HILLS V. GAUTREAUX: WHEN A FEDERAL COURT MAY GRANT AN INTERDISTRICT REMEDY IN THE ABSENCE OF AN INTERDISTRICT VIOLATION

Remedial relief which encompasses the metropolitan area surrounding a central city is often demanded to rectify unconstitutional segregation in central city schools and housing. The growing pattern of residential segregation which separates the black central city from its white suburbs[1] makes it increasingly difficult to provide integrated educational and housing opportunities through remedial action limited to the city alone. Metropolitan remedies, however, will often affect suburban governments that are innocent of constitutional violations.[2]

1. Relying on 1960 census figures sociologist Karl E. Taueuber used a scale from zero (no segregation) to 100 (complete segregation) to analyze the degree of racial separation in 207 cities. Half the cities had segregation ratings above 87, a quarter exceeded 91, and only 8 cities rated below 70. NAT'L COMM. AGAINST DISCRIMINATION IN HOUSING, HOW THE GOVERNMENT BUILDS GHETTOS 20-21 (Oct. 1968). The situation has become even worse in recent years as blacks migrate to our cities while whites and jobs leave. Today 40.5% of whites live within the central city, compared with 78% of blacks. U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 125 (1975). Between 1960 and 1970, for each new job created in the central city, nearly three new jobs were created in the suburbs. E. ERBER, HOUSING ALLOCATION PLANS: A NATIONAL OVERVIEW 809 (Nat'l Comm. Against Discrimination in Housing, May 1974).

2. Although segregative practices may not be proven on the part of suburbs in a particular case so as to make them legally responsible, it is difficult to see the suburbs as morally "innocent." Segregation cases involve problems which are merely symptoms of the deteriorating nature of our cities. The central cities have huge problems, e.g., crime, overcrowding, unemployment, poor public schools, degenerative neighborhoods, which are worsened by the fact that the well-to-do whites and the resources they control have moved to the suburbs. With a diminishing tax base, the cities cannot begin to cope with their problems. *See* Freilich, *Down with the Doughnut-Up with the Whole: The Need for Metropolitan Relief in School and Housing Integration*, 7 URBAN LAW. xiii (1975); Grad, *The City is Here to Stay*, 1973 URBAN L. ANN. 15.

Chicago is a prime example of what happens to an inner city which has been deserted by its white residents.

> Between 1960 and 1970 Chicago lost 500,000 whites and gained 33,000 Blacks, lost 220 factories, 760 stores, and 229,000 jobs, and gained 90,000 welfare recipients, lost 140,000 private housing units and gained 19,000 public housing units. These losses represent 12% of the housing, 14% of the jobs, 17% of the stores and 18% of the whites in terms of 1960 assets. The suburbs of Chicago, meanwhile have gained 800,000 whites, 350,000 private housing units and 500,000 jobs. In 1970, 64% of the metropolitan area unemployed, 75% of the families below the poverty level, 76% of the Spanish-speaking, 85% of the welfare recipients and 90% of the blacks lived in Chicago.

P. DE VISE, THE WASTING OF CHICAGO: THE MAGNET OF SUBURBAN JOBS AND HOUSING

In *Hills v. Gautreaux*,[3] the United States Supreme Court held that even though innocent suburban governments might be affected, a federal court order requiring the Department of Housing and Urban Development (HUD) to extend remedial action throughout a metropolitan area was not "impermissible as a matter of law."[4]

In *Gautreaux*, residents in and applicants for public housing in Chicago sued the Chicago Housing Authority (CHA) alleging that it had selected project locations and tenants based on procedures which "avoided the placement of Negro families in white neighborhoods."[5] Plaintiffs simultaneously filed a class action against HUD for assisting CHA in its discriminatory policy by providing financial support for CHA's housing projects. The district court entered summary judgment against CHA and eventually consolidated the suits for consideration of a remedy.[6]

Plaintiffs sought a remedial order encompassing the metropolitan area, maintaining that the city of Chicago was so segregated[7] that any remedy confined to the Chicago city limits could not provide an adequate number of project locations in white neighborhoods.[8] The district court rejected plaintiffs' argument and limited its remedial order to the city of Chicago.[9] Although the Seventh Circuit reversed and refused to discuss the validity of a specific metropolitan plan,[10] the

AND THE REPELLENT OF THE SELF-DESTRUCT GHETTO 1 (Working Paper II.14, Chicago Regional Hospital Study, Oct. 1972).

3. 425 U.S. 284 (1976).

4. *Id.* at 306.

5. *Id.* at 286.

6. 425 U.S. at 287, 290.

