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Intermunicipal Remedy
For Discrimination
In Public Housing


I. INTRODUCTION

Public housing recently has become a major target of civil rights groups intent on the integration of American society.¹ Their focus

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1. Among the major litigational efforts to alter metropolitan racial patterns by bringing public housing to the suburbs is a recent United States Supreme Court case, *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 97 S. Ct. 555 (1977). In 1971 the Metropolitan Housing Development Corporation, a nonprofit corporation, applied to the village of Arlington Heights for the rezoning of a 15-acre parcel from single-family to multi-family classification. The housing project had federal assistance under § 236 of the National Housing and Urban Development Act of 1968, 12 U.S.C. § 1715z-1 (1970), and would have been a first in Arlington Heights. According to a 1970 census, only 27 of the Village's 64,000 residents were black. Pursuant to the municipalities' comprehensive plans, the city trustees denied the request for a zoning change. Consequently, the Metropolitan Housing Development Corporation and three minority members potentially eligible to live in housing projects, brought suit in United States District Court for the Northern District of Illinois, alleging that the denial was racially discriminatory and that it violated, *inter alia*, the fourteenth amendment and the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1970). The trustees denied that racial motivation played any part in the denial decision. The trustees claimed they were legitimately exercising the discretionary power to protect property values and the integrity of the zoning ordinances granted to them by Arlington Heights' comprehensive plan.

The issues before the United States Supreme Court on appeal were whether a municipality, according to the dictates of its comprehensive housing plan, can refuse to rezone a site for public housing when such action effectually forecloses the construction of any low-income housing, and whether such action violates the Fair Housing Act and the equal protection clause of the fourteenth amendment. In an historic decision the Court held that the racially disproportionate impact of the Village's refusal to grant a zoning change necessary to allow the construction of a low-income housing project, was not sufficient, absent evidence of a racially discriminatory motivation to prove a viola-
has been on the formulation and enforcement of the nation's fair housing laws. On April 20, 1976, the United States Supreme Court reasserted the power of the federal courts to order the location of low-income public housing, largely benefiting racial minorities, in the suburbs of a large metropolitan area. The decision affirmed a ruling by the Seventh Circuit that the Department of Housing and Urban Development lawfully could be ordered by a federal district court to provide housing for low-income individuals in the suburban areas surrounding Chicago. The order was based on a determination that HUD had fostered racial segregation by supporting a racially discriminatory city housing authority plan.

Housing disparity based on race has been recognized as "the most serious domestic problem facing America today." A potential solution to this problem is the location of low-income public housing in the suburban areas of large cities. The majority of federal subsidized housing, intended for occupancy by individuals of low and moderate income, has been built in city core areas where there is a high concentration of minority populations. This type of public housing pattern has contributed to the development of

tion of the equal protection clause of the fourteenth amendment. Citing Washington v. Davis, 426 U.S. 229, 242 (1976), with approval, the Court made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.' . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . . ." 97 S. Ct. at 563.

The Court's ruling in Arlington Heights effectively limits the scope of the federal courts' ability to assist blacks and other minorities in funding housing in predominately white communities, as zoning laws are effective against public housing. This is especially important to the Court's decision in Hills v. Gautreaux, 425 U.S. 284 (1976). If a suburb has a prior zoning plan which excludes public housing, then the Department of Housing and Urban Development cannot carry out the order entered in Gautreaux. The Court has effectively limited public housing in Chicago to the less affluent suburbs.

4. Hereinafter referred to as HUD.
5. The court of appeals remanded the case to the district court for further consideration of a possible metropolitan relief plan. The United States Supreme Court affirmed stating: "Since we conclude, that a metropolitan area remedy in this case is not impermissible as a matter of law, we affirm the judgment of the Court of Appeals remanding the case 'for additional evidence and for further consideration of the issue of metropolitan area relief.'" 425 U.S. at 306.
6. 503 F.2d at 931.
7. Id. at 938.
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metropolitan areas where the core city is populated primarily by minority groups and the suburbs are inhabited predominately by whites.\(^8\)

In any solution to this problem, there is an inherent conflict over whether public housing should be built in the central city or the suburbs. On the one hand, there are those who maintain that low-income public housing is needed in the rapidly deteriorating city cores, because the majority of low-income minority populations already live there. They are joined by those in the suburbs who object to the location of public housing in their neighborhoods. On the other hand, there is the view adopted by the majority of federal courts, that to provide decent housing for low-income minority populations, public housing is needed in both urban and suburban areas. HUD's role in the development of public housing is to approve or reject funding for publicly and privately sponsored proposals for public housing. Consequently, when HUD approves low-income projects in the core areas of cities, the already established segregated housing patterns are reinforced. Conversely, projects initiated in the suburbs of a metropolitan area potentially have the effect of breaking down the segregated housing pattern.\(^9\)

The question before the Supreme Court in Gautreaux was whether the district court had authority to order HUD to remedy a segregated housing pattern by taking affirmative remedial action affecting the suburban areas outside the city limits of Chicago.\(^10\)

In finding such authority in this public housing segregation case, the Court resolved two crucial questions raised by similar school-desegregation cases, particularly Milliken v. Bradley.\(^11\) The first question considered was whether Milliken, in a public housing context, would deny the use of a remedy which transcended the boundaries of political subdivisions, where there had not been a finding of an intermunicipal constitutional violation.\(^12\) The second question raised by Milliken was whether the imposition of metropolitan area relief would "impermissibly interfere with local governments and suburban housing authorities that have not been implicated in HUD's unconstitutional conduct."\(^13\)

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8. For statistics of the ratio of blacks to whites in one Chicago suburb, see note 1 supra.
10. 425 U.S. at 296.
12. 425 U.S. at 292.
13. Id. at 300.
II. FACTUAL AND PROCEDURAL BACKGROUND

In 1966, six blacks, who were either tenants or applicants for public housing in Chicago, brought separate class actions against the Chicago Housing Authority\textsuperscript{14} and HUD.\textsuperscript{15} The complaint filed against CHA charged that the housing authority had violated 42 U.S.C. sections 1981 and 1982\textsuperscript{16} and the equal protection clause of the fourteenth amendment by maintaining site selection and tenant assignment procedures based on racial separation criteria.\textsuperscript{17} It was alleged that, in selecting public housing sites, CHA "'avoid[ed] the placement of negro families in white neighborhoods.'"\textsuperscript{18} The plaintiffs sought equitable relief in the form of an injunction to restrain CHA from discriminatory practices\textsuperscript{19} and affirmative remedial action to correct the past and future effects of the unconstitutional site-selection and tenant assignment procedures.\textsuperscript{20} The contemplated remedial action was construction of future public housing units in predominately white areas within Chicago.\textsuperscript{21}

On February 10, 1969, the district court entered a summary judgment against CHA.\textsuperscript{22} The district court found that CHA had violated the constitutional rights of the plaintiffs by maintaining a practice of selecting public housing sites\textsuperscript{23} and assigning tenants

\begin{footnotesize}
\numberedfootnotes
\item[14] Hereinafter referred to as CHA.
\item[15] 425 U.S. at 286.
\item[16] 42 U.S.C. § 1981 (1970) provides:
\begin{quote}
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
\end{quote}
\item[17] 42 U.S.C. § 1982 (1970) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."
\item[18] 425 U.S. at 286. "The complaint filed . . . alleged that between 1950 and 1965 substantially all of the sites for family public housing selected by CHA . . . were 'at the time of selection, and are now,' located 'within the areas known as the Negro Ghetto.'" Id.
\item[19] Id.
\item[20] 503 F.2d at 932.
\item[21] Id. at 931.
\item[23] Id. at 913-14. Under Illinois law, housing authorities are provided with certain criteria for choosing sites for public housing. ILL. ANN. STAT. ch. 67½, § 8.2 (Smith-Hurd Supp. 1976), provides several factors for the housing authority to consider in selecting a site, including: (E)limination of unsafe and unsanitary dwellings, the clearing and redevelopment of blighted and slum areas, the assembly
\end{footnotesize}
on the basis of race. The evidence submitted to the district court clearly showed that the public housing system was racially segregated. According to the plaintiffs' statistics there were only four projects having white majorities within Chicago and all were located in predominately white areas. Of the remaining housing projects, with nonwhite majorities, 99½ per cent of the family units were located in areas of Chicago which were or would soon be substantially all black. Although there was not an explicit finding that housing officials were motivated by "racial animus," the district court held that CHA intentionally had fostered a program of public housing which resulted in "de jure" racial dis-

of improved and unimproved land for development or redevelopment purposes, the conservation and rehabilitation of existing housing, and the provision of decent, safe, and sanitary housing accommodations.

