bound the members of the City Council to this order, thereby prohibiting "invidious discrimination" by individual aldermen.⁶⁶

Most of the district court's order, however, contained specific measures that limited discretion, making impractical the preclearance procedures. The order split the City of Chicago into Limited Public Housing Areas, which had high concentrations of minorities,⁶⁷ and General Public Housing Areas, which were relatively integrated.⁶⁸ Judge Austin demanded that the CHA immediately construct 700 dwelling units in the General Public Housing Areas,⁶⁹ and that all subsequent construction be allocated between the General and Limited Housing Areas in a ratio of at least three units to one.⁷⁰ Furthermore, the judge ordered a scattering of public housing by capping at 15% the percentage of CHA low-income housing in any given census tract.⁷¹ Judge Austin also placed size constraints on CHA public housing, limiting construction to a maximum of three stories.⁷² The stringent constraints of the court-ordered scattered-site program gutted the informal veto. Even if an alderman disapproved of the sites in blatant disregard of the court order, the CHA would have been compelled to follow

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

65. *Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736, 741 (N.D. Ill. 1969) (emphasis added).

66. *Id.* at 741 ("This order shall be binding upon CHA . . . the members of the City Council of the City of Chicago").

67. *Id.* at 737. Limited Public Housing Areas lie "within census tracts of the United States Bureau of the Census having 30% or more non-white population, or within a distance of one mile from any point on the outer perimeter of any such census tract."

68. *Id.* General Public Housing Areas include all areas that are not deemed Limited Public Housing Areas.

69. *Id.* at 738.

70. *Id.* Due to CHA recalcitrance, *see infra* notes 145-46 and accompanying text, the ratio was later changed; for every unit built in a Limited Public Housing Area, the CHA had to build a unit in a General Housing Area. Leonard S. Rubinowitz, *Metropolitan Public Housing Desegregation Remedies: Chicago's Privatization Program*, 12 N. ILL. L. REV. 589, 596 (1992); Polikoff, *supra* note 31, at 460.

71. *Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. at 739.

72. *Id.*

the order and, concomitantly, to ignore the alderman's informal veto.

Instead of complying with these guidelines, the CHA, relying upon the City Council's statutory veto, did not seek project approval and, thereby, refused to provide any public housing, integrated or segregated. The mere existence of a local, mandatory check on the CHA's policy decisions enabled the CHA to maintain the City Council's *de facto* veto. To diminish the City Council's *de facto* veto power, the court ordered the CHA to submit to the City Council "sites appropriate for the construction in conformity with the provisions of said Judgment Order of July 1, 1969 of not fewer than 1500 dwelling units."⁷³ In response to this order, the CHA submitted 275 sites to the City Council. Of these sites, the City Council held approval hearings on a mere 85, and eventually approved only 50.⁷⁴

Given the City Council's impenetrable recalcitrance, Judge Austin abrogated the statutory veto, declaring that the Illinois statute requiring the City Council's approval "shall not be applicable to the Chicago Housing Authority's actions, including without limitation the acquisition of real property in the City of Chicago."⁷⁵ Instead, the CHA would directly receive public comments on proposed sites⁷⁶ and then decide, within the confines of court orders, which sites were appropriate for inclusion in CHA proposals.⁷⁷ In freeing the CHA of a crucial statutory constraint, the court vested the policymaking power that the City Council previously held in the CHA.

In the first stage of *Gautreaux's* remedial process, the courts redistributed power from the City Council to the CHA. The district court first forced circumvention of the aldermen's informal, preclearance veto. Then, Judge Austin removed the statutory veto from the City Council's arsenal. Finally, the court gave the CHA authority, with due consideration of public comments, to decide which sites would be submitted to HUD and eventually developed for public housing.

73. *Gautreaux v. Chicago Hous. Auth.*, 436 F.2d 306, 311 (7th Cir. 1970) (appeal from district court order, arrived at after a series of informal conferences between plaintiff and defendant, demanding that CHA submit sites to the City Council by a specified date).

74. *Gautreaux v. Chicago Hous. Auth.*, 342 F. Supp. 827, 831 (N.D. Ill. 1972).

75. *Id.* at 830.

76. *Id.* at 830, 831. Judge Austin also ordered the City to give the CHA "a list of all the vacant, residentially zoned parcels of land in the General Public Housing Area of the City of which it has knowledge." *Id.* at 830.

77. *Id.* at 830, 831.

C. HUD Remedy: Redistributing Power from the CHA to HUD

Phase two of the structural injunction — the HUD remedy — effected a significant redistribution of power in favor of HUD. This redistribution stemmed from procedural, as well as substantive, decisions. First, in broadening the scope of the remedy to include the entire Chicago metropolitan area, the court terminated the CHA's monopoly over Chicago housing policy. Second, in relying upon a negotiated, party-driven consent decree, the CHA was effectively removed from the remedial process. Third, the content of the consent decree, emphasizing market-based, Section 8 policies, privileged HUD.

1. Metropolitan-Wide Remedy

By approving a metropolitan-wide remedy,⁷⁸ the courts began shifting power from the CHA to HUD. On a superficial level, defining remedial scope was necessary to guide HUD's remedial efforts. On a more subtle level, however, the courts' grappling with a metropolitan-wide remedy should be understood as a struggle to decide whether the CHA should maintain monopoly control over public housing in Chicago.

The metropolitan-wide remedy issue cannot be analyzed in isolation but rather must be discussed in tandem with the *Milliken v. Bradley* decisions,⁷⁹ not only because they raise related issues but also because they were making their way through the courts at roughly the same time. The key issue in *Milliken* was whether the Detroit suburban school districts could be incorporated into a metropolitan-wide school desegregation plan. The district court ordered a metropolitan-wide remedy.⁸⁰ The Sixth Circuit held, "[T]he only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan."⁸¹ The Supreme Court reversed, holding that a metropolitan-wide remedy that included the suburban school districts would be unconstitutional.⁸²

When the *Gautreaux* district court first examined this issue, the Sixth Circuit had just sanctioned the metropolitan-wide reme-

78. Cook County contains, but is not limited to, the City of Chicago. The metropolitan-wide remedy involves the City of Chicago, the Chicago suburbs within Cook County, and the suburbs in neighboring counties.

79. *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972), *aff'd in part and rev'd in part*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, *Milliken v. Bradley*, 418 U.S. 717 (1974).

80. *Bradley v. Milliken*, 345 F. Supp. at 918.

81. *Bradley v. Milliken*, 484 F.2d at 249.

82. *Milliken v. Bradley*, 418 U.S. at 753.

dy in *Milliken*. Nonetheless, the *Gautreaux* district court rejected the metropolitan-wide remedy, stating that “[u]nlike education, the right to adequate housing is not constitutionally guaranteed and is a matter for the legislature.”⁸³ The *Gautreaux* district court also concluded that, because the discriminatory conduct took place within, and solely within, Chicago’s city limits, it would be illogical to include the suburbs in the remedy.⁸⁴ Instead, the district court simply required HUD to use its “best efforts” to work with the CHA to increase the supply of housing in a non-discriminatory manner.⁸⁵

By the time the Seventh Circuit reviewed the metropolitan-wide remedy in *Gautreaux*, the Supreme Court had determined that the metropolitan-wide remedy in *Milliken* was unconstitutional.⁸⁶ Despite this precedent, the Seventh Circuit rejected Judge Austin’s “best-efforts” approach and remanded *Gautreaux* for “the adoption 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.”⁸⁷ The Seventh Circuit interpreted *Milliken* as holding that the joining of suburban school districts to effect a metropolitan-wide remedy would be “an impractical and unreasonable over-response to a violation limited to one school district.”⁸⁸ According to this interpretation, *Milliken* did not bar all remedies extending beyond the municipality in which the constitutional violation took place but only such remedies which were considered “over-responsive.” The Seventh Circuit further reasoned that administrative and equitable distinctions between the public housing system and the public school system made a metropolitan-wide remedy in *Gautreaux* practical and reasonable.⁸⁹ Finally, the Seventh Circuit did find evidence of suburban discrimination resulting from an “extra-city impact” of “intra-city discrimination.”⁹⁰

Although the Supreme Court affirmed the Seventh Circuit’s

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

84. *Id.* at 691. The court stated that:

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

Id.

85. *Id.*

86. *Milliken v. Bradley*, 418 U.S. at 753.

87. *Gautreaux v. Romney*, 503 F.2d 930, 939 (7th Cir. 1974).

88. *Id.* at 936.

89. *Id.*

90. *Id.* at 936-37, 939-40.

decision, the Court rejected the Seventh Circuit's interpretation of *Milliken*. The Court interpreted *Milliken* as hinging on judicial restructuring of "the operation of local governmental entities that were not implicated in any constitutional violation."⁹¹ The critical difference between *Milliken* and *Gautreaux*, the Court believed, was not the empirical distinctions between public school systems and public housing systems but rather that HUD, a federal institution with a field of vision and mandate that extended beyond the City of Chicago, bore partial responsibility for discriminatory housing patterns in the City of Chicago.⁹² The Court further implied that restricting the remedy to the City of Chicago would be irresponsibly ignoring the institutional expertise of HUD.⁹³ Finally, the Court determined that a metropolitan-wide remedy would not necessarily "interfere with local governments and suburban housing authorities that have not been implicated in HUD's unconstitutional conduct."⁹⁴

The CHA, already operating under stringent court guidelines, also lost its monopoly over housing policy decisions in the City of Chicago. By directing the district court to fashion a metropolitan-wide remedy, the Supreme Court implicitly demanded that HUD extend its range of vision beyond that of the CHA, breaking the congruity between the Chicago public housing system and the CHA.⁹⁵ According to the Court, the Chicago public housing system also included the suburbs and involved a network of smaller housing authorities.⁹⁶ The only institution with vision that exceeded any one housing authority jurisdiction was HUD. Therefore, it would be incumbent on HUD to insert itself not only into financing decisions but also into policy decisions.

2. *The Consent Decree: Procedural Decisions*

A consent decree is a remedy negotiated by the parties and approved by the judge.⁹⁷ The way the parties negotiated the *Gautreaux* consent decree effected a significant redistribution of power in favor of HUD. The plaintiff class and HUD, who until 1976 had been aggressive opponents, approached the negotiated remedy tentatively.⁹⁸ First entering into a Letter of Understanding⁹⁹

91. *Hills v. Gautreaux*, 425 U.S. 284, 296 (1976).

