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Housing—Site Selection for Public Housing and the Expanded Equal Protection Concept

SITE SELECTION FOR PUBLIC HOUSING AND THE EXPANDED EQUAL PROTECTION CONCEPT

Banks v. Perk[1] was a class action brought in behalf of all eligible nonwhite applicants for federally-assisted public housing. The action was brought in two counts. The first charged that the city of Cleveland and its agents denied plaintiffs equal protection of the laws,[2] and violated the Civil Rights Acts of 1964 and 1968[3] and the Fair Housing Act[4] by revoking building permits issued for low-income housing in predominantly white residential areas of the city.[5] The second count alleged that the Cuyahoga Metropolitan Housing Authority (CMHA) abridged similar rights of plaintiffs by failing to place a clear majority of the planned housing projects in white neighborhoods when the racial composition of the waiting list for such housing was 90% black.[6] CMHA joined in Count I as a cross-claimant.

The issue presented before the court in Count I was neither novel nor difficult. The evidence indicated that within two months of taking office the new administration for the city, whose announced policy was to oppose low-income housing in neighborhoods where the residents voiced disapproval, revoked the building permits for two projects scheduled to be constructed on the west side of the Cuyahoga River. Although no intent to discriminate was established, the city's actions had the net effect of perpetuating existing patterns of racial

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1. 341 F. Supp. 1175 (N.D. Ohio 1972). Federal jurisdiction was invoked pursuant to 28 U.S.C. §§ 1343(3)-(4) (1970).

2. U.S. CONST. amend. XIV, § 2.

3. 42 U.S.C. §§ 1981, 1983, 2000d (1970).

4. 42 U.S.C. §§ 3601 *et seq.* (1970).

5. The city of Cleveland is divided nearly in half by the Cuyahoga River. Most of the city's black population is housed on the east side of the river while the west is almost entirely white. 341 F. Supp. at 1178. The city itself is second only to Milwaukee, Wisconsin in residential segregation. *Id.* at 1181.

6. Plaintiffs apparently contended that low-income housing is the "functional equivalent" of minority housing. That is, the exclusion of low-income housing from white areas is the "functional equivalence" of exclusion by race. *See generally* Gomillion v. Lightfoot, 364 U.S. 339 (1960), for the foundations of the "functional equivalence" test.

segregation.[7] Relying on a list of cases in point,[8] the court had little difficulty in holding that defendants' actions deprived plaintiffs of equal protection, subjected them to discrimination on the basis of color, and denied them equal access to public housing on a nondiscriminatory basis.[9] Since defendants gave no substantial reason for their action that might amount to a supervening governmental interest,[10] they were ordered to issue the permits and cautioned not to interfere or further impede efforts by CMHA to place low-income public housing in white areas of the city.

The challenge in Count II was more difficult, both in finding actionable discrimination and fashioning a remedy. An examination of the evidence indicated that CMHA had unofficially maintained segregated housing in the past. It presently professed, however, a policy of dispersal for public housing, and of the total number of units built in the last five years, nearly half were located in white neighborhoods and a comparable breakdown was planned for future projects. CMHA admitted, however, that it did not include the racial composition of surrounding neighborhoods in its site selection criteria and that no limits were placed on the number of units to be

7. In United States v. O'Brien, 391 U.S. 367 (1968), the Supreme Court interpreted *Gomillion* to stand for the proposition that the inevitable effect of, and not the motive behind, a statute or other state action is the key determinant to its constitutional validity. Recently in Palmer v. Thompson, 403 U.S. 217 (1971), the Court was presented with the issue of whether effect or motive is the proper test for racial discrimination. Six justices (Burger, Black, Blackmun, Douglas, Harlan and Stewart) believed effect was the key while three justices (Brennan, Marshall and White) voted for motive. *See also* Reitman v. Mulkey, 387 U.S. 369 (1967), where the Court held that a statute or state action neutral on its face which has the effect of encouraging private discrimination is unconstitutional.

8. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir.), *cert denied,* 401 U. S. 1010 (1971) (holding unconstitutional a refusal by the city to permit plaintiffs to tie sewers from low-income housing into city's sewer system); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (finding that no explanation other than racial motivation was possible for city's refusal to grant a zoning variance to construct low-income housing in a white residential area); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972) (holding use of conditional zoning variances to defeat public housing projects in white neighborhoods unconstitutional).