The plaintiffs alleged that the procedure under which CHA operated had the effect of maintaining existing patterns of residential segregation. Under the procedure CHA would informally submit potential sites to a city council alderman in whose ward the potential site was located. The alderman then allegedly vetoed the sites because the large percentage of blacks on the waiting list would create a black population in a white area, if the housing was constructed. As a consequence of this type of action 99½% of the submitted housing sites located in white areas were vetoed while only 10% of the proposed sites located in black areas were rejected. 296 F. Supp. at 910.

24. 296 F. Supp. at 909. The district court found that CHA had imposed racial quotas at four white family housing projects to keep the number of black families at a minimum. The blacks' population in the four white majority projects was between 1% and 7% of the total population. Conversely, 90% of the total number of tenants living in the CHA projects were black and 90% of the people on the waiting list were black. In fact, the CHA officials testified that they employed "elastic quotas," which resulted in white tenant preference for white majority projects. Id.

25. Id. at 910. The statistics (excluding the four white projects) established, that 92% of all the family units were in neighborhoods that were at least 75% black and two-thirds in areas that were at least 95% black. Id.

26. Id. at 914. The district court noted that the racial character of the neighborhood was never an explicit factor in CHA's selection of a housing site. In fact, most of the sites selected were chosen primarily "to further the praiseworthy and urgent goals of low cost housing and urban renewal." Id. It was apparent that the CHA board members were under severe pressure from their constituents to follow a policy of keeping blacks out of white neighborhoods. Id.

27. In Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1969), the district court stated that de jure segregation means "segregation specifically mandated by law or by public policy pursued under color of law," and that de facto segregation results "from the action of pupil assignment
The district court specifically rejected the argument offered by CHA that a history of racial tension and threats of violence justified a policy of racial segregation.

To implement its decision, the district court, on July 1, 1969, entered a judgment order granting equitable relief to the plaintiffs for the purpose of prohibiting future violations and remedying the effects of past unconstitutional practices. The district court ordered CHA to construct at least 700 family units in the predominately white areas of Chicago before any units could be built in minority areas. It was further directed that CHA, after construction of the first 700 units, locate at least 75 per cent of any new public housing projects in predominately white areas in Chicago. CHA also was ordered to modify its site-selection and policies not based on race but upon social or other conditions for which government cannot be held responsible.”

In Keyes v. School District No. 1, 413 U.S. 189 (1973), the Court stated: “[W]e emphasize that the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.”

The statistics on the family housing sites considered during the five major programs show a very high probability, a near certainty, that many sites were vetoed on the basis of the racial composition of the site’s neighborhood. In the face of these figures, CHA’s failure to present a substantial or even a speculative indication that racial criteria were not used entitles plaintiffs to judgment as a matter of law. . . . The additional evidence of intent, composed mostly of uncontradicted admissions by CHA officials, also establishes plaintiffs’ right to judgment as a matter of law either considered alone or in combination with the statistics.

The district court’s plan divided Cook County into a “General Public Housing Area” and a “Limited Public Housing Area.” CHA was prohibited from building any new units within the “Limited Public Housing Area” unless certain specified conditions were satisfied. The “Limited Public Housing Area” was defined as “that part of the County of Cook in the State of Illinois which lies either within census tracts . . . 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.” The “General Public Housing Area” consisted of the remaining part of Cook County. After the first 700 units were into the actual construction stage in the “General Public Housing Area,” CHA was permitted to locate up to 33% of its “General Public Housing Area” dwelling units outside the City of Chicago.
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tenant assignment procedures to conform with the purposes of the judgment order. The CHA did not file an appeal from this judgment order.

At the same time that the suit was filed against CHA, the plaintiffs filed a complaint against the Secretary of the Department of Housing and Urban Development. However, the action against HUD was stayed until resolution of the action against CHA. The plaintiffs sought a declaratory judgment that HUD had "'assisted in the carrying on . . . of a racially discriminatory public housing system within the City of Chicago'" in the form of financial assistance for CHA's discriminatory housing projects. The complaint asked that HUD be enjoined "from making available to the Chicago Housing Authority any federal financial assets to be used in connection with or in support of the racially discriminatory aspects of the Chicago public housing system." On September 1,

33. Id. The judgment order contained two affirmative directives:
A. CHA shall use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order . . . .
B. CHA is hereby permanently enjoined from invidious discrimination on the basis of race in the conduct or operation of its public housing systems.

Id. at 741. The district court retained exclusive jurisdiction over the case and the power to issue and enforce supplemental orders "for all purposes . . . upon proper notice and motion, of orders modifying or supplementing the terms of this order." Id. CHA did not file an appeal from this judgment order; although it was later affirmed by the Court of Appeals for the Seventh Circuit after CHA had refused to offer any plans for proposed sites to the Chicago City Council as required by statute. See Gautreaux v. Chicago Hous. Auth., 436 F.2d 306 (7th Cir. 1970), cert. denied, 402 U.S. 922 (1971).

Under Illinois law, CHA was required to submit proposed family housing sites to the Chicago Planning Commission and the Chicago City Council. See ILL. ANN. STAT. ch. 24, §§ 11, 12, 4.1; ch. 67 ½ § 9 (Smith-Hurd Supp. 1976). Besides the original judgment order, the district court found it necessary to enter five supplemental orders. 436 F.2d at 308. Subsequently after a series of conferences concerning the delay of submission of any proposed family unit sites for approval, the district court on July 20, 1970, entered a new judgment order modifying the "best efforts" provision of the July 1, 1969 order. The order directed that the proposed sites be submitted to the city council in accordance with a specific timetable. CHA appealed this subsequent order, arguing that because of community hostility and political considerations the delay in submission was justified. The court of appeals held that these justifications were properly rejected by the lower court. Id. at 310.

34. Gautreaux v. Romney, 448 F.2d 731, 733 (7th Cir. 1971).
35. Id. at 732.
36. Id.
1970, the district court granted HUD's motion to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief could be granted. The dismissal was grounded on the belief of the district court that HUD should not be held liable for the discriminatory conduct of CHA. However, on appeal, the Seventh Circuit reversed the lower court decision and ordered the district court to enter a summary judgment for the plaintiffs, on the grounds that HUD had violated both the due process clause of the fifth amendment and 42 U.S.C. section 2000d by knowingly assisting CHA's maintenance of a racially discriminatory public housing program.