92. *Id.* at 297.

93. *Id.* at 299-300.

94. *Id.* at 300.

95. *Id.* at 306.

96. *Hills v. Gautreaux*, 425 U.S. at 304-06.

97. See, e.g., Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. ILL. L. REV. 579, 579.

98. Rubinowitz, *supra* note 70, at 612 n.87.

99. The Letter of Understanding was tantamount to a letter of intent developed

and then solidifying their remedial vision in a formal consent decree,¹⁰⁰ the plaintiff class and HUD, along with a representative from the Leadership Council for the Metropolitan Open Communities (Leadership Council), forged a novel approach to public housing policy.

The CHA's exclusion from the negotiation process is striking. While it is unclear exactly why the CHA was excluded, there are several plausible explanations. The *Gautreaux* litigation had been bifurcated into separate CHA and HUD suits.¹⁰¹ Just as each institution's liability was assessed individually, so might the specific remedy be crafted independently. But given that the CHA, up to this point, had played an integral role in the provision of low-income housing, it is improbable that an artificial judicial bifurcation would preclude the CHA from participation in a remedy that could potentially change the face of public housing in Chicago.

There are two additional institution-based explanations. The CHA had been given a test and failed. From 1972, when the City Council's veto power was abrogated, to 1976, when consent decree negotiations began, the CHA continued to stall and defy court orders. Racially motivated opposition to the scattered-site program from within the CHA thwarted construction of all public housing in that period.¹⁰² Such behavior forced the plaintiff class to repeatedly seek redress in court.¹⁰³ Instead of factoring CHA recalcitrance into a remedy, HUD, the plaintiff class, and the judge may have deliberately tried to circumvent this formidable barrier to successful reform.

Another explanation assumes more self-interested motives on the part of HUD. Seizing an opportunity to augment its power-base, HUD consciously opted for a consent decree as a means to freeze the CHA from the remedy. This explanation envisions HUD and the CHA embroiled in a power struggle, with HUD strategi-

by HUD and the plaintiff class. *Agreement Between Plaintiffs and HUD Concerning Implementation of the Gautreaux Supreme Court Decision*, Hous. & Dev. Rep. (BNA), 4 Current Developments, at 40 (June 14, 1976) [hereinafter Letter of Understanding]. It contained their remedial vision and was the precursor to the ultimate consent decree. Rubinowitz, *supra* note 70, at 612-13.

100. *Gautreaux v. Landrieu*, 523 F. Supp. 665, 668-69 (N.D. Ill. 1981).

101. *See supra* note 38 and accompanying text.

102. Rubinowitz, *supra* note 70, at 596.

103. *See, e.g., Gautreaux v. Chicago Hous. Auth.*, 384 F. Supp. 37, 38 (N.D. Ill. 1974) (appointing a special master to oversee the CHA's scattered-site program because "[f]or the past five years and four months, no public housing construction has been completed" and the CHA has "avoided and frustrated" the "effect and import" of the court's orders).

In the face of continuing recalcitrance, the plaintiff class petitioned twice to have the CHA placed in receivership. *See Gautreaux v. Landrieu*, 498 F. Supp. 1072, 1074 (N.D. Ill. 1980); *Gautreaux v. Chicago Hous. Auth.*, CA No. 66 C1459 (N.D. Ill. filed Jan. 13, 1984); *see also infra* note 146 and accompanying text.

cally leveraging an opportune moment. There is a slightly more benign version of this scenario. The CHA's policies had dragged HUD into the racial intricacies of Chicago politics, ultimately resulting in HUD's implication in this racially charged suit. Excluding the CHA from the remedy was the only way for HUD to free itself from the influence of this tainted institution.

The CHA's exclusion from the negotiations clearly empowered HUD. The courts and the plaintiffs had "given up" on the CHA and instead viewed HUD as their hope for integrating public housing. Moreover, HUD, in steering the remedial process, controlled the remedy's substance. In 1979, for example, HUD released a report assessing the incipient Gautreaux Demonstration Program that emerged from the Letter of Understanding and setting forth recommendations, backed with empirical evidence, for the future of this program.¹⁰⁴ The report's conclusions were later codified in the formal consent decree.

3. *The Consent Decree: Substantive Decisions*

The content of the consent decree reinforced the redistribution of power in favor of HUD. In linking Section 8 programs to the creation of a constitutionally sound, discrimination-free public housing system, the consent decree forced acceptance of the government's subsidizing role and, thereby, reshuffled power in favor of HUD.¹⁰⁵

The consent decree employed Section 8 mechanisms to facilitate relocation of members of the *Gautreaux* class throughout the entire Chicago metropolitan area. First, the consent decree enlarged the applicable General Public Housing Areas and Limited Public Housing Areas¹⁰⁶ to include the entire Chicago Standard

104. See U.S. DEPT OF HOUS. AND URBAN DEV., *GAUTREAUX HOUSING DEMONSTRATION: AN EVALUATION OF ITS IMPACT ON PARTICIPATING HOUSEHOLDS* (1979) [hereinafter HUD REPORT].

105. The federal government's current market-based subsidization programs are contained in Section 8 of the Housing and Community Development Act of 1974, 88 Stat. 633, P.L. 93-383 (1974). In Section 8 programs, the government makes "assistance payments" to private owners to cover the gap between rent and what low income families can afford. The two currently active Section 8 programs are the Rental Voucher Program and the Rental Certificate Program. In general, HUD enters into a contract with a public housing authority, which, in turn, distributes vouchers or certificates to low-income families. Under the Rental Certificate Program (or the Existing Housing Program), 42 U.S.C. § 1437f(b) (1988), assistance payments make up the difference between what low-income households can afford and the approved rent for an adequate housing unit. The Rental Voucher Program is more flexible. Housing and Urban-Rural Recovery Act of 1983, 97 Stat. 1153, Pub. L. No. 98-181 (1983) (codified at 42 U.S.C. § 1437f(o) (1988)). Although the rental unit must meet HUD quality standards, the holder of a voucher does not face the rent restrictions of a certificate holder.

106. See *Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736, 737 (N.D. Ill.

Metropolitan Statistical Area (SMSA).¹⁰⁷ Second, the decree introduced the concept of a Revitalizing Area which included areas in the City of Chicago which had "substantial minority occupancy" and were "undergoing substantial physical development."¹⁰⁸ Although the Revitalizing Areas were predominantly minority, the fact that they were being developed presumably indicated that they would become integrated sometime in the future. Third, HUD promised to provide assisted housing in the General or Revitalizing Areas to 7,100 members of the plaintiff class.¹⁰⁹ Fourth, "assisted housing" was to be provided primarily in the form of Section 8 Existing Housing (certificates),¹¹⁰ with a subsidiary role for Section 8 New Construction.¹¹¹ Specifically, HUD agreed, on a yearly basis, to "set-aside" a minimum of 150 certificates for the Gautreaux Demonstration Program.¹¹² HUD also imposed set-aside requirements on all HUD-assisted housing developments, but, to avert racial concentration, HUD limited the set-aside to 12% of the units.¹¹³ The district court also retained jurisdiction "for the purpose of enabling the plaintiffs and HUD to apply to the court at any time for such further orders as may be necessary or appropriate for the construction, implementation, modification or enforcement of this consent decree."¹¹⁴ In sum, this consent decree required HUD to relocate, in General or Revitalizing Housing Areas throughout the entire Chicago SMSA 7,100 members of the *Gautreaux* class using Section 8 mecha-

1969); see also *supra* notes 67-68 and accompanying text.

107. The Chicago SMSA includes the City of Chicago, the remainder of Cook County, and five other suburban counties.

108. *Gautreaux v. Landrieu*, 523 F. Supp. at 674.

109. *Id.*

110. *Id.* at 675-76.

111. *Id.* at 677. The Section 8 Voucher and Certificate programs are currently active, but the government has experimented with other subsidization programs. U.S. DEPT HOUS. & URBAN DEV. PROGRAMS OF HUD 75 (1992) (listing various Section 8 programs). Section 8 New Construction was operated much the same way as housing projects except that HUD financed private developers rather than public housing authorities. JOHN C. WEICHER, HOUSING: FEDERAL POLICIES AND PROGRAMS 65-66 (1980). Rubowitz argues that Section 8 New Construction took a subsidiary role in the *Gautreaux* Program because 1) the frustrating experience with the scattered-site program in the CHA remedy; and 2) the Supreme Court, in *Gautreaux*, emphasized the myriad of local regulatory barriers involved when the government supplies housing. Rubowitz, *supra* note 70, at 618.

112. *Gautreaux v. Landrieu*, 523 F. Supp. at 676. These "set-asides" are in addition to the "fair share" of contract authority which otherwise would be allocated to the Chicago SMSA. *Id.*

113. *Id.* at 677.

114. *Id.* at 681. Currently, plaintiffs, HUD, and the Leadership Council meet every three months with the judge to discuss progress. Interview with Katherine Burttschi, Litigation Department, U.S. Department of Housing and Urban Development, Washington, D.C. (Apr. 19, 1993) [hereinafter Burttschi Interview].

nisms.

By embracing market-based public housing policies, HUD recaptured significant policymaking power. When the government supplies public housing, the local governments control policy decisions and implementation decisions, while the federal government controls financing decisions.¹¹⁵ On the other hand, when the government subsidizes in the form of vouchers or certificates, the balance of power lies decisively with the federal government.