9. *See* 42 U.S.C. §§ 1981, 1983, 2000d, 3601 *et seq.* (1970).

10. A state or city has the duty to insure compliance with the Constitution when it puts its property, power and prestige behind any program. Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968). A variance with this mandate is permissible only when a compelling governmental interest can be shown. Shapiro v. Thompson, 394 U.S. 618 (1969).

built in the black areas of the city.[11] A look at the entire picture indicated that the attempts by CMHA to integrate and disperse public housing were not very successful.[12] Generally, the racial composition of the housing projects tended to mirror the racial composition of the census tracts in which they were located: blacks in the east and whites in the west.

Thus the court was presented with a situation where racially neutral and apparently good faith efforts by CMHA to disperse housing contributed to de facto segregation.[13] The central issue presented in *Banks* was whether the placement of *any* low-income housing in black areas under the circumstances was consistent with the fourteenth amendment, or, in other words, does CMHA have an affirmative duty to remedy segregation it did not cause?[14] The court held that the national policy concerning public housing, as reflected in the Fair Housing Act of 1968, places on all local housing authorities the duty to take affirmative action to provide fair housing for all on a nondiscriminatory basis.[15] This duty necessitates a commitment to the dispersal of public housing throughout the city,[16] and requires the local housing authority to carefully consider the racial impact of its decisions.[17] Consequently, the racial composition of proposed loca-

11. 341 F. Supp. at 1181-82.

12. At the time the suit was filed, approximately 90% of the applicants for family housing units were black and approximately 62% of these units were located on the east side of the river. This last statistic, however, does not reflect the true status of segregation in Cleveland. CMHA followed a freedom of choice plan wherein impartially selected applications were sent to managers of each complex who were thereafter free to select the applicants who would fill their vacancies. As a result the racial composition of each housing complex was closely linked to the prejudices of each complex manager. For the purposes of the preliminary injunction, however, the court chose not to consider CMHA's tenant selection policies but recognized that active discrimination may be practiced daily in the program. 341 F. Supp. at 1182.

13. *Id.*

14. *Id.* at 1184.

15. For a summary of the development of federal policy concerning housing equality see Maxwell, *HUD's Project Selection Criteria—A Cure for "Impermissible Color Blindness?"*, 48 NOTRE DAME LAW. 92 (1972); Pearl & Terner, *Fair Housing Laws: Halfway Mark,* 54 GEO. L.J. 156 (1965); Note, *Public Housing and Integration: A Neglected Opportunity,* 6 COLUM. J.L. & SOC. PROB. 253 (1970); and Note, *Discriminatory Site Selection in Public Housing and Federal Judicial Response,* 64 NW. U.L. REV. 720 (1969).

16. *See* note 15 *supra.*

17. *See also* El Cortez Heights Residents & Property Owners Ass'n v. Tucson Housing Authority, 10 Ariz. App. 132, 457 P.2d 294 (1969), where the Court of

tions for public housing must be an integral part of the authority's site selection criteria. Placing family units in black neighborhoods when the city is racially segregated and where a majority of the applicants are black continues the isolation of blacks and inhibits their ability to break out of the ghetto. Regardless of motive, such action prevents blacks from competing on an equal basis and therefore violates the equal protection clause of the fourteenth amendment.[18]

The district court credited CMHA with a good faith effort to disperse public housing in Cleveland, but held that its conception of dispersal did not meet the standards of the fourteenth amendment. Implicit in the concept of dispersal is the notion that some sort of balance must be reached. This balance cannot be attained if new projects are built in racially concentrated areas at a rate equal to that of projects constructed elsewhere.[19] To insure rapid compliance, the court enjoined CMHA from selecting or considering sites on the east side of the Cuyahoga River.

Typically, local housing authorities and the Department of Housing and Urban Development (HUD) have been unable to fulfill the national mandate on nondiscriminatory site selection.[20] Until a very few years ago, courts avoided site selection problems by claiming that local authorities required wide discretion to discharge their duties, and that in the absence of a clear showing of bad faith by public officials, no violation of equal protection would occur.[21] After

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Appeals of Arizona ruled on the basis of the language contained in 24 C.F.R. § 1.4 (1969), but recognized that the equal protection clause also supported the result.