37. Id. at 733. The complaint against HUD contained four separate counts. Count I was brought under the general federal question statute, 28 U.S.C. § 1331 (1970), and the fifth amendment. It alleged that HUD had violated the due process clause of the fifth amendment through its actions of approving and funding CHA's racially discriminatory programs. The district court concluded that "the Fifth Amendment under the circumstances here alleged [did] not authorize this suit," thus there was no jurisdiction to bring Count I. Id. Count II alleged that HUD's acts had violated 42 U.S.C. § 2000d (1970), in that the official conduct supported a racially discriminatory program. 42 U.S.C. § 2000d (1970) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The district court dismissed Count II for a failure to state a claim upon which relief could be granted. The district court felt that the amount of financial assistance from HUD to CHA was insufficient to make HUD a "joint participant" in CHA's racially discriminatory conduct. The dismissal of Counts III and IV was not contested by the plaintiffs. 448 F.2d at 733.

38. 448 F.2d at 740. The district court found that HUD had knowingly approved and funded sites which were not "optimal," but only after having made "numerous and consistent efforts * * * to persuade the Chicago Housing Authority to locate low-rent housing projects in white neighborhoods." Id. at 737. HUD rationalized this procedure on the theory "that it was better to fund a segregated housing system than to deny housing altogether to the thousands of needy Negro families of that city." Id. The realities of community and city council resistance were also offered as justifications. The court of appeals recognized the fact that HUD faced a major "dilemma" in trying to reconcile the conflicting interests. If HUD had applied an inordinate amount of pressure on CHA, it would have been met with community resistance, which would have effectively cut off federal funds and the flow of new housing. However, the court of appeals refused to accept "good faith" as a viable defense to a segregated result. The court of appeals stated:

Courts have held that alleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools. . . . Moreover, the fact that it is a federal agency or officer charged with an act of racial discrimination
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The next step to be taken in the litigation was the formulation of relief with respect to the action against HUD. On re-
does not alter the pertinent standards since "... it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Id. at 738 (citations omitted).

The court of appeals also found that HUD retains a large amount of discretion over which projects are eligible for federal funding. HUD has the power to approve or reject both site selection and tenant assignment procedures of local housing authorities, as a prerequisite to funding. See note 119 infra. Based on the inapplicability of the "good faith" argument and the failure of HUD to exercise its discretion in a constitutionally sound manner, the court of appeals concluded that HUD's past actions constituted racially discriminatory conduct in its own right. Id. at 739.

39. However, before the issue of relief could be addressed, the lower courts were faced with additional problems. Although CHA had been ordered in 1969 to use its "best efforts" to increase the number of public housing units, within a period of ten months from the order there had not been any proposed sites submitted to the Chicago city council. Under Illinois law a housing authority is required to obtain the approval of the local governmental entity before it can acquire any property for development. See Ill. Ann. Stat. ch. 67½, § 9 (Smith-Hurd Supp. 1976). In the spring of 1971, CHA finally did submit a few proposed sites, but the city council refused to pass approval of the sites. Subsequently, on the basis of the inactivity and flouting of court orders, the district court in Gautreaux v. Romney, 332 F. Supp. 366 (N.D. Ill. 1971), attempted to insure that the remedial orders entered against CHA in 1969 would be implemented. The district court initiated a "letter-of-intent" between the City of Chicago and HUD. The letter provided that the city would approve sites for use by CHA and permit the acquisition of the sites in accordance with a specified timetable. On the basis of this "letter-of-intent" HUD would then release funds, which had been held back due to inactivity on the public housing issue for the city's "Model Cities Program." Once again the city fell behind schedule and the district court was forced to enter an injunction, directing HUD to withhold the "Model City Program" funds until the city complied with the timetable by approving 700 dwelling units. Id. at 368-70.

However, on appeal the Court of Appeals for the Seventh Circuit in Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972), reversed the injunction, holding that the district court had abused its discretion in granting the injunction, because there was not an explicit finding that the Chicago "Model Cities Program" itself had been improperly administered. The court of appeals felt that the denial of the funds was an inappropriate way to force compliance with the original court orders.

Subsequently, between July 1971 and April 1972, the city council neglected to conduct any hearings with respect to site approval and acquisition of developmental property. After the filing of a supplemental complaint by the plaintiffs, the district court, in Gautreaux v. Chicago Hous. Auth., 342 F. Supp. 827 (N.D. Ill. 1972), found that the city's inaction had prevented CHA from complying with the earlier
mand, the district court, upon the plaintiffs' motion, consolidated the CHA and HUD remedial actions. The district court ordered the parties to propose a "comprehensive plan to remedy the past effects of unconstitutional site selection procedures," and to provide the district court with feasible "alternatives which are not confined in their scope to the geographic boundary of the City of Chicago."

After consideration of the plans submitted, the district court in a memorandum opinion and judgment order, filed on September 11, 1973, denied the plaintiffs' motion for the implementation of a metropolitan area plan. The metropolitan area remedial plan advocated by the plaintiffs included both Chicago and the surrounding suburban areas. The plan the district court adopted required HUD to use its "best efforts" to assist CHA in increasing the supply of public housing units in compliance with existing HUD regulations, applicable federal statutes and the judgment order entered against CHA in 1969. The district court specifically denied any form of intermunicipal relief encompassing the whole metropolitan area, for the following reasons: (1) the wrongs were committed within the territorial limits of Chicago; (2) the complaint did not allege racial discrimination in the contiguous suburbs; and (3) the suburban political entities were not at any time parties to the lawsuit.

On appeal however, the Seventh Circuit reversed the district court's decision and remanded the case. The court of appeals held that any plan designed to remedy the racially discriminatory public housing system within Chicago would have to be organized on a metropolitan area basis to be effective. The Seventh Circuit's

court order. The district court then circumvented the Illinois law requirement of city council approval by suspending the approval requirement as to CHA. In Gautreaux v. Chicago Hous. Auth., 480 F.2d 210 (7th Cir. 1973), cert. denied, 414 U.S. 1144 (1974), the court of appeals affirmed the decision of the district court on the basis of the broad equity powers available to a district court.

41. 425 U.S. at 290.
42. Id.
43. 503 F.2d at 932. The district court order was not reported.
44. 363 F. Supp. at 691.
45. Id. at 690-91. The plaintiffs contended at the district court level, that a metropolitan area remedial plan was absolutely necessary to fully remedy the past effects of the unconstitutional segregationist policies, and to achieve the racial balance required by the fourteenth amendment. 503 F.2d at 932.
46. 503 F.2d at 936.

[T]he adoption of a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago which has resulted from CHA's and HUD's unconstitutional site selection and tenant assign-
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decision was based on an interpretation of a recent Supreme Court opinion on school desegregation—Milliken v. Bradley.\footnote{47} Milliken was viewed as an extension of an established line of precedent developing the scope of federal courts' equity powers.\footnote{48} The Milliken opinion explicitly required that prior to the imposition of an interdistrict remedy for school segregation, there must be a finding of either an interdistrict constitutional violation or racially discriminatory acts in one school district which had been the substantial cause of the interdistrict segregation.\footnote{49} Without the showing of either an interdistrict violation or interdistrict effect there would be no basis for the imposition of an interdistrict remedy.\footnote{50}

In phrasing the basic question raised by Gautreaux, the Seventh Circuit adopted the language of Milliken: "The basic issue now before the Court concerns . . . the appropriate exercise of federal equity jurisdiction."\footnote{51} The precise equitable question raised by Gautreaux was to how great a degree public housing desegregation is actually practical and realizable.\footnote{52} The Seventh Circuit concluded that Milliken did not bar a remedy of metropolitan area relief, in view of the equitable and administrative distinctions between a metropolitan public housing plan and the consolidation of school districts. However, the court's language left unclear whether the opinion was actually based on a satisfaction of the Milliken requirements or on the equitable and administrative distinctions between public housing and public schools.