Disaggregation of decision-making power into its three constituent parts—policy, financing, and implementation—helps illustrate this shift in power. Some policy issues, namely the “what type” and “where” questions, fall outside the purview of government control, federal or state, when Section 8 programs are involved. The market decides these questions. However, the federal government, through the budgeting process, decides whether or not to subsidize and in what quantity. Once HUD receives budgetary authority,¹¹⁶ HUD contracts with various housing authorities to distribute certificates, vouchers, or other types of Section 8 assistance.¹¹⁷

Notably, a shift to subsidization denies local government, the PHAs and the local legislative bodies, control over policy decisions. The federal government generally solicits the help of PHAs to assist in the distribution of Section 8 vouchers and certificates. Not all PHAs receive Section 8 instruments for distribution; they must apply to HUD and be granted an annual contributions contract before receiving authorization to disseminate vouchers or certificates. Although the Section 8 application process is reminiscent of the one PHAs utilize to procure approval for housing project proposals,¹¹⁸ it is substantively distinct because it does not reflect creativity and policy initiative. The application process is rather routine,¹¹⁹ focusing on the administrative competence of the PHA.¹²⁰ Furthermore, HUD’s approval of an application depends primarily on a geographic area’s Section 8 needs rather than on the particular merits of an application.¹²¹

The fact that the federal government pays PHAs various fees for administering Section 8 programs is indicative of the purely administrative relationship between HUD and the PHA. These

115. See *supra* notes 42-60 and accompanying text.

116. 42 U.S.C. § 1437f(b)(1) (1988).

117. 42 U.S.C. § 1437f(b), (o)(5) (1988).

118. For an explanation of the PHA application process, see *supra* notes 45, 49-53 and accompanying text.

119. For a description of the application process, see 24 C.F.R. § 887.55(b), (c) (1994).

120. *Id.*; see also 24 C.F.R. § 887.61 (1994) (describing the administrative plan).

121. 24 C.F.R. § 887.63(b) (1994) (HUD’s application review preferences for voucher program).

"administrative fees," as provided for both in federal statutes and regulations,¹²² also reflect the hierarchical relationship favoring HUD. Just as the PHA hires and pays a contractor to build a housing project when the government supplies housing, HUD hires and contracts with the PHA to carry out its programs when the government subsidizes. No one would argue that the contractors possess any significant, policymaking power; likewise, it is difficult to argue here that the PHAs possess any significant, policymaking power in administering the Section 8 programs.

Furthermore, while local governments possess an essential legislative veto over housing project proposals, no such veto is available before PHAs submit Section 8 applications.¹²³ This contrast reflects a deliberate removal of decision-making power from local governmental entities. If one assumes that legislative approval is necessary to ratify the PHA's *policy* decisions, removal of local legislatures from the Section 8 application process suggests that the application is not deemed one of true policy import.

Once annual contribution contracts are approved and allocated, PHAs generally reassert a certain amount of control over implementation decisions. For example, the PHA's responsibilities in administering the certificate program include: publication of information, public invitation to owners, receipt and review of applications for certificates, issuance of certificates, and notification of families deemed ineligible.¹²⁴ These responsibilities are circumscribed, however, by HUD eligibility guidelines,¹²⁵ leaving the PHA with little more than rote administrative power. And the administrative power that a PHA retains is significantly less comprehensive than that enjoyed when housing construction is involved. Because of the nature of Section 8 programs, tenant selection and maintenance¹²⁶ are the responsibility of private owners rather than a PHA.¹²⁷

Furthermore, Section 8 programs provide HUD with the means to completely disempower the PHA. Whereas the PHA is

122. 42 U.S.C. § 1437f(q) (1988) (administrative fees for certificate and housing voucher programs); 24 C.F.R. § 887.103 (1994) (administrative fees paid to PHA).

123. The Illinois statute only requires local legislative approval when real property is being acquired. 310 ILCS 10/9 (1992). The relevant federal statutes require local legislative approval only when the government is acting as supplier. 42 U.S.C. § 1437c(e) (1988).

124. 24 C.F.R. § 882.116 (1993).

125. See, e.g., 42 U.S.C. § 1437f(c) (describing formula for deriving maximum rent charges); 42 U.S.C. § 1437a(1), (2) (describing formula for deriving rental payments).

126. 42 U.S.C. § 1437f(d)(1)-(3) (1988).

127. The federal government promulgates regulations regarding tenant selection, 24 C.F.R. § 882.209 (1993) (certificate); 24 C.F.R. §§ 887.151, 887.155, 887.157 (voucher), and housing quality, which private landlords must meet in order to maintain eligibility to redeem vouchers and certificates.

an indispensable part of government supply efforts, the PHA is a dispensable part of subsidization efforts. In the certificate program, for example, HUD is authorized to implement the program without the assistance of a PHA.¹²⁸ Likewise, HUD is authorized to enter into contracts with private or non-profit groups to implement Section 8 programs. For administrative convenience and simplicity, HUD usually prefers to delegate administrative functions to a PHA. But a PHA's services are not deemed crucial to the functioning of the Section 8 programs, suggesting that the PHA is the locus of few, if any significant decisions.

The derivative effect of the *Gautreaux* consent decree, therefore, was a reconfiguration and reordering of the government institutions involved in public housing, with HUD emerging dominant. Pre-*Gautreaux*, local government enjoyed significant control over policy and implementation decisions. The *Gautreaux* remedy removed policy initiative from the CHA, leaving this local agency with mere administrative power. Implementation of the consent decree and institutionalization of the remedy deprived the CHA of even this limited power.

D. Empowering a Private, Non-Profit Organization: The Leadership Council

One of the distinctive features of Section 8 programs is that they can exist independent of PHAs. HUD availed itself of this option. In the original Letter of Understanding, which initiated a one-year pilot program, HUD agreed to contract with the Leadership Council for the distribution of the Section 8 certificates.¹²⁹ When the *Gautreaux* Demonstration Program (*Gautreaux* Program)¹³⁰ was formally solidified in the consent decree, the Leadership Council was again explicitly delegated all implementation responsibilities: "No contract shall be entered into with an entity other than the Leadership Council for Metropolitan Open Communities."¹³¹

But the Leadership Council was not a mere surrogate for a PHA. While a PHA plays a mere administrative role in Section 8

128. 42 U.S.C. § 1437f(b)(1) (1988) ("In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section."); see also 24 C.F.R. § 882.121(b) (describing the circumstances in which HUD may implement the program without a PHA).

129. Rubinowitz, *supra* note 70, at 612-13.

130. The *Gautreaux* Demonstration Program is the name that has been given to the set of policies conceived of in the Letter of Understanding, see *supra* note 99 and accompanying text, and solidified in the consent decree, see *supra* notes 105-14 and accompanying text.

131. *Gautreaux v. Landrieu*, 523 F. Supp. 665, 675 (N.D. Ill. 1981).

programs, the Leadership Council was given a voice in policy decisions. As a party to the negotiations leading to the Letter of Understanding and the subsequent consent decree, the Leadership Council actively crafted a vibrant alternative to public housing construction.¹³² Furthermore, the particular expertise of this private, not-for-profit organization was deemed crucial to the Gautreaux Program's success. A child of Dr. Martin Luther King, Jr.'s open housing movement, the Leadership Council had struggled to eradicate housing discrimination throughout the Chicago metropolitan area since 1966.¹³³ The Leadership Council uniquely combined social counseling and education with formal legal mechanisms to remedy housing discrimination. The parties recognized that this "knowledge of the Chicago area real estate market" and "experience in counseling and placement" made the Leadership Council an indispensable pillar of the Gautreaux Program.¹³⁴

The Leadership Council has leveraged this position, emerging as the dominant member of a new institutional status quo governing public housing in Chicago. In carrying out its duties, the Leadership Council identifies landlords in the General or Revitalizing Housing Areas that would be willing to participate in the Gautreaux Program.¹³⁵ It holds information sessions for prospective landlords to try to break debilitating stereotypes.¹³⁶ The Leadership Council also selects Gautreaux Program participants.¹³⁷ Once a year, it holds a phone lottery, and members of the *Gautreaux* class call with the hope of being among the first 2,000 to reach the Leadership Council.¹³⁸ The Leadership Council then invites these 2,000 callers to briefing sessions which explain the Gautreaux Program¹³⁹ and screens those who attend the briefing by verifying income levels, visiting the applicants'

132. *Id.* at 558; see also Rubinowitz, *supra* note 70, at 612-613.

133. LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, GUIDE TO PRACTICE OPEN HOUSING LAW 1-2 (1974); Polikoff, *supra* note 31, at 452.

134. *Gautreaux v. Landrieu*, 523 F. Supp. at 675.

135. Letter of Understanding, *supra* note 99 (The Leadership Council is to "locate owners of housing willing to participate in the demonstration program"); see also HUD REPORT, *supra* note 104; Rubinowitz, *supra* note 70, at 645-48.

136. Rubinowitz, *supra* note 70, at 647, 664.

137. HUD REPORT, *supra* note 104, at 34.

138. CNN NEWS, *Low Income Chicagoans Get New Life in 'Burbs* (CNN television broadcast, Dec. 6, 1993); Jason DeParle, *An Underground Railroad from Projects to the Suburbs*, N.Y. TIMES, Dec. 1, 1993, at A1 ("The leadership council registers the first 2,000 families who call and provides the subsidies . . . to about 400 new recipients a year."); Barbara B. Buchholz, *The Call of a Better Life Gives CHA Residents Hope*, CHI. TRIB., Feb. 28, 1993, at C1; Rubinowitz, *supra* note 70, at 622-23.

139. Interview with former director of the Gautreaux Demonstration Program, in Washington, D.C. (July, 1993) [hereinafter *Gautreaux Demonstration Program Director Interview*].

current homes, performing credit and criminal checks, and obtaining reference letters.¹⁴⁰ The Leadership Council also superimposes some objective criteria, such as family size and accessibility to transportation, on its screening decisions.¹⁴¹ Once the participants are selected, the Leadership Council serves as counselor, assisting participants with their housing search, accompanying them to meet landlords and sign leases, making follow-up calls, providing counseling to ease the transition from the city to the suburbs, and mediating some landlord/tenant disputes.¹⁴² The Leadership Council clearly serves as much more than a mere implementor.

As the liaison between HUD, the private market suppliers, and the prospective tenants, the Leadership Council melded the Gautreaux Program into a coherent and thriving whole. To assure supply of 7,100 viable dwelling units, the Leadership Council meets with potential landlords, hoping to conquer negative preconceptions of low-income housing residents. Screening prospective tenants bolsters this goal, for if the "less desirable" low-income residents are removed from the pool, landlords will be less tentative about renting to individuals bearing Section 8 certificates. On the demand side, the relocation of 7,100 families in foreign neighborhoods presupposes willing participants. By providing counseling before, during, and after the move, the Leadership Council eases an otherwise dislocating transition. Positive experiences pass by word of mouth to potential participants, generating further demand. By acclimating *Gautreaux* class members to their new environs, the Leadership Council mitigates participants' defensive hostility, provides landlords with more pleasant and receptive tenants, and further allays landlords' debilitating perceptions.