18. *See* note 7 *supra.*

19. 341 F. Supp. at 1184.

20. Note, *Racial Discrimination in Public Housing Site Selection,* 23 STAN. L. REV. 63, 114-16 (1970). Three factors contribute to this result: First, sites for public housing are generally subject to review by local governmental bodies. Community opposition manifests itself in a failure to approve sites selected by local housing authorities. Second, land in white neighborhoods is generally more expensive and local housing authorities often forego selection of sites in white districts because the minimum cost per unit set for HUD allotments cannot be met or because community needs demand quantity rather than location. Third, white areas are usually zoned to permit fewer families per dwelling thus causing the local housing authorities to run into the same cost problems because they cannot take advantage of economies of scale. All three of these factors are recognized by HUD as legitimate excuses for a failure to achieve nondiscriminatory site selection. *See* HUD, LOW-RENT HOUSING MANUAL (1967). For a discussion of HUD's authority see Lefcoe, *HUD's Authority to Mandate Tenants' Rights in Public Housing,* 80 YALE L.J. 463 (1971), and Maxwell, *supra* note 15.

21. *See* Thompson v. Housing Authority, 251 F. Supp. 121 (S.D. Fla. 1966); Varnadoe v. Housing Authority, 221 Ga. 467, 145 S.E.2d 493 (1965); *In re* Housing Authority, 235 N.C. 463, 70 S.E.2d 500 (1952).

Gautreaux v. Chicago Housing Authority,[22] however, courts began to be more aware of the site selection problems. In *Gautreaux*, the court held that a pre-clearance agreement between the Chicago Housing Authority (CHA) and the city, wherein each alderman had veto power over sites selected in his district, was in violation of the fourteenth amendment.[23] By constructing low-income housing on sites chosen because more desirable sites were rejected by a racially motivated aldermanic council, CHA, in effect, adopted the city's discriminatory practices as its own policy. In addition, the court permitted statistical inference of discriminatory intent to be drawn from the fact that 99½% of all sites chosen in white areas were rejected while only 10% in black neighborhoods were disapproved.

The *Gautreaux* decision found affirmation when the court in *Hicks v. Weaver*[24] held that sites in all black neighborhoods selected while the city operated under a de jure segregationist policy violated the fourteenth amendment because the sites were initially intended to maintain segregation between the races. In effect, both the *Gautreaux* and *Hicks* decisions made it clear that site selection is highly relevant to nondiscriminatory public housing and that the location of a majority of the new projects in racially concentrated areas created a strong inference of illegality.[25] To establish a right to judicial relief, however, the *Gautreaux* and *Hicks* courts required a showing of intent to discriminate. In so doing, they failed to recognize that neutral

22. 265 F. Supp. 582 (N.D. Ill. 1967) (Gautreaux I), 296 F. Supp. 907 (N.D. Ill. 1969) (Gautreaux II), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971). *Gautreaux* was the first site selection case in which plaintiff prevailed.

23. 296 F. Supp. at 914.

24. 302 F. Supp. 619 (E.D. La. 1969).

25. Both *Gautreaux* and *Hicks* substantially expanded the protection of rights in this area. Neither court spoke in terms of bad faith; rather they held that disadvantaged minorities have an absolute right to have sites for low-income housing selected with regard to the racial composition of the surrounding neighborhoods or of the projects themselves. Thus it was no longer permissible to justify a planned separation of races on the ground that separation was needed to avoid hostile confrontations and civil unrest. Any purposeful separation is unconstitutional. In addition, the court in *Gautreaux I* facilitated class actions of this nature by holding that the injury of the individual litigant is subservient to the interests of the group as a whole. Consequently, any class member could have standing to litigate without showing personal injury. For an excellent discussion see *Racial Discrimination in Public Housing Site Selection, supra* note 20, at 118. *See also* Note, *Housing Law—Discriminatory Site Location and Tenant Allocation Procedures—Equitable Relief*, 1970 WIS. L. REV. 559.

site selection procedures can have the same ill effects as a deliberate plan[26] and, as a result, put the availability of judicial relief beyond the reach of injured persons who could not establish proof of intent to discriminate.[27]