The Seventh Circuit's conclusion that a metropolitan area remedy was necessary was predicated on two main factors. First, the

\begin{enumerate}
\item \textit{Id.} at 939.
\item 47. 418 U.S. 717 (1974).
\item 48. 503 F.2d at 935. \textit{Milliken} was seen by the court as a logical extension of recognized equitable principles. The court stated:

\textit{Beginning in Brown I, the court recognized that remedial complexities may limit or delay implementation of the constitutional right to school desegregation. . . . In Brown II, the court emphasized local school problems . . . and Justice Stewart in Milliken, reminded that "[T]raditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."}

\textit{Id.} at 935. The court also quoted the following rule for reconciling practical equity problems: "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." \textit{Id.} at 935.
\item 49. \textit{Id.}
\item 50. 418 U.S. at 745.
\item 51. 503 F.2d at 935.
\item 52. \textit{Id.} at 936.
\end{enumerate}
court determined that the equitable factors which prevented inter-district relief in \textit{Milliken} were not present in a public housing context. The court said that the deeply-rooted tradition of local control over the operation of public schools was not present in public housing. Rather, public housing had its roots in federal statutes where federal involvement was pervasive.\footnote{53} Second, the court said that the administrative problems involved in the location of low-income public housing were not comparable to the problems raised by the restructuring of a large number of school districts as proposed in \textit{Milliken}.\footnote{54} The opinion indicated that the Seventh Circuit probably based its holding on these two factors. However, some language in the opinion implied that the \textit{Milliken} standard was satisfied. Although the Seventh Circuit in \textit{Gautreaux} could not point to any specific examples, it said that there was some evidence that the constitutional violations in Chicago had discriminatory effects throughout the metropolitan area.\footnote{55} It also noted that the evidence offered, including the testimony of expert witnesses, established that the whole metropolitan area was a single relevant locality for public housing purposes and that a "city only" directive would not fully remedy the effect of the unconstitutional conduct.\footnote{56}

\footnote{53} \textit{Id.} The equitable and administrative factors present in \textit{Milliken} were that consolidation of the 54 independent school districts would have presented staggering problems of logistics, finance, administration, and political legitimacy; and the presence of a "deeply rooted" and "essential" tradition of local control of public schools; and the fact that a district judge could possibly become both a \textit{de facto} legislature and a metropolitan school superintendent. \textit{Id.} at 935.

\footnote{54} \textit{Id.} at 936.

\footnote{55} \textit{Id.} at 936-37. The Seventh Circuit cited two examples of suburban discrimination. First, the court concluded that the evidence indicated that of the 12 suburban public housing projects, 10 were located in or adjacent to overwhelmingly black census tracts. Second, the Seventh Circuit pointed to the case of Clark v. Universal Builders, Inc., 501 F.2d 324, 335 (7th Cir. 1974), wherein the court had taken judicial notice of widespread residential segregation in Chicago and the surrounding area. The widespread segregation in \textit{Clark} led the court to conclude that there had been a prima facie showing that the segregation had discriminatory effects throughout the metropolitan area. 503 F.2d at 937.

The court's reliance on \textit{Clark} could be misplaced. In \textit{Clark} the court took judicial notice of widespread residential segregation, while in \textit{Gautreaux} the court of appeals was concerned with public housing segregation furthered by governmental conduct. Logically, it could be possible that there could be both widespread residential segregation in a metropolitan area as in \textit{Clark} and a city housing authority that was validly operating so as not to violate the Constitution.

\footnote{56} Emphasizing that HUD believed the metropolitan area should be viewed as a single locality for public housing purposes, the Seventh Circuit quoted a statement by Secretary Romney:

\textit{The impact of the concentration of the poor and minorities}
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The combination of these factors confirmed that the only solution was the imposition of a public housing plan which would include the political subdivisions surrounding Chicago.\footnote{57} The Seventh Circuit's opinion reaffirmed the philosophy of the majority of federal courts that adheres to a dispersal theory of housing as the proper method for correcting segregationist conduct.\footnote{58} The need to distribute low-income public housing through-

\begin{quote}
in the central city extends beyond the city boundaries to include the surrounding community. The City and the suburbs together make up what I call the 'real city'. To solve problems of the 'real city' only metropolitan-wide solutions will do. \footnote{503 F.2d at 937 (emphasis added).}
\end{quote}

\footnote{57. \textit{Id.} at 939. In dissent, Judge Tone emphasized that \textit{Milliken} requires an interdistrict violation. He believed that no such violations were offered or proved. He stated that the principle is that the remedy must be commensurate with the constitutional violation found, and, therefore, an inter-district remedy is not justified unless the evidence shows an inter-district violation... This seems to me to preclude metropolitan relief here. No violation outside the city has ever been alleged, let alone proved as the District Court pointed out. \textit{Id.}}

\footnote{58. In finding HUD's conduct to be violative of the Constitution, the Seventh Circuit joined the majority of federal courts in their concern for rectifying racial problems. These courts share the underlying belief that racial and ghetto problems cannot be resolved as long as minority groups are segregated within the inner city. In Hicks v. Weaver, 302 F. Supp. 619 (D. La. 1969), the court held HUD liable on facts nearly identical to those in \textit{Gautreaux}. The court stated:

\begin{quote}
HUD was not only aware of the situation in Bogulusa [Louisiana] but it effectively directed and controlled each and every step in the program... HUD thus sanctioned the violation of plaintiff's rights... since it could have halted the discrimination at any step in the program. Consequently, its own discriminatory conduct in this respect is violative of 42 U.S.C. § 2000d. \textit{Id.} at 623.
\end{quote}

\textit{Id.} at 623.}

\begin{quote}
In Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970), the plaintiffs sought to enjoin HUD from paying rent supplements on a multi-family project. The complaint was based on the theory that a location of the site would have the effect of increasing an already high concentration of low income blacks. The court of appeals held that HUD failed properly to take into account the factor of racial concentration in approving the project. The Seventh Circuit recognized that HUD was vested with broad supervisory discretion but stated that the "discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing... and in favor of fair housing." \textit{Id.} at 819. The Seventh Circuit also reasoned that:

Possibly before 1964 the administrators of the federal housing programs could... remain blind to the very real effect that racial concentration has had in the development of urban
out the metropolitan area was a primary concern of the Seventh Circuit. It stated: "We must not sentence our poor, our underprivileged, our minorities to the jobless slums of the ghettos and

blight. Today such color blindness is impermissible. Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.

Id. at 820-21 (emphasis added) (citations omitted).

In Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972), the district court stated:

For better or worse, both by legislative act and judicial decision, this nation is committed to a policy of balanced and dispersed public housing . . . this reflects the recognition that in the area of public housing local authorities can no more confine low income blacks to a compacted and concentrated area than they can confine their children to segregated schools.

Id. at 390 (emphasis added).

In Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), the district court enjoined the development of future public housing in black areas on the basis of the need for racial dispersal. The court stated that "the failure of the housing authority to include any racial criteria in determining site selection constitutes a violation of the Fourteenth Amendment." Id. at 1182. The court indicated that in low income housing cases the discriminatory actions may be judged by their effect and not necessarily an actual intent to discriminate. In discussing the possible ways to accomplish dispersal of public housing, the court stated:

Dispersal of public housing can mean many things to many people. To some it could mean the equal dispersal of each type of housing, beginning with the present type of housing, scattered site family housing. To others, including this court, dispersal of public housing means that if historically housing has been built primarily in one area or section of the city, housing must be built in other areas or sections of the city until such time as all the public housing in the city is dispersed. By this method, given an energetic housing authority, a cooperative city and cooperation from the federal housing agencies, it is possible that dispersal of housing could be accomplished within a reasonable time. Under the first method discussed, dispersal of public housing would most likely never be achieved and we will have left the next generation only a potential lawsuit, rather than an integrated community.

Id. at 1184 (emphasis added).