In synergistically linking all aspects of the program, the Leadership Council became a primary recipient of the policymaking power redistributed to HUD during the course of *Gautreaux*. First, the Leadership Council effectively collapsed many policy and implementation decisions into a single function, assuming much of the policymaking power HUD would otherwise possess. The crucial policy question was: will the government subsidize public housing? Although the consent decree expressed the parties' intent to subsidize 7,100 *Gautreaux* families,¹⁴³ the

140. Rubinowitz, *supra* note 70, at 663; see also HUD REPORT, *supra* note 104, at 35-37 (describing the application process).

141. Guy Gugliotta, *Lottery Offers Chicago's Black Welfare Families a Ticket out of Town*, WASH. POST, Feb. 24, 1993, at A13 [hereinafter *Lottery Offers a Ticket Out*]; see also HUD REPORT, *supra* note 104, at 37.

142. Rubinowitz, *supra* note 70, at 643-44.

143. *Gautreaux v. Landrieu*, 523 F. Supp. at 669.

various Leadership Council initiatives enabled the preceding question to be answered affirmatively. Without counseling and screening services, the Leadership Council's unique and irreplaceable contribution to this Section 8 variant, the viability of the entire program could have been problematic. Second, in recognizing the need for a centralized entity to coordinate policy, financial, and implementing decisions, the Leadership Council identified another important function and, therefore, source of power. By assuming this coordination role, mainly by providing counseling services to market suppliers and program participants, the Leadership Council sustained the entire Gautreaux Program and prevented any one component from faltering.

Chicago's broader public housing context magnifies the Leadership Council's power. The Gautreaux Program, while not the only source of public housing in Chicago, is the only viable alternative to the notoriously segregated Chicago housing projects "condemned" as unconstitutional almost twenty-five years ago. While the CHA remedy, the scattered-site program,¹⁴⁴ remains theoretically in effect, the CHA has actually provided less than 1,000 dwelling units since 1969.¹⁴⁵ And the CHA is now operating in receivership.¹⁴⁶ Members of the plaintiff class will need to wait longer for the scattered-site housing promised decades ago. Furthermore, to receive a non-Gautreaux Section 8 certificate or voucher, an applicant must spend at least 25 years on a waiting list.¹⁴⁷ As the ex-Director of the Gautreaux Program put it: "*Gautreaux* is the only game in the town."¹⁴⁸

It is unclear whether HUD, in accepting the Leadership

144. For a discussion of the historical development of scattered-site housing see *supra* notes 67-72 and accompanying text.

145. Rubinowitz, *supra* note 70, at 597; Polikoff, *supra* note 31, at 452, 459-60.

146. Frustrated with the slow pace of the scattered-site program, the plaintiff class asked the judge to impose a receiver on the CHA's scattered-site program. Plaintiffs' request failed twice. *Gautreaux v. Landrieu*, 498 F. Supp. 1072, 1075 (N.D. Ill. 1980); *Gautreaux v. Chicago Hous. Auth.*, CA No. 66 C 1459 (N.D. Ill. filed Jan. 13, 1984); see also *supra* note 103 and accompanying text. Under the administration of Mayor Harold Washington, the CHA embraced the scattered-site program, but the CHA's inept administration placed it on the brink of bankruptcy. The CHA was forced to return to court for permission to suspend the scattered-site program. At that time, the judge placed the agency in receivership. *Gautreaux v. Chicago Hous. Auth.*, CA No. 66 C1459 (N.D. Ill. filed May 13, 1987). It is only in the past year that members of the *Gautreaux* class have begun to see the fruits of this receivership. The Habitat Company of Chicago, the appointed receiver, has, at a fledgling pace, begun to implement the scattered-site program. Blair Kamin, *Home Truths: Exploring Some Recent Successes in Public Housing*, CHI. TRIB., May 30, 1993, Arts, at 10.

147. *Gautreaux Demonstration Program Director Interview*, *supra* note 139. At times, the waiting lists have been so long that the CHA stopped accepting applications. Rubinowitz, *supra* note 70, at 642.

148. *Gautreaux Demonstration Program Director Interview*, *supra* note 139.

Council's integral role in the remedy, knew that it would be abdicating much of the power redistributed in its favor. It is also unclear whether the Leadership Council deliberately amassed this power. Nonetheless, the Leadership Council's preeminence is indisputable. As the fuel that makes the one, active public housing program function, the Leadership Council wields an inordinate amount of power.

The *Gautreaux* remedy reshuffled institutions, ultimately creating a new institutional status quo dominated by the Leadership Council. The following chart records the uprooting, reshuffling, and recongealing of the institutional status quo governing public housing.

NEW INSTITUTIONAL STATUS QUO

LOCATION OF POWER

<i>Type of Power</i>	Pre-Gautreaux (Pre-1966)	CHA Remedy (1972-1976)	HUD Remedy (1981-present)
Policy	City Council CHA	CHA	Leadership Council Market HUD
Financing	HUD	HUD	HUD
Implementation	CHA	CHA	Leadership Council Market
Coordination	----	----	Leadership Council

The *Gautreaux* remedial saga accentuates the inter-institutional import of the structural injunction. Whereas the balance of power rested decisively with the CHA and the City Council prior to the litigation, the Leadership Council became the power broker in the wake of *Gautreaux*. *Gautreaux* also highlights that the structural injunction is not a remedial moment but rather a prolonged remedial process during which institutions vie for power in the new institutional status quo.

III. RECONFRONTING THE CRITICS

The *Gautreaux* structural injunction is a remedial process composed of a series of redistributive acts. By refocusing the legitimacy and efficacy critiques to better comport with the struc-

tural injunction's related inter-institutional and temporal dimensions, these critiques are disarmed.

A. *The Legitimacy Critique*

The *Gautreaux* story illustrates that: 1) the judiciary retained very little, if any, usurped power; and 2) once the power was redistributed, the Leadership Council emerged as the most powerful actor in the new institutional status quo. The first conclusion neutralizes many separation-of-powers concerns, while the second mitigates the countermajoritarian difficulty.

1. *Separation of Powers*

Retelling *Gautreaux* in terms of redistributive acts allays concerns regarding judicial forays into the legislative or executive branch's domain. In redressing the separation-of-powers critique, one must analytically disentangle the ways in which a judge can trespass on another branch's domain: 1) in usurping power that belongs to the legislative or executive branches; 2) in redistributing such power from one institution to another; and 3) in dislodging the institutional status quo and catalyzing the entire redistributive process.

a. *Judicial Retention of Power*

From a separation-of-powers perspective, certain isolated judicial acts appear suspect. The judiciary, for example, suspended operation of the Illinois law requiring legislative approval for CHA housing project proposals,¹⁴⁹ prescribed additional regulatory standards for the functioning of federal programs,¹⁵⁰ and created an on-going, supervisory relationship with HUD.¹⁵¹ Any of these actions, viewed as an isolated remedial moment, raises separation-of-powers concerns.

Asking whether the judge illegitimately usurped legislative and/or executive power is a premature and narrow inquiry. The more appropriate inquiry is: What did the judge do with the usurped power? *Gautreaux* illustrates that the judiciary retained very little, if any, power because, as soon as the judge usurped power, he redistributed it to other institutions. When the judge took power away from the City Council, he quickly redistributed this power to the CHA. And when the judge took power from the

149. For a discussion of this decision, see *supra* notes 75-77 and accompanying text.

150. For discussion of constraints imposed on the scattered-site program and the Section 8 *Gautreaux* Program, see respectively *supra* notes 67-72 and 106-14.

151. See *supra* note 114 and accompanying text.

CHA, he redistributed the power to HUD. The Leadership Council, in turn, accumulated much of the power redistributed to HUD. The judge did not retain power, ostensibly obviating concern regarding substantive encroachment upon the power granted to other branches of government. When the critique's time-frame and perspective are broadened to encompass the entire redistributive process, the *Gautreaux* judges, using the metaphor embraced by Horowitz, better approximate umpires than empires.¹⁵²

b. Judicial Redistribution of Power

But it is not just in judicial retention of power that the judge can implicate separation of powers. Judicially supervised manipulation of power also heightens separation-of-powers concerns. Did the judge violate separation of powers in 1) redistributing policy-making power from the Chicago City Council to the CHA? and 2) shifting the balance of power from the CHA to HUD?¹⁵³ Part II of this Article traced the judicial decisions that effected the inter-institutional redistributions. In this section, each of these decisions will be subjected to separation-of-powers scrutiny on the theory that the entire redistributive process withstands scrutiny if individual redistributive decisions survive scrutiny.

The court effected a redistribution of power from the City Council to the CHA by eliminating the City Council's legislative check on CHA housing project proposals.¹⁵⁴ This legislative check, in reality, functioned as a *de jure* and *de facto* veto. While judicial usurpation of legislative prerogative to make and terminate laws is suspect,¹⁵⁵ this is a rather static, narrow way to describe the judge's actions here. The City Council had, in effect, self-abrogated the statute. Even though the judge ordered the CHA to submit sites to the City Council¹⁵⁶ and bound the mem-

152. See generally Horowitz, *Umpire or Empire?*, *supra* note 7.

153. The redistribution of power in favor of the Leadership Council will not be examined in this section. This redistributive act does not raise the same type of separation of powers concerns because the parties, through negotiation of the consent decree, rather than the judiciary, abdicated power to this private organization. This abdication was sanctioned by federal statute. See *supra* note 128 and accompanying text.

154. 310 ILCS 10/9 (1992). See also *supra* notes 75-77 and accompanying text for discussion of judicial abrogation of the Illinois statute.

155. If a statute is facially unconstitutional, the judiciary has the power, and the duty, to abrogate the law. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). While the Illinois statute was not facially unconstitutional, the way in which the law was implemented, or circumvented, effected unconstitutional outcomes. The Supreme Court has held that the federal judiciary can abrogate state laws that obstruct remedial attempts to correct constitutional wrongs. See *infra* notes 160-61 and accompanying text.