Following the traditional equal protection approach of *Gautreaux* and *Hicks*, plaintiffs in *Banks* undoubtedly would have been denied relief since CMHA was acting in good faith without intent to discriminate, and, most importantly, its actions were incontestably "rational."[28] Moreover, there is little room to argue that a classification by race or some other "suspect trait" was involved. All that demonstrably could have been proven was that, in light of the existing social conditions, the particular state action produced a result unequal in fact, leaving an identifiable group in worse shape than the rest of society.[29] The result is de facto segregation for which state officials traditionally are held unaccountable since the state action requirement of the equal protection clause is not satisfied.[30] The *Banks* court, however, adopted an expanded equal protection concept that rejects the need for proving intent or "suspect traits" in certain civil rights areas. That is, sufficient state action can be found solely on the basis that state or local officials failed to initiate action designed to alleviate de facto segregation. A growing number of cases obviate the necessity of placing the blame for existing segregation and hold that the equal protection guarantees are violated when seemingly impartial government programs result in de facto segrega-

26. *See Racial Discrimination in Public Housing Site Selection, supra* note 20, at 125.

27. Comment, *Gautreaux v. Public Housing Authority: Equal Protection and Public Housing*, 118 U. PA. L. REV. 437, 440 (1970). It should be noted that this type of proof is usually unavailable since few state agencies openly profess racism. Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

28. Assuming that the requisite state action has been found, courts traditionally require that either the state intended to discriminate or that there was no rational basis for the particular action. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (no rational basis); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (intent). In addition, courts will require a showing of a supervening governmental interest to justify a classification by race or some other "suspect trait." Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Korematsu v. United States, 323 U.S. 214 (1944).

29. *Gautreaux v. Public Housing Authority: Equal Protection and Public Housing, supra* note 27, at 442.

30. *See generally* Hemphill, *State Action and Civil Rights*, 23 MERCER L. REV. 519 (1972); Kellett, *The Expansion of Equality*, 37 S. CAL. L. REV., 400, 402, 421 *et seq.* (1964); Comment, *The Fourteenth Amendment and The State Action Doctrine*, 24 WASH. & LEE L. REV. 133 (1967).

tion or when steps are not taken to correct the results of past wrongs.[31]

This expanded approach to equal protection comes close to holding the existence of de facto segregation a per se violation of the fourteenth amendment.[32] Although no court has yet gone that far, the concept has been employed successfully in particular situations, especially school desegregation. An emerging line of both federal and state cases has held the failure of local school boards to take steps to counteract the evils of de facto segregation to be an abridgement of the fourteenth amendment.[33] In *Hobson v. Hansen,*[34] the court stated

31. For a general discussion of this topic see Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment,* 61 NW. U.L. REV. 363 (1966); Kellet, *supra* note 30; *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969); Note, *Low-Income Housing and the Equal Protection Clause,* 56 CORNELL L. REV. 343 (1971); Comment, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board,* 81 HARV. L. REV. 1511 (1968). *Racial Discrimination in Public Housing Site Selection, supra* note 20; Comment, *Equal Protection in Urban Renewal Relocation,* 1969 U. ILL. L.F. 105; *Gautreaux v. Public Housing Authority: Equal Protection and Public Housing, supra* note 27.

32. In many legal circles, the argument exists that racial classifications involved in judicial desegregation orders are themselves per se violations of the fourteenth amendment; that is, the fourteenth amendment does not permit racial classifications for any purpose. This contention, however, has found little judicial support, especially when de jure segregation is involved. Arguably there is less justification for the theory that racial classifications are permissible to remedy de facto segregation. Contentions range from claims that such action violates the first amendment right to freedom of association to arguments that the primary function of the courts is to end discrimination, not to force integration. Expanded equal protection advocates, however, counter that they are merely correcting past wrongs. "If the only way to achieve racial balance is through the use of racial classifications, the purpose . . . fulfills the traditional requirement of 'overriding justification' and permits the use of racial classifications." *Racial Discrimination in Public Housing Site Selection, supra* note 20, at 129.