See also Croskey St. Concerned Citizens v. Romney, 459 F.2d 109 (3d Cir. 1972) (upholding the refusal of the district court to enjoin construction of low-income housing project based on HUD's formula for balanced racial distribution); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), aff'd, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971) (a city could not, absent a compelling interest, thwart the efforts of a private organization to building housing for low-income families in white areas of the city, by refusing a reasonable zoning request); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), aff'd, 425 F.2d 1037 (10th Cir. 1970) (a refusal to grant rezoning essential to erection of low-rent
thereby forever trap them in the vicious cycle of poverty which can only lead them to lives of crime and violence."

On rehearing, the Seventh Circuit reaffirmed the necessity for consideration of metropolitan area relief. However, instead of explicitly following its prior equitable and administrative distinction rationale, the court indicated that the Milliken standard was satisfied by the statistical evidence presented. In particular, it said that the impact of the city discrimination appeared to affect housing patterns significantly throughout the metropolitan area. HUD sought review of this decision by the Supreme Court on the issue of the permissibility of a metropolitan area remedial plan in the absence of a specific finding of an intermunicipal violation.

III. THE COURT'S DECISION

The Supreme Court affirmed the decision of the Seventh Circuit and remanded the case to the district court, holding that a metropolitan area remedy is not impermissible as a matter of law. The

housing project was motivated by desire to keep large concentration of blacks and other minority groups from living in the area).

59. 503 F.2d at 938.
60. Id. at 939.
61. Id. at 940. It is difficult clearly to ascertain the actual standard applied by the court. The order on rehearing seems to imply that a Milliken standard was applied. However, the original holding was based on the theory that the standard for public schools was not required, since Milliken was based on equitable and administrative problems not associated with public housing. A logical conclusion would be that the Seventh Circuit actually applied the Milliken standard since it did not reaffirm its earlier language; however, it could be implied that under either test metropolitan area relief was warranted.

62. Id. at 940.
63. Assuming the Seventh Circuit applied the Milliken standard, there is a question as to whether the requisite elements for interdistrict relief actually were present. The main objection, as the dissent emphasized, is that there was an absence of explicit proof that the constitutional violation within the City of Chicago produced a significant segregative effect in the metropolitan area or was the substantial cause of intermunicipality segregation as required by Milliken. The Seventh Circuit also relied on the factors of "racial paranoia" and "white flight" which were largely unsubstantiated and speculative. Another objection is the fact that the suburban political subdivisions were included within the desegregation plan although they were not parties to the litigation. They had no opportunity to answer accusations or present evidence.

64. 425 U.S. at 300. The case was remanded to the district court "for additional evidence and further consideration of the issue of metropolitan area relief." Id. at 306. The court explicitly stated that this order should not be interpreted as requiring a metropolitan order. The district court was merely granted the authority to order such relief in
opinion was based on two major considerations. First, the Court held that the entering of a remedial order against HUD, which would affect its operation outside Chicago’s geographic boundaries, but within the metropolitan housing market, was warranted because HUD had violated the Constitution and several federal statutes. In distinguishing the school desegregation cases from situations involving discrimination in public housing, the Court interpreted Milliken as not imposing a per se rule that federal courts lacked the authority to order remedial action beyond the municipal boundaries where the constitutional violation occurred.

Second, the Court determined that an order affecting HUD’s conduct outside Chicago’s boundaries would not interfere impermissibly with the operation of local governments and suburban housing authorities not actually implicated as participants in HUD’s unconstitutional conduct. This conclusion was supported by the fact that under 42 U.S.C. section 1437f HUD has the authority to contract directly with private owners and developers for the location of public housing.

A. Milliken v. Bradley

The most important issue facing the Supreme Court in Gautreaux was the proper application of Milliken v. Bradley to the context of intermunicipality housing segregation. In Milliken the Court

the exercise of its equitable discretion after a careful consideration of the plans offered.

65. Id. at 297-300.
66. Id. at 293. The court stated:

Although the Milliken opinion discussed the many practical problems that would be encountered in the consolidation of numerous school districts by judicial decree, the Court’s decision rejecting the metropolitan area desegregation order was actually based on fundamental limitations on the remedial powers of the federal court to restructure the operation of local and state governmental entities. That power is not plenary. It “may be exercised ‘only on the basis of a constitutional violation.’”

Id. (citations omitted).

67. Id. at 300-05.
68. Id.
70. In April of 1970 the Detroit Board of Education altered its high school attendance zones to create a better black-white student distribution. Later, in response to white parental opposition, the Michigan Legislature passed an act which delayed the implementation of the Detroit school board’s integration plan. Due to individual board member changes the zoning plan ultimately was rescinded. In August of 1970 a class action was instituted on behalf of all the school children and their parents in Detroit. The complaint alleged that the class was be-
was faced with the continuing problem of defining the proper scope of a federal court’s equitable powers to order remedial relief in a school desegregation case.\textsuperscript{71} The basic issue in \textit{Milliken} was whether denying the equal protection of the laws due to the unconstitutional segregation pattern that had developed in the Detroit school system as a result of the policies of the Detroit Board of Education and the State of Michigan. The plaintiffs asked for a preliminary injunction against the enforcement of the Michigan Act restraining implementation of the school zoning changes. \textit{Bradley v. Milliken}, 484 F.2d 215, 219-20 (6th Cir. 1973).

The facts and conclusion accepted by the Supreme Court were: to wit: (1) that the Detroit Board of Education had maintained attendance zones designed to perpetuate racial segregation, \textit{Bradley v. Milliken}, 338 F. Supp. 582, 588 (1971); (2) that the Board had transferred black students from overcrowded black schools to other black majority schools, instead of sending them to an uncrowded white majority school, 484 F.2d at 221; (3) that the Board maintained an optional attendance zone which resulted in white students being allowed to transfer to all white schools, 338 F. Supp. at 587; and (4) that these policies effectively created one-race schools in the Detroit school system constituting \textit{de jure} segregation. Id. at 588-89.

\textsuperscript{71} See Note, \textit{Intent to Segregate: The Omaha Presumption}, 44 Geo. Wash. L.R. 775 (1976). \textit{Milliken} is one of the latest decisions in a long line of cases developing the guidelines for the formulation of proper equitable remedies. In \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954) [hereinafter referred to as \textit{Brown I}], the Court overruled all of its earlier decisions under the doctrine of “separate but equal” facilities as expressed in \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896). The Court held that race was not a rational basis for classification as to use of facilities and thus state imposed segregation of public school violated the equal protection clause of the fourteenth amendment. The Court stated that “in the field of public education, the doctrine of ‘separate but equal’ has no place,” and that separate educational facilities are inherently unequal. 347 U.S. at 495.

Subsequently, \textit{Brown v. Board of Educ.}, 349 U.S. 294 (1955) [hereinafter referred to as \textit{Brown II}], which dealt with the proper form of relief afforded by \textit{Brown I}, the Court indicated that federal courts should be guided by equitable principles in formulating effective remedial decrees. \textit{Brown II} imposed a good faith requirement on state and school officials to comply with the mandates of \textit{Brown I}. The lower federal courts were granted a great deal of flexibility in the shaping of remedies, including the authority to revise school districts. 349 U.S. at 300. The Court stated:

Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs . . . . [C]ourts may consider problems related to administration . . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

\textit{Id.} at 300-01.

er a federal court could impose a multidistrict remedy where evidence of segregating conduct was found in one school district, but not in the other school districts.\textsuperscript{72} The district court found that the Detroit school board and state officials had contributed to racial segregation in the Detroit schools, in the form of \textit{de jure} discrimination.\textsuperscript{73} The district court established a desegregation panel to prepare a remedial plan which would consolidate the Detroit school system and 53 independent suburban school districts.\textsuperscript{74} The Sixth Circuit affirmed the desegregation order, concluding that "the 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."\textsuperscript{75} However, the Supreme Court reversed, stat-

The court in \textit{Swann} specifically granted federal district courts broad powers in dealing with \textit{de jure} segregation. The court cited the imposition of racial quotas and the power to alter attendance zones as examples of remedies. \textit{Id.} at 22-29. The \textit{Swann} opinion held that the task before the federal courts was to correct the condition that offends the Constitution by balancing the individual and collective interests affected. The Court stated that a federal remedial power can only be exercised "on the basis of a constitutional violation" and, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." \textit{Id.} at 16.