156. See *supra* note 73 and accompanying text.

bers of the City Council to the order,¹⁵⁷ the City Council effectively abdicated its legislative mandate by avoiding a vote.¹⁵⁸ The judge merely redistributed this abdicated policymaking power to the CHA and the public to effect ends for which the Illinois statute was originally designed: to ensure a public check on the CHA's efforts to carry out the government's mandate to supply housing.¹⁵⁹ If Judge Austin had not taken such redistributive action, the City Council's dormancy would have effectively frustrated other legislative mandates, namely constructing housing in accordance with the Housing Act of 1937.

In fact, recent Supreme Court doctrine further alleviates suspicion surrounding the district court's abrogation of the statute. In *Missouri v. Jenkins*, although the Supreme Court disavowed a district court remedial order effecting tax increases as an overly intrusive means to effect public school integration, the Supreme Court did state that if the judge had merely enjoined the operation of the state laws which prevented compliance with court orders, the remedy would have been a legitimate use of federal equity powers.¹⁶⁰ Furthermore, in *Spallone v. United States*, the Supreme Court implicitly held that circumventing local legislatures' obstructionist tactics falls within the federal courts' remedial power.¹⁶¹ The redistribution of power from the City Council to the CHA, engineered by the abrogation of a state statute, is immune from separation-of-powers concerns.

As a primary consequence of two substantive decisions, the judiciary redistributed much of the CHA's power to HUD: 1) the decision to broaden the scope of the remedy to encompass the entire Chicago metropolitan area; and 2) the decision to utilize market-based, Section 8 certificates as a means to integration. Each of these decisions is free from separation-of-power concerns.

In sanctioning a metropolitan-wide remedy, the courts shifted power from the CHA to HUD. In *Gautreaux*, the Supreme Court interpreted its decision in *Milliken*, which rejected a metropolitan-wide remedy, as hinging on separation-of-powers principles: "[T]he District Court's proposed remedy in *Milliken* was impermissible because of the limits on the federal judicial power to interfere with the operation of state political entities that were not implicated in unconstitutional conduct."¹⁶² Nonetheless, the Court en-

157. See *supra* note 66 and accompanying text.

158. See *supra* note 74 and accompanying text.

159. See *supra* notes 75-77 and accompanying text.

160. *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990).

161. *Spallone v. United States*, 493 U.S. 265, 267 (1990) (holding that a judge can hold a city council in contempt of a court order for refusing to vote in a prescribed manner); see also Grossenmacher, *supra* note 23, at 2243.

162. *Hills v. Gautreaux*, 425 U.S. 284, 298 (1976).

dorsed a metropolitan-wide remedy in *Gautreaux*, implicitly signalling that the *Gautreaux* remedy was clear of separation-of-powers concerns. Cognizant of the boundaries of judicial power, the *Gautreaux* Court concluded that a metropolitan-wide remedy fell within this boundary, thereby immunizing the decision from subsequent separation-of-powers attacks.

The use of Section 8 subsidization policies rather than traditional supply techniques was not a policy innovation. Passed during the course of *Gautreaux*, the Housing and Community Development Act of 1974 made explicit provision for Section 8 programs.¹⁶³ In fact, rather than frustrating political processes, the consent decree forced the utilization of the legislature's Section 8 initiatives, likely enhancing their standing as an alternative approach to public housing. While the courts did modify the Section 8 program, for example by requiring that relocation take place in General Housing Areas, these types of regulations are not commonly cited among the most egregious separation-of-powers abuses.¹⁶⁴ The *Gautreaux* Program did not require burdensome expenditures, as was the case with the remedy rejected by the Supreme Court in *Missouri v. Jenkins*; nor did the remedy require appointment of administrative personnel. Furthermore, the parties, rather than the judiciary, crafted the remedy. Judge Crowley, who had replaced Judge Austin, merely approved the consent decree.¹⁶⁵ The executive branch, which encompasses HUD, is charged with implementing legislative prerogative. In furthering implementation of constitutionally sound Section 8 programs, HUD was respecting, rather than violating, separation-of-powers principles.

c. Judicial Disruption of the Status Quo

There is a third, somewhat incorrigible, aspect of the separation-of-powers critique. In catalyzing the redistributive process, even if only by initially dislodging the institutional status quo, the judiciary violates separation of powers.

On an intuitive level, however, the courts participate in redistributive processes every time they adjudicate a claim and allocate rights. Rights are proxies, albeit imperfect ones, for power. To categorically exclude the courts from redistributive processes in the name of separation of powers is to ignore the very essence of adjudication.

Furthermore, disrupting the institutional status quo in *Gau-*

163. Housing and Community Development Act of 1974, Priv. L. No. 93-383, 88 Stat. 633 (1974).

164. See *supra* notes 14-17 and accompanying text.

165. *Gautreaux v. Landrieu*, 523 F. Supp. 665, 672 (N.D. Ill. 1981).

treaux was an *unintended* consequence of judicial efforts to redress a constitutional wrong. While separation of powers clearly can be offended by *unintended* judicial action, the constitutional necessity of this particular dislocation allays concern. Once the institutional status quo is upset, even if unintentionally, the re-configuration process assumes a life of its own. Therefore, the type of judicial interference necessary to stop or reverse the redistributive process may be more intrusive than efforts to help forge a new institutional status quo that better comports with constitutional demands. As long as subsequent judicial manipulation of power respects separation-of-powers principles, as was the case in *Gautreaux*, the judiciary's actions withstand scrutiny.

Finally, even the most avid critics of the structural injunction do not frame their objections in absolutist terms.¹⁶⁶ These critics demand *due deference* to the legislative and executive branches and would reserve intrusiveness for remedies of last resort.¹⁶⁷ In *Gautreaux*, Judge Austin clearly evinced a willingness to defer to the CHA and the City Council. For example, while Judge Austin found the CHA's practices unconstitutional in 1969,¹⁶⁸ he did not terminate the legislative veto until 1972.¹⁶⁹ Three years was ample time to plan, if not build, the type of scattered-site, integrated housing that the court deemed commensurate with constitutional obligations. Yet, in the three year respite Judge Austin provided, the City Council approved only 20% of the mere 275 sites begrudgingly submitted.¹⁷⁰ The institutional status quo, as it functioned in 1972, was an impenetrable obstacle to the provision of integrated housing.

Viewing the structural injunction as a prolonged, inter-institutional redistributive process alleviates many separation-of-powers concerns. The judiciary did not retain usurped power, obviating criticism based on substantive encroachment upon other branches' terrain. In redistributing power, the judiciary's actions also withstand scrutiny, for the individual decisions instigating redistribution did not raise separation of power concerns. While the judge's role in catalyzing redistributive processes is more difficult to reconcile with separation of powers, several countervailing considerations serve, at least, to dull the critique.

166. See *supra* notes 18-19 and accompanying text.

167. SCHUCK, *supra* note 18, at 189; Nagel, *supra* note 14, at 719.

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

169. See *supra* note 75 and accompanying text.

170. See *supra* note 74 and accompanying text.

2. *Countermajoritarian Concerns*

The countermajoritarian critics question the legitimacy of the structural injunction in the name of democracy: 1) in usurping legislative prerogative and in legislating via judicial decree, the judiciary skirts majoritarian policymaking; and 2) structural injunctions produce anti-democratic outcomes. The first argument is a specific genre of the separation-of-powers critique discussed above: in assuming a legislative posture without subjecting policies to legislative processes, the judiciary acts in an anti-democratic manner. However, in re-examining the judiciary's actions as non-isolated components of an ongoing redistributive process, the base-line claim that the judiciary usurped legislative prerogative becomes quite problematic. The countermajoritarian critique, therefore, reduces to the contention that these outcomes are anti-democratic because they disempower local government, diminish responsiveness to local demands, and weaken individual autonomy.¹⁷¹

The countermajoritarian inquiry, just like the separation-of-powers inquiry, must accurately reflect the underlying structural injunction. Asking whether particular remedial moments are anti-democratic discounts the temporal and inter-institutional dynamism of the remedy. The countermajoritarian critic must be cognizant of the entire redistributive process, and, therefore, must ask where power ultimately rests. The *Gautreaux* structural injunction created a new institutional status quo which ultimately empowered the Leadership Council, along with the market and HUD. Upon each of the countermajoritarian critic's axes—locale of decision-making, responsiveness to constituents, and individual empowerment—the new institutional status quo is just as, if not more, democratic than its pre-*Gautreaux* counterpart.

Pre-*Gautreaux*, the CHA and City Council controlled policy decisions. Post-*Gautreaux*, the Leadership Council, the market, and HUD share policy decisions. In its role as policymaker, HUD merely determines, on a yearly basis, how many Section 8 certificates will be available for members of the *Gautreaux* class. Although nominally a member of the policymaking team, HUD's real role remains that of financier. Because the Leadership Council assumed much of HUD's delegated power, HUD's pre- and post-*Gautreaux* roles are similar. In making the comparisons the countermajoritarian critique demands, HUD is a constant rather than a variable and, therefore, drops from the analysis.

The Leadership Council emerged as the dominant member of the new institutional status quo. While policy decisions that were

171. See *supra* notes 20-22 and accompanying text.

once made at City Hall are now made in a private office on the south side of Chicago, they remain local decisions nonetheless. Likewise, the market's policy input, deciding what type of housing should be provided and where, is a particularized reflection of the Chicago metropolitan area housing market. The locale of policy decisions continue to be made at the local level.

What has changed, however, is the policymakers' responsiveness to the needs of their constituents, and the current arrangement appears exceptionally more democratic. While the CHA-City Council duo ostensibly epitomized locally responsive policymaking, Chicago-style "democracy," in practice, suffered from severe defects due to institutional corruption and racism.¹⁷² The "preclearance procedure," whereby the CHA would not submit housing proposals to the City Council for a vote without informal approval from the individual aldermen in white districts,¹⁷³ belies most notions of responsive policymaking.