33. *See* Green v. County School Bd., 391 U.S. 430 (1968); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd,* 380 F.2d 385 (5th Cir.) (en banc), *cert. denied,* 389 U.S. 840 (1967); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc); Barksdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass. 1965), *vacated and remanded for dismissal without prejudice on other grounds,* 348 F.2d 261 (1st Cir. 1965); Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962); Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963). The rationale behind these cases is that racially segregated schools are demonstrably inferior and consequently affirmative action is needed to meet the mandate of equal educational opportunities contained in Brown v. Board of Educ., 347 U.S. 483 (1954). Some authors argue that *Brown* itself is authority for this approach to equal protection in that the text of that opinion is replete with references to the detrimental effects and inherent inequality of segregated schools. *Developments in the Law—Equal Protection, supra* note 31, at 1184.

34. 269 F. Supp. 401 (D.D.C. 1967).

that "[t]he complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false."[35] The *Hobson* court granted affirmative relief against practices which were neither discriminatory on their face nor the product of a discriminatory scheme, but which adversely affected the educational opportunities of a disadvantaged minority.[36] In short, the failure of school boards to deal with de facto segregation is tantamount to intending the result.[37] Similar results were obtained in voting rights,[38] public services[39] and employment[40] discrimination cases.

Efforts to extend this added protection to public housing rights after the *Gautreaux* and *Hicks* decisions have not been as successful, or as conclusive, at least as far as site selection is concerned. In *Carr v. Brown*,[41] a claim against the Atlanta Housing Authority (AHA) which charged site selection discrimination was rejected because the evidence indicated that 93% of the sites proposed by AHA were located in all-white or racially mixed neighborhoods. In a well-reasoned opinion, the court stated that intent to discriminate was not a prerequisite to a cause of action.[42] Although the logic was persuasive, it was not relevant to the holding since the case was dismissed on the facts alone. In *El Cortez Heights Residents and Property Owners Ass'n v. Tucson Housing Authority*,[43] the Court of Appeals of Arizona granted

35. *Id.* at 497.

36. *See Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board, supra* note 31, at 1512.

37. See Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962). *See also* Kellett, *supra* note 30, for a discussion of the negative versus positive attributes of the equal protection clause.

38. Gaston County v. United States, 395 U.S. 285 (1969).

39. Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971). *See* Ellington & Jones, *Hawkins v. Town of Shaw: The Court as City Manager*, 5 GA. L. REV. 734 (1971).

40. United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir. 1970); Local 53, Heat & Frost Insulators v. Voglet, 407 F.2d 1047 (5th Cir. 1969).

41. This case was joined for trial with Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

42. *Id.* at 391.

43. *See* note 17 *supra.*

a temporary injunction to halt ground breaking on a local housing project on the basis that the Tucson Housing Authority failed to include the racial impact of its programs in its site selection criteria. Inclusion of such criteria was a significant step beyond *Gautreaux* and *Hicks* where the parties were granted only the right to have racial factors excluded from site selection criteria. But again, the usefulness of the decision is diminished by the fact that the Arizona court was not faced with a multi-faceted problem of the same magnitude as in *Gautreaux, Hicks,* or *Banks.*[44]

An opportunity to expand the protection given in *Gautreaux* and *Hicks* was presented to the Court of Appeals for the Third Circuit in *Shannon v. HUD,*[45] a case similar in the issues it raised to *El Cortez.* The Department of Housing and Urban Development (HUD) had approved a modification of the Philadelphia urban renewal plan for the East Poplar area, an almost all-black area, in which planned single-family, owner-occupied homes were replaced by a low-income housing project. Considering only land use factors, HUD ruled that the alterations were minor and therefore dispensed with the public hearing required by both statute and internal regulations. In a suit to restrain HUD's support of the project, plaintiffs contended that low-income housing in racially impacted areas was not permissible under the fourteenth amendment and HUD's procedures were inadequate since it did not consider the effects of placing projects in racially concentrated neighborhoods. The court reversed the district court's decision for HUD on the grounds that the Civil Rights Acts of 1964 and 1968 make the segregative effect and integrative potential of a project relevant factors that must be considered.[46] The court, therefore, held that HUD's procedures were inadequate. Further assistance was to be restrained until HUD reconsidered the effects of placing a low-income housing project on the site selected. By holding "effect" to be only one relevant factor, the court avoided

44. The town of Tucson, Arizona does not suffer from severe racial imbalances. The Arizona court was called upon to decide only whether the exclusion of racial impact from its site selection criteria was legally significant. It did not have to review the town's dispersal policies and it did not have to take significant steps to implement its decision. The court found only that the placement of public housing in racially impacted areas created doubts as to the legality of the selection and ordered the Tucson Housing Authority to halt ground breaking only until the court had reconsidered its decision.