There were a number of cases prior to \textit{Milliken} which considered the fragility of school district lines. See Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972) (school district lines and state laws were not unpenetrable, and if they conflicted with the fourteenth amendment the federal court had a duty to enter the appropriate remedy; the court held that state or local officials were prevented from carving out a new school district from an existing district in the process of dismantling a dual school system).

\textsuperscript{72} 418 U.S. at 744.


\textsuperscript{75} Bradley v. Milliken, 484 F.2d 215, 249 (6th Cir. 1973). The Sixth Circuit stated that the acts of racial discrimination shown in the record were related to the segregation found in the entire metropolitan public
school system. A metropolitan area remedial plan was thought appropriate because the State had participated in the violations. The Sixth Circuit concluded that the plan could be implemented on the State's authority to control local school districts. The court stated that "the State has committed de jure acts of segregation and . . . the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts." Id. at 249.

Judge Weich, dissenting, pointed out the problems associated with the Sixth Circuit opinion. He emphasized that the remedial order was issued in the absence of necessary parties, which resulted in prejudice to the school districts because they had no effective participation. To support his conclusion he cited Bradley v. School Bd. of the City of Richmond, 338 F. Supp. 67 (E.D. Va. 1972), where the district judge had required the adjoining suburban counties to be joined as defendants so as to give them an opportunity to be heard on the merits. 484 F.2d at 266.

76. 418 U.S. at 752. The court also stated:

[1]t must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race . . . . Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

Id. at 745.

77. Id. at 752–53. Justice Stewart's concurrence in Milliken foreshadowed the situation and holding in Gautreaux. He stated:

This is not to say, however, that an interdistrict remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, . . . or by purposefully, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.

Id. at 755.

The majority of the Court in Milliken rejected the argument offered by the dissent that since the agencies involved in maintaining the dual school system in Detroit possessed statewide authority then the district court should have a relatively free hand in restructuring the school districts outside of Detroit. Id. at 745–46. The majority adhered to the view that the disparate treatment of black students occurred only in Detroit thus limiting any remedy to that system.

Justices Douglas, Brennan, Marshall and White dissented from the majority opinion in Milliken. Justice Marshall in a strong dissent
The Supreme Court in *Gautreaux* viewed *Milliken* as establishing a basic limitation on the exercise of federal courts' equitable powers. The Court stated that *Milliken* limited the "remedial powers of the federal courts to restructure the operation of local and state governmental entities," to situations where there had been a constitutional violation. Once such a constitutional violation was found, it would be the duty of the federal courts to make "the scope of the remedy... fit the nature and extent of the constitutional violation." The Court held that the interdistrict decree in *Milliken* was impermissible because it was not commensurate with the constitutional violation to be remedied. Such a decree would have had the effect of direct federal judicial interference with the operation of local governments without first finding a constitutional violation by those entities or a significant segregative effect from the conduct of the Detroit school district. The Court concluded that the interdistrict desegregation order in *Milliken* "contemplated a judicial decree restructing the operation of local governmental entities that were not implicated in any constitutional violation."

Unlike the Seventh Circuit, the Court did not view its opinion affirming the permissibility of a metropolitan area remedy as resting on the equitable and administrative distinctions between the location of public housing and the desegregation of school districts. The Court said that *Milliken* was not based on a balanc-
ing of the competing consideration in a school desegregation case, but instead was premised on the equity power of the federal courts. Nevertheless, the distinctions between school district desegregation and public housing desegregation are important to an understanding of the limitations on the exercise of the federal courts’ equitable powers. The most important principle in *Milliken* that can be used in a public housing context is that boundary lines cannot be “’casually ignored or treated as a mere administrative convenience’ because they separate independent governmental entities responsible for the operation of autonomous.”

### B. The Court’s Reasoning

Consistent with its interpretation of *Milliken*, the Court characterized the basic question in *Gautreaux* as concerning only the authority of the district court to order HUD to take remedial action outside the city limits of Chicago. On appeal, HUD did not dis-

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enth Circuit interpreted the *Milliken* opinion as holding that the administrative complexities involved with school district consolidation and the deeply rooted tradition of local control of schools outweighed the potential of a metropolitan area school desegregation remedy. However, the Supreme Court stated that *Milliken* was premised on the permissible scope of the federal judicial power.

The Seventh Circuit also concluded that there was either an interdistrict violation or interdistrict effect present in *Gautreaux*. The Supreme Court, however, stated that there was no evidence in the record which would support either theory. The Seventh Circuit relied on Exhibit 11 as the sole basis of the alleged suburban discrimination. It established that of the 12 public housing projects located outside of the Chicago city limits 11 were located in areas with less than 70% white population. However, the Supreme Court pointed out that this exhibit was not offered as evidence that the suburban municipalities were guilty of discrimination but to show the scarcity of public housing opportunities open to minorities. Thus the Seventh Circuit was mistaken in relying on the exhibit as evidence of suburban discrimination. The Supreme Court noted that there was no evidence offered that established a constitutional violation in the city which had a significant segregative effect in the suburban municipalities or that proved the housing policies of the suburbs were the substantial cause of the segregation. The Supreme Court also criticized the Seventh Circuit’s assertion that it was reasonable to conclude from the record that the violations committed in Chicago caused “racial paranoia” and encouraged “white flight.” The Court stated that, “such unsupported speculation falls far short of the demonstration of a ‘significant segregative effect in another district’ as required by *Milliken*.” *Id.* at 295 n.11.

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85. *Id.* at 294.
86. *Id.* at 295.
87. *Id.* at 295-96 (citations omitted).
88. *Id.* at 296.
pute the lower court's findings that it had violated the fifth amendment and the Civil Rights Act of 1964 by knowingly funding CHA's racially discriminatory housing programs. HUD's basic argument was that an order requiring it to take remedial action outside of the boundaries of Chicago was barred by *Milliken*. This argument was premised on the following considerations. HUD asserted that a remedial order granting metropolitan area relief would constitute a grant of relief beyond the actual scope of the constitutional violation, and that an order regulating its action outside of the Chicago boundaries would have the effect of "consolidat[ing] for remedial purposes" governmental units not originally implicated in HUD's and CHA's violations.

The remaining question facing the Court in *Gautreaux* concerned the scope of such a remedial order. Relying on recognized equitable principles the Court indicated that a judicial order directing HUD to construct public housing in the metropolitan area would not have the effect of coercing uninvolved governmental units. This conclusion was based on the fact that both CHA and HUD already had the authority to operate outside the Chicago city limits. Thus, in reality, *Gautreaux* merely directed HUD and CHA to do what they could have done on a voluntary basis. A metropolitan remedial order directed against HUD would not have the effect of requiring the suburban municipalities to change their activities. The order would affect only HUD's operations. However, in *Milliken*, an interdistrict remedy would have consolidated a large number of suburban school districts without finding a constitutional violation on their part.