Although the Leadership Council is not *explicitly* accountable to the people through legislative processes, it is much more responsive. The Leadership Council designed the Gautreaux Program to redress the *Gautreaux* class' complaints, and continues to implement the Program so as to mitigate its dislocating and disruptive impact on *Gautreaux* participants. In other words, the Leadership Council is functionally responsive to its constituents in a way that the CHA and City Council never were. What accounts for this discrepancy? Ostensibly, the Leadership Council is apolitical while the City Council is political. Yet, the Leadership Council is an organization with a history of liberal political activism, rooted in Dr. Martin Luther King's civil rights movement. While it may not be political in the purely legislative sense, the Leadership Council clearly has a political agenda. The more nuanced explanation is that the Leadership Council's constituency, black, low-income Chicago public housing residents, matches its rather focused political agenda, to guarantee racially integrated housing. The City Council, on the other hand, carried many political agendas and had to placate a number of constituent groups. In balancing multiple demands against political clout, the City Council inevitably sacrificed the desires of some groups, most often the financially impotent. It is not surprising, therefore, that the Leadership Council is more responsive to the *Gautreaux* class' needs.

172. See generally A. Dan Tarlock, *Remedying the Irremediable: The Lessons of Gautreaux*, 64 CHI.-KENT L. REV. 573 (1988). The similarity between the title of this Article and Professor Tarlock's article emphasizes that we both glean generalizable conclusions from the experience of *Gautreaux*. However, we greatly differ regarding the substance of these conclusions.

173. See *supra* notes 61-66 and accompanying text.

But the *Gautreaux* remedy also empowers the market. The debate regarding the market's ability to respond to low-income housing needs has raged since the inception of Section 8 housing programs.¹⁷⁴ Many critics believe that market-based housing initiatives are highly unresponsive, subjecting the poor to the harsh inequalities of the market. But we need not engage these debates here because the *Gautreaux* Program does not place an impoverished individual at the unconstrained mercy of the market. Instead, the Leadership Council orients *Gautreaux* participants to market realities, cushioning the harsh confrontation between market and low-income individual. In seeking and generating market responsiveness, the Leadership Council alleviates many concerns that an unconstrained market may raise.

This potent policymaking combination of constrained market and local public-interest organization has empowered the individual, creating choice—choice where to live, choice whether to live in integrated housing, and choice whether to traverse the market or remain in government supplied housing. The following are a few of the reported reactions to the *Gautreaux* Program. “I would never move back to Chicago,” said Ms. Evans, who is studying at a community college to become a nurse; “I plan, when I finish school, to buy me a house. And it'll be out there.”¹⁷⁵ “I feel happy, I feel proud of myself. If I could do this, then I am quite sure I can do other things, too.”¹⁷⁶ And the Leadership Council ap-

174. There are those who argue that the housing market, *per se*, is an imperfect market. See, e.g., Henry J. Aaron, *Rationale for a Housing Policy*, in *FEDERAL HOUSING POLICY & PROGRAMS*, (J. Paul Mitchell ed., 1985); Chester Hartman, *Housing Allowances: A Bad Idea Whose Time Has Come*, in *FEDERAL HOUSING POLICY & PROGRAMS* 383-89 (J. Paul Mitchell ed., 1985). When demand is stimulated, as it may be through the use of some type of market-oriented housing allowance, the nature of the housing market does not allow for quick supplier response. Therefore, a housing subsidy program that increased demand without effecting great increases in supply would merely lead to an increase in the cost of housing and, in reality, negate the effect of the housing allowance. *But see* I. LOWRY, *EXPERIMENTING WITH HOUSING ALLOWANCES* (1982) (confirming that the provision of housing allowances did not inflate the price of housing in either Green Bay or South Bend).

On the other hand, there are those who argue that the housing problem is the result of skewed income distribution, not a flawed market, suggesting that direct income transfers would stimulate the private market to increase supply and improve quality of housing. See Elizabeth A. Roistacher, *A Modest Proposal: Housing Vouchers as Refundable Tax Credits*, in *HOUSING AMERICA'S POOR* 162-74 (Peter D. Salins ed., 1987); John C. Weicher, *Private Production: Has the Rising Tide Lifted All Boats?*, in *HOUSING AMERICA'S POOR* 45-66 (Peter D. Salins ed., 1987). Proponents of indirect government subsidization not only argue that the market can and does function, even in the housing realm, but also argue that the state is lacking in its ability to effect efficient construction.

175. DeParle, *supra* note 138, at A1.

176. *World News Tonight with Peter Jennings* (ABC television broadcast, Feb. 4,

proaches its responsibilities so as to maximize this sense of individual empowerment. "The Leadership Council intentionally doesn't present prospective tenants with a new home. . . . The thinking is that participants are happier if they've had full control over the process and the final selection."¹⁷⁷

Focusing on the ultimate configuration of power embodied in the new institutional status quo allays the countermajoritarian's concerns. While policy decisions remain local decisions, the Leadership Council better responds to low income housing residents' needs, and the individual *Gautreaux* participant regains some autonomy. Far from being anti-democratic, the new institutional status quo, with the Leadership Council at the helm, better approximates the local, grass-roots ideals the countermajoritarian critics associate with democracy.

Those questioning the structural injunction's legitimacy hastily labeled particular remedial moments illegitimate without broadening their frame of reference to encompass the rich inter-institutional dynamic. By recasting the separation-of-powers and countermajoritarian inquiries to account for the related temporal and inter-institutional dimensions, the *Gautreaux* structural injunction becomes a legitimate exercise of judicial power.

B. Revisiting Efficacy

Efficacy critics generally ask: Did the judge successfully effectuate the remedy chosen to rectify the constitutional violation? Usually the critics answer this question negatively, noting particular blunders occurring during the course of a structural injunction, including cumbersome delays and blatant institutional defiance of court orders. The *Gautreaux* structural injunction has not escaped this type of criticism. Professor Tarlock, for example, writes, that "the *Gautreaux* litigation is a classic example of the inability of the judiciary to remedy effectively racial discrimination."¹⁷⁸ Tarlock further argues that the effectiveness of the *Gautreaux* remedy was constrained by political resistance—the image that public housing had conjured was so unpalpable that the CHA met impenetrable resistance in implementing the scattered-site program.¹⁷⁹ Professor Peter Shane also highlights the delay between the original court order and the development of new, scattered-site housing as proof of the structural injunction's ineffectiveness and the judge's inability to appreciate Chicago's political dynamics.¹⁸⁰ Likewise, Professor Linda Hirshman criticizes the

1993).

177. Buchholz, *supra* note 138, at Real Estate 1.

178. Tarlock, *supra* note 172, at 576.

179. *Id.* at 578.

180. Peter Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531,

remedy's effectiveness, pointing to the meager number of dwelling units constructed in the wake of *Gautreaux*.¹⁸¹

These criticisms may have been well-founded in 1974, or even in 1988 when they were made, but today they are outdated. Efficacy critics uniformly made their assessments too early, extrapolating from a static snapshot of the relationship between the judge and the CHA an overall conclusion that the *Gautreaux* structural injunction was ineffective. In discounting the structural injunction's temporal dimension, the critics unfairly skew efficacy assessments.

1. *The Gautreaux Program: A Policy Success*

A re-examination of efficacy, factoring the entire remedial process into the assessment, produces an aura of success rather than failure. While the success of housing mobility strategies is a matter of debate, the results of *Gautreaux* are clearly not as glum as the critics depicted. Nearly 5,300 families have taken advantage of the Gautreaux Program to relocate in predominantly white Chicago suburbs,¹⁸² and HUD officials estimate that they will meet the 7,100 requirement soon.¹⁸³ More revealing than the total number of families served by the Gautreaux Program is the increasing demand for coveted *Gautreaux* certificates. For example, when the Leadership Council conducted its 1993 annual phona-thon through which it makes available the Section 8 housing certificates, 15,000 people called, 2,000 people actually reached the Leadership Council, and 250 Section 8 certificates were available for distribution.¹⁸⁴ This phone lottery is so popular that some participants "often travel to suburbs simply to call, since the circuits jam in parts of the city where public housing is dense."¹⁸⁵

The high local demand likely reflects the perceived social and economic advantages linked to participation in the Gautreaux Program. Professor James Rosenbaum, in several studies of *Gautreaux* participants, documents the benefits those participants who relocate in the suburbs enjoy.¹⁸⁶ Adults, who are primarily single

568 (1988).

181. Linda R. Hirshman, *Foreword: Kicking over the Traces of Self-Government*, 64 CHI.-KENT L. REV. 435, 437 (1988). Other analyses criticize *Gautreaux* for the virtual freeze in the construction of low-income housing in Chicago. See also *The Gautreaux Decision and its Effect on Subsidized Housing Before the Subcomm. on the House Comm. on Government Operations*, 95th Cong., 2d Sess. (Sept. 22, 1978).

182. CNN NEWS, *Low Income Chicagoans Get New Life in 'Burbs* (CNN television broadcast, Dec. 6, 1993).

183. Burtschi Interview, *supra* note 114.

184. Buchholz, *supra* note 138, at C1.

185. DeParle, *supra* note 138, at A1.

186. See James E. Rosenbaum & Susan J. Popkin, *Employment and Earnings of*

mothers,¹⁸⁷ are able to find work more easily in the suburbs not only because there are more jobs¹⁸⁸ but also because the safer environment allows them to work relatively free from worry about the safety of their children.¹⁸⁹ Furthermore, *Gautreaux* children raised in the suburbs are over five times more likely to go to college than their city counterparts,¹⁹⁰ and the high school graduation rate of those who enroll is ninety-five percent.¹⁹¹ Those *Gautreaux* children not in school are almost twice as likely as their inner-city counterparts to find employment and four times as likely to be earning over \$6.50 per hour.¹⁹²

The *Gautreaux* Program is nationally lauded as a program that works. Touted as "a modest version of the Underground Railroad," the *Gautreaux* Program "is one of the few answers [to inner-city poverty and violence] that has passed a field test."¹⁹³ In *American Apartheid*, a recent study of how urban policies have perpetuated the segregated ghetto, the *Gautreaux* Program is praised as a policy that promises to rectify the related economic and racial problems inflicting inner-city America.¹⁹⁴ In fact, HUD is currently using the *Gautreaux* Program as the model upon which its national "Moving to Opportunity" program will be based.¹⁹⁵

Low Income Blacks who Move to Middle Class Suburbs, in THE URBAN UNDERCLASS 342 (Jencks & Peterson eds., 1991) [hereinafter *Employment and Earnings*]; James E. Rosenbaum, et al., *Social Integration of Low-Income Black Adults in Middle-Class White Suburbs*, 38 SOC. PROBS. 448 (1991) [hereinafter *Social Integration*]; James E. Rosenbaum, et al., *White Suburban Schools' Responses to Low Income Black Children: Sources of Success and Problems*, URB. REV., Spring 1988, at 28.