45. 436 F.2d 809 (3d Cir. 1970).

46. *Id.* at 820.

facing the issue of whether support for low-income housing in racially concentrated areas is by itself a per se violation of the Civil Rights Acts because such support encouraged continued segregation.[47]

The Supreme Court has yet to express its opinion on the subject of site selection for public housing. In *James v. Valtierra*,[48] however, it implicitly rejected the view that de facto housing segregation is unconstitutional in the same sense as de facto school segregation. In *James*, the Court upheld an article of the California constitution that required approval by public referendum of all low-income public housing projects. The *James* case is similar in many respects to *Gautreaux*. In both cases, the sites selected were subjected to outside approval,[49] and, by statistical inference, it was obvious that discrimination was in force since a substantially greater number of projects in white areas were rejected than were in black areas. The Supreme Court, however, did not formally recognize the site selection problem and merely held that the referendum requirement was a valid exercise of democratic decision making.[50] The *James* decision, on this basis, appears inconsistent with past decisions.[51] Its effect on site selection problems, however, is uncertain since the Court did not speak of *Gautreaux* even by implication and the decision was itself totally ignored by the *Banks* court.

The expanded approach to equal protection has not been totally inoperative in the area of housing. In *Norwalk CORE v. Norwalk Redevelopment Agency*,[52] the Court of Appeals for the Second Circuit held the failure by defendants to find adequate housing for nonwhites displaced by urban renewal, when private discrimination makes it difficult to find alternative housing, to be an equal protec-

47. Comment, *Urban Renewal—HUD Has an Affirmative Duty to Consider Low-Income Housing's Impact Upon Racial Concentration*, 85 HARV. L. REV. 870 (1972).

48. 402 U.S. 137 (1971).

49. Note that the *Gautreaux II* court held that it was immaterial that the aldermen were merely reflecting the opinions of their constituents. Gautreaux v. Chicago Housing Authority, 296 F. Supp. at 914. Why does an aldermanic middleman make a difference?

50. The Court labored to distinguish Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Hunter v. Erickson, 393 U.S. 385 (1969). Even a conservative estimate, however, would deem the decision inconsistent with Reitman v. Mulkey, 387 U.S. 369 (1967).

51. *See* Comment, *James v. Valtierra: Housing Discrimination by Referendum?*, 39 U. CHI. L. REV. 115 (1971).

52. 395 F.2d 920 (2d Cir. 1968).

tion violation. Defendants were held accountable because they should have foreseen the problem.[53] The court stated:

> "Equal protection of the laws" means more than merely the absence of governmental action designed to discriminate; . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.[54]

Thus the fact that discrimination is "accidental" to, rather than inherent in, the administration of the program does not relieve the planners of the duty to insure compliance with the Constitution.

Despite its positive attributes, one should recognize that *Banks v. Perk* leaves many unsolved problems. First, local opposition to court-ordered dispersal will obviously continue. Inevitably the result will be a reduction in the rate of construction for needed units as local authorities contrive more subtle ways to avoid the orders. Such a reduction conflicts with another national goal, an adequate supply of decent housing to meet community needs. Second, dispersal of public housing which is to be inhabited by blacks may serve to break down the political power of the black community and sever cultural ties. Third, a dispersal program assumes that blacks will want to move into white neighborhoods, and that employment will be available. Finally, direct judicial supervision assumes that courts and judges have the expertise to handle the diverse social and economic problems that accompany any comprehensive plan to relocate a city's people and resources.[55]

Charles Dean

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53. *Id.* at 931.

54. *Id.*

55. On appeal, the order in Count I of Banks v. Perk has been reversed in part. 473 F.2d 910 (6th Cir. 1973). The city of Cleveland appealed the decisions as it applies to both defendants. Significantly, CMHA joined with plaintiffs on a motion to dismiss the appeal, as far as it applies to the order against CMHA.