The Court specifically rejected HUD's contention that *Milliken* precluded an order affecting its action throughout the entire metropolitan area. The Court said *Milliken* placed no specific limits on the authority of federal courts to order relief outside the municipal boundaries of a city where the prerequisite constitutional violation

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89. See note 16 supra.
90. 425 U.S. at 296.
91. Id. at 296-97.
92. Id. at 297.
93. Id.
94. See note 70 supra.
95. 425 U.S. at 298.
96. Id. Although the State of Michigan was found to have contributed to the maintenance of racial segregation in Detroit, the Court in *Milliken* limited the remedy to the Detroit system because previous cases "each addressed the issue of constitutional wrong in terms of an established geographic and administrative school system," and because of the local and statutory tradition of local school district control. 418 U.S. at 742-44, 746.
DISCRIMINATION

has been found. The critical distinction between HUD and the suburban school districts involved in *Milliken* was the fact that HUD explicitly had been found by the lower courts to have violated the Constitution. This violation provided the necessary predicate for the entering of a remedial order against HUD.

The Court emphasized that an order directing HUD to create low-income public housing alternatives in the Chicago suburbs was "entirely appropriate and consistent with *Milliken*" on the theory that HUD's constitutional violation subjected the plaintiffs to segregated public housing. Consistent with the approach of the Seventh Circuit, the Court took notice of the fact that the relevant geographic area for imposition of an effective remedy was the entire metropolitan housing market, not limited by the Chicago city limits. In fact, HUD, in the administration of federal housing assistance programs, recognized that the housing market area "usually extends beyond the city limits" and "may extend into sev-

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97. 425 U.S. at 298.
98. *Id.* at 297. The Court noted that its prior decisions mandated that in the event of a constitutional violation "all reasonable methods must be available to formulate an effective remedy." *Id.* See North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1970). The Court also cited Davis v. School Comm'rs of Mobile County, 402 U.S. 33 (1970), for the proposition that a federal court should employ those methods that would "achieve the greatest possible degree of [relief], taking into account the practicalities of the situation." *Id.* at 37. The Court quoting from Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1 (1970), stated that, "[o]nce a right and a violation have been shown, the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* at 15.
99. 425 U.S. at 298. According to Illinois law a city housing authority has the power to operate within an "area of operation". This area includes the territorial boundary of the city and all of the area within three miles of the city boundary that is not located within the boundaries of another city. A housing authority could also act outside this area by contracting with another housing authority. See Ill. Ann. Stat. ch. 67½, §§ 17(b), 27c (Smith-Hurd Supp. 1976). See note 121 infra, for discussion of HUD authority.

An important distinction between *Milliken* and *Gautreaux* is that in *Milliken* the state had the authority to operate across school district lines, but the exercise of that authority would have had the effect of eliminating or restructuring a number of independent school districts. However, in *Gautreaux*, an order granting metropolitan relief would not displace the rights and powers of the suburban governmental entities under either federal or state law.

100. 425 U.S. at 299.
101. *Id.*
102. See note 56 *supra*.
103. 425 U.S. at 299.
eral adjoining counties,” depending on the size of the metropolitan area. Applying this factor, the Court declared that for a remedial decree to be consistent with the “nature and extent of the constitutional violations,” it logically must include the whole of the metropolitan area. The Court stated that to foreclose metropolitan area relief solely because HUD’s unconstitutional conduct occurred within the city limits of Chicago “would transform Milliken’s principled limitation on the exercise of federal judiciary authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct.” In Milliken, the Court implied that political or administrative boundaries drawn by states would not be allowed to be breached when dealing with the central city in large metropolitan areas. However, in Gautreaux the Court dispelled any notion that governmental subdivisions can avoid metropolitan area remedies by the existence or erection of administrative boundaries in cases involving a constitutional violation.

The second question discussed by the Court was whether under Milliken an order against HUD directing remedial action outside Chicago boundaries would interfere impermissibly with the operation of local governments and suburban housing authorities that were not implicated as participants in HUD’s constitutional violations. HUD contended that a remand for consideration of a metropolitan area decree was impermissible because “‘court-ordered metropolitan relief in this case, no matter how gently it’s gone about, no matter how it’s framed, is bound to require HUD to ignore the safeguards of local autonomy and local political processes’” thus violating the limitations on federal judicial power established in Milliken. The Court suggested that HUD’s posi-

104. See Department of Housing and Urban Development, FHA Techniques of Housing Market Analysis 12 (Jan. 1970). In large metropolitan areas HUD gathers its statistics on the basis of the relevant metropolitan housing market not limited by municipal boundaries.
105. 425 U.S. at 300.
106. Id.
107. Id.
108. Id. (citations omitted).
109. Id. at 300-01. In discussing this issue, the Court was not called upon to evaluate the validity of any specific order because one had not yet been formulated. The Seventh Circuit’s decision did not endorse or discuss any particular plans, but instead left the formulation of the remedial plan to the district court on remand. 503 F.2d at 936. However, on rehearing the Seventh Circuit did state that the purpose of the remand was to gather “additional evidence” and consider further “the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in Milliken v. Bradley.” Id. at 940.
tion underestimated the ability of federal courts to formulate a decree that would grant the plaintiffs constitutional relief without exceeding the limits of judicial power established in Milliken. The Court’s conclusion was that a metropolitan area remedial order would not interfere with the operation of local governments and suburban housing authorities. The Court said, that because HUD had the authority to select housing projects for funding and contract directly with private owners and developers for the construction of low income housing, HUD could be required to take remedial actions which would not preempt or interfere with the operation of local governments. The problems associated with Milliken, namely the logistics of restructuring a large number of school districts and the manageability of such a system, are not present in a public housing context to interfere with the operation of the local governments.

In reaching this conclusion, the Court relied on two main factors. First, an order directing HUD to use its discretion to encourage the development of low income housing in suburban areas would be entirely consistent with established federal housing policy. Title VI of the Civil Rights Act of 1964 prohibits racial discrimination in federally assisted public housing programs. In 1967, in response to the passage of the Civil Rights Act of 1964, HUD issued site-approval regulations for low income housing. These regulations were designed to avoid racial segregation and to give low income minority groups a chance to find housing outside areas of minority concentration.

In addition to adopting site-approval regulations, HUD outlined a system of “Project Selection Criteria” for the purpose of “eliminating clearly unacceptable proposals and assigning priorities in funding to assure that the best proposals are

110. 425 U.S. at 301.
111. Id.
112. Id.  See note 121 infra.
113. Id.
114. Id.  HUD was held to have violated Title VI of the Civil Rights Act of 1964 by its funding of CHA’s projects. 448 F.2d at 740.
115. See Department of Housing and Urban Development, Low Rent Housing Manual § 205.1, ¶ 4g (Feb. 1967 rev.).  On the basis of these regulations HUD rejected any application which would significantly contribute to racial concentrations and perpetuate housing segregation. This presumption against acceptability could be overcome by showing that there were an equivalent number of low rent housing units outside the area of racial concentration within the housing authority’s jurisdiction. In addition, Title VIII of the Civil Rights Act of 1968 requires HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” the Act’s fair housing policy. 42 U.S.C. § 3608(d) (5) (1970).
funded first." The most important of these criteria considered by HUD in evaluating applications for public housing is the one dealing with "Minority Housing Opportunities." This criterion "is designed to assure that building in minority areas goes forward only after there truly exist housing opportunities for minorities elsewhere" and "that the housing available to minorities outside areas of minority concentrations is more than a token amount of so few units that there is in fact no true opportunity."


117. The "Project Selection Criteria" rules govern the evaluation of applications for funding of housing projects under Housing Act of 1937, 42 U.S.C. § 1437f (Supp. IV 1974), as amended by Housing Authorization Act of 1976, Pub. L. No. 94-375, § 2, 90 Stat. 1068 (1976). There are eight criteria that are considered in multi-family applications. They are: (1) need for low-income housing; (2) minority housing opportunities; (3) improved location for low-income families; (4) relationship to orderly growth and development; (5) relationship of proposed project to physical environment; (6) ability to perform; (7) project potential for creating minority employment and business opportunities; and (8) provision for sound housing management. Each proposal submitted for funding is rated superior, adequate, or poor on the basis of the criteria. The objectives of the "Minority Housing Opportunity" criterion are "[t]o provide minority families with opportunities for housing in a wide range of locations [and] [t]o open up nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discriminations." 37 Fed. Reg. 203, 206 (1972).