187. A 1979 HUD report revealed that over 85% of all *Gautreaux* families that moved to the suburbs were headed by single mothers. HUD REPORT, *supra* note 104. This percentage remained relatively constant over the subsequent decade.

188. *Employment and Earnings*, *supra* note 186, at 343-44

189. See Buchholz, *supra* note 138, at C1; Michael Abramowitz, *High Rises to Hell: Why Fix Up Ghastly Projects Like Cabrini Green? Let's Gut Them Out*, WASH. POST, Nov. 22, 1992, at C5.

190. See *World News Tonight with Peter Jennings* (ABC television broadcast, Feb. 4, 1993).

191. Jonathan Alter, *The Body Count at Home*, NEWSWEEK, Dec. 28, 1992, at 55.

192. DeParle, *supra* note 138, at A1.

193. *Id.*

194. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 231 (1993).

195. Moving to Opportunity is one of four pilot programs that HUD hopes to initiate this fiscal year. Guy Gugliotta, *Shallow Pockets and Big Needs Prod 'Small' Thinking at HUD*, WASH. POST, July 13, 1993, at A6 [hereinafter *Shallow Pockets*]. The federal government plans to allocate \$234 million, over the next year, to help over 6,000 poor families move to middle class areas in five different cities. DeParle, *supra* note 138, at A1. While Moving to Opportunity is modeled after the *Gautreaux* Program, the federal program focuses on economic, rather than racial, integration. Gugliotta, *Shallow Pockets*, *supra*, at A6. See generally Alter, *supra*

As a substantive remedy, the parties, institutions, and judges evinced a high degree of foresight and understanding of the problems afflicting inner-city America. Despite the documented legal, economic, and social advances toward racial equality, the Gautreaux Program is not an uncontroverted success. While a full-fledged weighing of the costs and benefits of housing mobility strategies is beyond the scope of this Article, some criticisms of the Gautreaux Program deserve mention here.

Some claim that this type of housing mobility subjects those trying to escape one evil, segregation, to another related evil, discrimination.¹⁹⁶ While acknowledging that suburban participants encounter more discrimination and harassment than their inner-city counterparts,¹⁹⁷ Rosenbaum argues that, after the first year, discrimination in the suburbs is not significantly more prevalent than that confronted in intra-city integrative efforts.¹⁹⁸ Children who moved to the suburbs had as many friends as those who remained in the city,¹⁹⁹ and *Gautreaux* participants "did not encounter the kind of white hostility commonly experienced by project inhabitants."²⁰⁰ Furthermore, the Leadership Council's commitment to educating and counseling participating landlords, as well as its stringent pre-screening efforts, alleviates overt discrimination. While it is indisputable that *Gautreaux* participants have reported incidents of discrimination, institutionalized buffers apparently mitigate such discrimination.

Although the Gautreaux Program will meet its 7,100 target with little difficulty, others note that demand for *Gautreaux* certificates far outweighs the supply of certificates and housing in General and Revitalizing Housing Areas that meets the Section 8 requirements. Rubinowitz, for example, argues that because land-

note 191, at 55; Sharon Cohen, *Program Helps Chicago Black Families Break Out of Inner-City Despair*, L.A. TIMES, Aug. 23, 1992, at A2; Gugliotta, *Lottery Offers a Ticket Out*, *supra* note 141, at A13; *World News Tonight with Peter Jennings* (ABC television broadcast, Feb. 4, 1993).

196. See Mahlon R. Straszheim, *Participation*, in DO HOUSING ALLOWANCES WORK 143 (Katherine L. Bradbury & Anthony Downs eds., 1979) (21% of households in Experimental Housing Allowance Program faced discrimination); CNN NEWS, *Low Income Chicagoans Get New Life in 'Burbs* (CNN television broadcast, Dec. 6, 1993) (quoting Professor James Fuerst, "It is not a very good idea to move a poor family into an area where you have middle class families of another kind, because they stand out like a sore thumb. And that's the--oh, that's the public housing kid").

197. *Social Integration*, *supra* note 186, at 458.

198. *Id.*

199. James R. Rosenbaum & Susan J. Popkin, *Economic and Social Impacts of Housing Integration* (Center for Urban Affairs and Policy Research) (Spring 1990), at 1 [hereinafter *Economic and Social Impacts*].

200. MASSEY & DENTON, *supra* note 194, at 231 (citing Rosenbaum & Popkin, *Economic and Social Impacts*).

lords are under no obligation to rent to recipients of Section 8 vouchers, many landlords reject *Gautreaux* participants. Rubinowitz attributes much of this reticence to entrenched racism.²⁰¹ Furthermore, the stringent proscription against relocating in Limited Housing Areas restricts the Leadership Council's ability to find eligible dwelling units in many of Chicago's suburban areas.²⁰²

In many ways, the preceding criticism highlights the policy's successes. If the public did not perceive the *Gautreaux* Program as the preferable housing alternative, then demand would not be so high. But does the nature of the *Gautreaux* Program inherently limit its remedial scope? While discrimination threatens to circumscribe the Program's viability, the Leadership Council's coaxing approach promises to topple some discriminatory barriers to increasing supply. Other limiting factors, such as the requirement that the *Gautreaux* certificates be redeemable only in General or Revitalizing areas, could be modified to stimulate supply. While the *Gautreaux* Program will never be the panacea to all of Chicago's housing problems, or even all of its housing discrimination problems, there is no apparent *institutional* reason why the program could not be extended beyond the 7,100 target. But even if the impediments to increasing the Program's size could not be overcome, critiques based on scope do not squarely undermine the policy successes.

Many question why the victims of a segregated housing system should bear the remedial burden.²⁰³ The success of the remedy clearly hinges on the *Gautreaux* class' willingness to uproot themselves and to move to the suburbs. And in that sense, the cost of integration is carried by the victims of segregation. The structure of the remedy, however, mitigates this criticism. From accompanying *Gautreaux* participants as they meet prospective landlords to conducting follow-up counseling, the Leadership Council minimizes the disruptiveness of the move.

Probably the most damning critique of the *Gautreaux* Program is its discounting of minority, in this case black, communitarian values. It is paradoxical that the solution to decades of majoritarian oppression is a dispersal of the black community. However, the original goal of the case, integration, implied a certain diminution in the integrity of minority communities. While the cohesiveness of the black community is further diminished when the suburbs are included in the remedy, any remedy that the court could have fashioned in response to this particular com-

201. Rubinowitz, *supra* note 70, at 656.

202. *Id.* at 651.

203. See, e.g., Richard Gervase, *Remedy or Not?: Public Housing Discrimination and Suburban Exclusion*, 12 YALE L. & POLY REV. (forthcoming Spring 1994).

plaint would have, in some ways, diminished community integrity.

While the success of generic housing mobility strategies is a matter of controversy, the *Gautreaux* context allays many concerns. The Leadership Council's agility as coordinator makes it difficult to label the Gautreaux Program anything but a policy success.

2. *The New Institutional Status Quo: Institutional Success*

The way the critics pose efficacy questions reveals a poignant lack of appreciation for the structural injunction's inter-institutional dimension. As a structural injunction progresses, two simultaneous, but not necessarily independent, processes ensue: 1) the substantive remedying of a constitutional wrong; and 2) the forging of a new institutional status quo. As traditionally posed, the efficacy inquiry focuses solely on the imposition of the substantive remedy, discounting the structural injunction's inter-institutional function. Notions of "efficacy" or "success" must be unpacked to reflect this underlying duality. In this Article, "policy success" refers to the substantive results of the Section 8 housing mobility strategies, and, as discussed above, the *Gautreaux* structural injunction is a stunning policy success. A structural injunction that effectively forges a new institutional status quo is deemed an "institutional success."

The successful congealing of a new institutional status quo is not easily discernable. Stability, however, is one indicia. For over a decade, the Leadership Council, the market, and HUD have been allocating power as indicated on the preceding chart.²⁰⁴ It appears as though this distribution of power will remain stable even as the Gautreaux Program meets its goals, for HUD is desperately trying to maintain this auspicious partnership by finding a new role for the Leadership Council.²⁰⁵ A second indicia is ability to sustain the substantive remedy. As will be discussed in the following section, this particular panoply of institutions buttressed the policy success of the Gautreaux Program, effectively sustaining the remedy until reaching its target. That *Gautreaux* is becoming a nationally generalizable model is a third indicia of institutional success. HUD's "Moving to Opportunity" initiative combines the expertise of local public interest organizations, the flexibility of market-based housing vouchers, and the resources of HUD to create *Gautreaux*-like programs throughout the country.

In forging a stable institutional network that effectively sustains the Gautreaux Program, *Gautreaux* constructed a new institutional status quo. As such, *Gautreaux* is properly labeled an

204. See Chart: New Institutional Status Quo, *supra* p. 83.

205. Burtschi Interview, *supra* note 114.

institutional, as well as policy, success. Viewing *Gautreaux* from a distance, as a multidimensional redistributive process, *Gautreaux* is a success story that undermines the traditional efficacy critique and fundamentally alters the way efficacy questions must be asked in the future.

3. *Relationship Between Institutional and Policy Success*

While notions of success must be parsed to account for the structural injunction's underlying complexity, one cannot deny the relationship between policy success and institutional success. *Gautreaux's* new institutional status quo did not merely sustain the Gautreaux Program but actually contributed to the policy's success. I have already noted how particular institutional changes, such as the Leadership Council's ascension, contributed to the Gautreaux Program's success. Whereas the CHA and the City Council were corrupt, inefficient, and obstructionist, the highly responsive Leadership Council tamed its market partner, furthering the policy's efficacy.

The post-*Gautreaux* institutional status quo also depoliticized public housing policy without abandoning "grass roots" policymaking. While removal of the City Council from the network was probably most significant, disempowering the CHA, notorious for its unyielding alliance with the City Council,²⁰⁶ also furthered depoliticization. Depoliticization permits policymakers' focus to remain on the substantive issue. With cost/benefit analyses informed by substance rather than by political expedience, sound and viable policy decisions will more likely ensue.

In addition, the institutional network is significantly more differentiated than that governing pre-*Gautreaux* housing policy. Prior to *Gautreaux*, specific institutions held monopolies over various decisions: the CHA controlled implementation decisions, HUD controlled financing decisions, and the City Council and the CHA controlled policy decisions. Although the City Council and CHA may, at first, appear to be a differentiated pair, the CHA was a mere puppet of the City Council.²⁰⁷ Monopoly power reduces accountability and responsiveness to demand. The *Gautreaux* remedy broke these monopolistic power structures. Neither the market, the Leadership Council, nor HUD currently enjoys unbridled policymaking power; each institution mediates the decisions of the others. Likewise, the Leadership Council and the market negotiate implementation decisions. The dismantling of such monopolies forces inter-institutional deliberation, explicit or implicit, which, in turn, engenders more responsive, accountable,

206. Rubinowitz, *supra* note 70, at 596.

207. Polikoff, *supra* note 31, at 456-57.

and rational decisions.

The new institutional status quo also has a coordinator while the pre-*Gautreaux* institutional landscape did not. As discussed above, the Leadership Council serves not only as policymaker and implementor but also as coordinator, assuring that the policy, financing and implementation decisions function as a coherent package. Using hindsight, foresight, and peripheral vision, the coordinator maximizes the synergies among participating institutions.

In dividing power among a not-for-profit, the market, and a federal government agency, *Gautreaux* institutionalized a powerful trio that mitigates some of the inefficiencies of government programs and inequalities of the market. This institutional network is currently being harnessed by HUD to effect numerous contours of housing policy. For example, the National Community Development Initiative is a joint venture of HUD and philanthropic organizations to fund local, non-profit groups in efforts to further community-based, inner-city development.²⁰⁸ Likewise, the Innovative Homeless Fund integrates the resources and expertise of HUD, local officials, nonprofit groups, and private neighborhood groups to combat the growing homelessness problem.²⁰⁹ Courts also recognize the remedial power of this triad. For example, Hispanic recipients of Section 8 vouchers in Westchester County, New York, charged HUD and local housing authorities with discrimination in their steering practices.²¹⁰ In negotiating a settlement that mirrors the *Gautreaux* Program, the defendants agreed to finance a nonprofit organization modeled after the Leadership Council, the Westchester People's Action Coalition, to distribute Section 8 vouchers.²¹¹

The preceding discussion suggests how a new institutional status quo can inform policy success. Conversely, policy success may impact institutional success. A successful policy satisfies a requisite condition for institutional success, ability to sustain the underlying substantive remedy. A successful policy also instills confidence in the configuration of executing institutions and,

208. *Shallow Pockets*, *supra* note 195, at A6.

209. *Id.* New York City has had a particularly positive experience in entrusting policy issues, such as homelessness, to non-profit organizations. See generally David C. Anderson, *Ellen Baxter*, N.Y. TIMES, Dec. 19, 1993, § 6 (Magazine), at 36-39.

210. See Joseph Berger, *Deal Reached in Westchester Housing Suit*, N.Y. TIMES, Sept. 29, 1993, at B1.

211. Elsa Brenner, *After a Suit, Moving to a New Life*, N.Y. TIMES, Nov. 7, 1993, 13WC, at 1. The Westchester People's Action Coalition, run and administered by the plaintiffs, will find landlords and relocate at least 550 families over the next five years. This "Enhanced Section 8 Outreach Program" will perform "many of the same duties as a real estate office." *Id.* A federal district court judge approved the consent decree on September 28, 1993. Berger, *supra* note 210, at B1.

thereby, enhances the stability of the new institutional status quo. Furthermore, a successful policy will be sought for replication and the supporting panoply of institutions may become a generalizable model. A successful policy fortifies a new institutional status quo.

Despite the strong correlation between policy and institutional success, policy success is not necessarily a perfect or timely proxy for institutional success. A particular institutional configuration may effectively support the prescribed substantive remedy, but that remedy may not be deemed a policy success. In such a scenario, policy failure would not necessarily undermine institutional success. Furthermore, policy success may occur years after the new institutional status quo congeals. In *Gautreaux*, for example, the policy successes were not prominent until the early 1990s, but the new institutional landscape was solidified sometime in the mid-1980s.

C. Relationship Between Efficacy and Legitimacy

This Article was inspired by an inclination that the Gautreaux Program's nationally recognized policy successes somehow vindicated the whole judicial enterprise—that somehow the policy ends legitimated the legal means. It is not merely the success of the Gautreaux Program that begs this question. The critics of the structural injunction generally confound efficacy and legitimacy, subsuming the former into the latter. Horowitz, one of the most avid legitimacy critics, relies on *ex post* efficacy arguments to undermine the structural injunction's legitimacy. Horowitz argues that "the least bureaucratized branch of government," the judiciary, will ineffectively administer the legislative functions it inappropriately assumes, and, thereby, the structural injunction is illegitimate.²¹² In conflating efficacy and legitimacy, Horowitz intimates that policy ends may impact the legitimacy of the means.

Yet an argument directly linking legitimacy to policy success, carried to its logical conclusion, would delegitimize all judicial interventions resulting in policy failures. This is not what I am arguing. This Article dispelled the legitimacy critiques not by showcasing policy successes but rather by aligning the respective critiques with the structural injunction's underlying inter-institutional and temporal realities. In fact, the relationship between the efficacy of the ends and the legitimacy of the means is rather attenuated. Results only become relevant in as much as they provide a secure point from which to make retrospective legitimacy assessments, which then proceed along the countermajoritarian and separation-of-powers axes.

212. Horowitz, *Decreeing Organizational Change*, *supra* note 15, at 1304.

Traditional legitimacy critiques are hasty and myopic, reaching tentative, and frequently incorrect, conclusions. But, when recast to account for the structural injunction's inter-institutional and temporal dimensions, the focus of these inquiries inevitably shifts toward the conclusion of the redistributive process. Separation-of-powers critics must broaden their focus on individual judicial acts to encompass the entire redistributive process. Likewise, the countermajoritarian critics must scrutinize the identity of the *ultimate* power holders to determine whether the remedy produced anti-democratic outcomes. In utilizing the culmination of the remedial process as their vantage point, legitimacy analyses inevitably collide with the structural injunction's empirical results. With the results also serving as the point of retrospection, how, if at all, do these ends inform legitimacy assessments?

Properly recast legitimacy inquiries presuppose the congealing of a new institutional status quo, for it is at this moment that uprooted institutions come to rest, inter-institutional redistributive processes culminate, and the identity of the ultimate power holders becomes apparent. When the inter-institutional, redistributive process has stabilized into a configuration capable of sustaining the remedy, the structural injunction is deemed an institutional success. At that point, the critic is assured of a secure vantage point from which to look back and assess the legitimacy of remedial efforts in light of separation-of-powers and countermajoritarian concerns. Institutional success, therefore, acts as a precursor to the entire legitimacy inquiry. While institutional success *lays the foundation* for legitimacy analysis, it does not affect the substantive outcome of the inquiry.

Although legitimacy and institutional success are indirectly related, it is important to underscore what this conclusion does not state. First, although institutional success is a precondition for the legitimacy *inquiry*, it does not legitimate the remedial means. Institutional success is no guarantee of legitimacy; it is only a guarantee of a stable vantage point from which to make legitimacy judgments. Second, except for its relationship to institutional success, policy success is irrelevant to legitimacy assessments. Although the correlation between institutional and policy success is very high, this correlation is not perfect. Suppose, for example, that the Gautreaux Program was an ineffective policy—landlords would not participate, members of the *Gautreaux* class did not demand the certificates, and the shock of the move hindered low-income residents' ability to make the social adjustment to suburban life. While the substantive remedy would likely be labeled a policy failure, it is not clear whether the institutional dimension would deserve a similar label. As long as the failure is policy-specific rather than linked to structural deficiencies, policy failure does not necessarily undermine the stability of the result-

ing institutional framework. As such, policy failure or success may be insignificant, even as a mere precursor to the legitimacy inquiry.

While many critics scorned its beginnings, the *Gautreaux* story has ended happily. But these endings can be utilized to resuscitate *Gautreaux's* beginnings only indirectly, by providing a stable vantage point from which to make unyielding legitimacy assessments. The successful congealing of a new institutional status quo demarcates this durable vantage point. While policy success may bolster institutional success, it is only through this circuitous avenue that *Gautreaux's* well-publicized endings can be used to recover its beginnings.

V. CONCLUSION

The structural injunction is a multidimensional remedial process. On one plane the judge interacts with a particular institution. On another plane, related institutions interact with each other. In attempting to redress a constitutional violation in one implicated institution, the judge frequently disrupts the institutional status quo and effects significant inter-institutional redistributions of power. While critics view the structural injunction myopically, the *Gautreaux* case colorfully illustrates this remedy's inter-institutional and temporal dynamism. As power passed from the Chicago City Council to the CHA, from the CHA to HUD, and then from HUD to the private sector, *Gautreaux* forged a new institutional status quo.

The legitimacy and efficacy critiques typically launched at the structural injunction are incommensurate with this remedy's complexity because the language of assessment is clearly molded by the very dispute resolution models that the structural injunction rejects. "Legitimacy" has been understood as a snapshot assessment of the propriety of a remedial moment—the judge's resolution of a dispute between two parties. Traditional legitimacy inquiries inevitably discount the other moments that constitute the overall remedial process and, thereby, skew the inquiry's outcomes independent of substance. Likewise, notions of "success" or "efficacy" are incommensurate with the underlying structural injunction. Conventionally used to appraise for a particular remedial moment, efficacy assessments do not account for the remedy's dynamism. Furthermore, efficacy has traditionally been synonymous with policy success, belittling the structural injunction's inter-institutional dimension.

At its very core, therefore, this Article is about recasting time-honored modes of assessment to conform better with the underlying object of assessment. It is about asking new questions to avoid privileging misleading answers. It is about reinvigorating

beginnings, not by parading happy endings, but by using such endings as a new entree from which to reexamine beginnings. These are the enduring lessons of *Gautreaux*.