118. 37 Fed. Reg. 203, 204 (1972). Several fundamental suggestions of guidelines for governing HUD's site approval decisions have been listed:

1. HUD must have an institutionalized method to weigh socio-economic factors in considering housing proposals.
2. HUD should include, among the various criteria by which applications for housing assistance are judged, the extent to which a proposed project or the overall development plan of which it is a part, will in fact open up new, nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination. This means that HUD should consider the impact of proposals on patterns of racial concentration.
3. Involuntary racial concentration leads to urban blight; it is therefore contrary to national housing policy for HUD to reinforce racial concentration in making its housing site decisions.
4. HUD may approve housing proposals in areas of racial concentration when its informed judgment is that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.
5. HUD may not knowingly acquiesce in a racially discriminatory housing program or proposal.
6. Community opposition to sites outside areas of minority concentration does not justify HUD's funding of a racially discriminatory housing program or proposal.

Maxwell, supra note 9, at 100. See 24 C.F.R. § 200.710 (1976).
Second, the Housing and Community Development Act of 1974 increased the ability of HUD, independent of local governing bodies, to create new housing programs. According to section 1437f, HUD has the authority to contract directly with private owners to make housing units available to eligible low-income persons.


(c) The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives—

. . . .

(6) the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income.

42 U.S.C. § 5301(c) (Supp. IV 1974).


121. Under the housing programs in existence at the time the district court entered its original remedial order against HUD, the local housing authorities and city governments had to make application to HUD for funds or to approve the use of funds in their jurisdiction before HUD could grant any funds. 42 U.S.C. § 1415(7) (b) (1970); 42 U.S.C. § 1421b (a) (2) (1970). Even under these laws an order directed solely at HUD would not force the housing authorities or local governments to apply for assistance under the programs but only would apply to HUD's already existing duty of determining whether or not to grant any funds.

Under the new regulations HUD is permitted to select the geographic areas where housing is to be constructed. 24 C.F.R. § 880.203 (1975). It is directed that "the site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons." 24 C.F.R. § 880.112(d) (1975). HUD contracts to make payments to local public housing agencies or to private owners of housing units for the purpose of making up the difference between the fair market value of the rent and that amount actually contributed by the low-income tenant. The low-income family pays between 15% and 25% of its gross income for rent. 42 U.S.C. § 1437 (c) (3) (Supp. IV 1974).

However, the Act does allow local governments the right to comment on the application. 42 U.S.C. §§ 1439(a)-1439(c) (Supp. IV 1974). The Act directs HUD to allow the local governmental entity 30 days to comment on an as yet unapproved housing plan proposal and 30 days in which to object to an approved proposal on the ground it is inconsistent with the local government's housing plan. Even if an ob-
Local government approval is no longer a prerequisite to an application for funding. An order directed exclusively to HUD will not force any unwilling municipality to apply for assistance under these programs, but will merely assist HUD in carrying out its duties under the federal housing laws. The Court concluded that a HUD program of expanding low-income housing opportunities outside areas of minority concentration would not interfere impermissibly with the operation of the suburban municipalities because under the section 1437f program the local governmental units have (1) the right to comment on proposals, (2) the right to reject certain proposals inconsistent with their own adopted housing assistance plans, and (3) the right to require that zoning and other land use restrictions are adhered to by builders. The right of the local governments to block public housing proposals depends upon their housing plans and zoning laws.

In summary the Court stated:

[T]here is no basis for the petitioners' claim that court-ordered metropolitan relief in this case would be impermissible as a matter of law under the *Milliken* decision. In contrast to the desegregation order in that case, a metropolitan relief order directed to HUD would not consolidate or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land-use laws. The order would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system created by CHA and HUD.124

> jecation is filed, HUD can approve the proposal if it feels it is consistent with the housing assistance plan. HUD will look to see if the housing assistance plan properly provides for the present and future needs of low-income persons and whether it "promot[es] greater choice of housing opportunities and avoid[s] undue concentrations of assisted persons." 42 U.S.C. § 5304(a) (4) (C) (ii) (Supp. IV 1974). It is possible that the location of subsidized housing in predominately white areas of suburban municipalities may be consistent with the community housing-assistance plans.

122. 425 U.S. at 303.
123. Id. at 305.
124. Id. at 305-06. Justices Brennan and White joined Justice Marshall in a concurring opinion. Justice Stevens did not participate. Justice Marshall stated:

I dissented in *Milliken* . . . , and I continue to believe that the Court's decision in that case unduly limited the federal courts' broad equitable power to provide effective remedies for official segregation. In this case the Court distinguishes *Milliken* and paves the way for a remedial decree directing the Department of Housing and Urban Development to utilize its
It has been stated that "[f]or better or worse, both by legis-
lative act and judicial decision, this nation is committed to a policy
of balanced and dispersed public housing."\(^{125}\) **Gautreaux** has re-
affirmed this commitment to responsible public housing policy.
The Court's recognition that HUD's conduct reinforced the con-
centration of low-income and minority populations in the core
area of Chicago is a significant foundation for society to begin to
deal realistically with the multitude of problems associated with
segregated housing patterns. **Gautreaux** affirmatively established
that **Milliken** did not bar metropolitan area-wide relief per se in a
public housing context to remedy the past and future effects of
racially discriminatory housing plans.

**Gautreaux** spoke broadly to the issue of providing low-income
and minority groups with greater opportunities for access to de-
segregated public housing, but this breadth creates a number of
problems which must be resolved before the policy of dispersed
public housing can be applied effectively. The primary problem
as evidenced by **Arlington Heights v. Metropolitan Housing De-
velopment Corp.**,\(^ {126}\) is that **Gautreaux** did not address the issue
concerning local zoning laws which effectively limit public hous-
ing to less affluent suburban areas. Municipal zoning laws which
zone out public housing units remain fully intact and effective.
Another major problem is that **Gautreaux** applies only to situations
where a constitutional violation has been found. Although HUD
already possesses the authority to operate within the entire metropo-
latin area of large cities, there are not any remedial orders di-
recting HUD to take affirmative action in any other cities.

**Gautreaux** has practical application only where it can be proven
that HUD has fostered and assisted in the development of a racially
discriminatory public housing pattern. Furthermore, **Gautreaux**
leaves unanswered the question of whether a metropolitan area
remedy would be permissible where the local housing authority
lacked statutory authority to operate outside of its own boundaries.
In **Gautreaux**, one of the main reasons for upholding the permis-
bility of a metropolitan area remedial plan was the fact that both

\(^ {125}\) see note 77 *supra*.
CHA and HUD had statutory authority to contract for the location of public housing within the entire metropolitan area.

Despite these probable limitations, *Gautreaux* recognized that federal courts have the obligation to enforce the rights of all citizens to equal access to housing. The positive result of the decision is the declaration that arbitrarily drawn governmental boundaries will not prevent metropolitan area relief where a constitutional violation is found. *Gautreaux* also offers the potential for future administrative and legislative action. The determination that the relevant housing market in a city is the entire metropolitan area presents a progressive premise from which HUD may operate and on which Congress may build. The Court's dedication to the de-concentration of low-income and minority groups and to the Housing and Community Development Act of 1974 are tools through which the federal government can keep the promise of equal rights made in the Civil Rights Act of 1964.

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