7. Data compiled by the U.S. Commission on Civil Rights supports this contention. U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 130 (1975).

8. Gautreaux v. Chicago Housing Auth., 503 F.2d 930, 932 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976).

9. Gautreaux v. Romney, 363 F. Supp. 690, 691 (N.D. Ill. 1973), *rev'd sub nom.* Gautreaux v. Chicago Housing Auth., 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976).

10. Gautreaux v. Chicago Housing Auth., 503 F.2d 930, 936 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976). It is important to note that because the Seventh Circuit did not endorse a specific remedy but remanded the case to the district court for further consideration of metropolitan relief, the Supreme Court did not review the validity of a particular order. 425 U.S. at 301. Some features of the actual order, however, may be surmised from references by the Court. Metropolitan relief would require that HUD fund only projects which provide integrated housing opportunities for residents of the housing projects. *Id.* Because of the segregated nature of the city of Chicago (*see* note 2 *supra*), the new guidelines for integration by which HUD must

court held that it was "necessary and equitable that any remedial plan to be effective must be on a suburban or metropolitan basis."[11] The Supreme Court affirmed, focusing on whether metropolitan relief is permissible when innocent governmental units are located within the remedial area. The Court concluded that metropolitan relief directed to HUD would not "necessarily entail coercion of uninvolved governmental units"[12] and was therefore permissible.

A metropolitan remedy is an equitable device which attempts to rectify the plaintiff's injury.[13] A federal court's power to order equitable relief has traditionally been viewed as very broad and flexible.[14] In fashioning an appropriate equitable remedy, the emphasis is on the effectiveness of the relief in alleviating the wrong suffered by the injured party. If the relief is effective, it is generally permissible even if administratively awkward, bizarre, or inconvenient.[15] Furthermore, courts are afforded particularly wide latitude in granting relief pertaining to matters of significant public interest,[16] such as eliminating segregation in housing and education.[17]

The courts' equitable powers may, however, be limited by our system of federalism.[18] In cases where metropolitan relief would affect

evaluate housing applications will apply not only to applications from the city, but also to applications from the suburban areas surrounding Chicago.

11. Gautreaux v. Chicago Housing Auth., 503 F.2d 930, 936 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976).

12. 425 U.S. at 298.

13. Chief Justice Burger described the nature of an equitable remedy in Milliken v. Bradley, 418 U.S. 717, 746 (1974): "[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."

14. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); Hecht v. Bowles, 321 U.S. 321, 329-30 (1944) ("The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between public interest and private needs as well as between competing private claims.").

16. *See* Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937) (When the public interest is involved, "courts of equity may and frequently do, go much farther both to give and withhold relief . . . than they are accustomed to go when only private interests are involved.").

17. That is in our "public interest" not to tolerate segregation and to promote desegregation is clearly expressed in federal statutes. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §§ 1447, 1971, 1975, 2000(a)-2000(h), 2204, 2205 (1970); Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1970).

18. *See generally* Hart, *The Relationship Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

governmental entities which are innocent of constitutional or statutory violations, a federal court must weigh its duty as a court of equity against its duty to respect the autonomy of the states and their political subdivisions.[19] Unless the court is presented with proof of substantial injury which requires relief[20] and is convinced that no less drastic alternatives are available,[21] interference with state activities is imper-

19. This duty is derived from our concept of federalism. The Supreme Court recently emphasized that federalism principles, which were first expounded in cases of conflict between state and federal courts, apply equally to cases where equitable relief is sought in a federal court against a state or local governmental agency. Rizzo v. Goode, 423 U.S. 362 (1976). *See* note 20 *infra*. Although it did not involve a court's equity power National League of Cities v. Usery, 426 U.S. 833 (1976), emphasized the duty of the federal government to respect the states and their political subdivisions. The "[Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 843. The Court held that the 1974 Amendments to the Fair Labor Standards Act, which extended the Act's wage and hour provisions to almost all employees of the states and their subdivisions, were not within the authority granted to Congress by the commerce clause. *Id.*

H.M. Hart Jr. has argued that this duty is implied in the Eleventh Amendment of the Federal Constitution: "Judicial mandates to nonjudicial state officers . . . requiring the performance of affirmative acts are relatively infrequent . . . [A]n action to compel the performance of an affirmative act would encounter, ordinarily, the bar of the Eleventh Amendment." Hart, THE RELATIONS BETWEEN STATE AND FEDERAL LAW, 54 COLUM. L. REV. 489, 516 (1954).

20. *See* Rizzo v. Goode, 423 U.S. 362 (1976). The Supreme Court held that the district court had abused its discretion by ordering the Philadelphia police department to adopt a comprehensive plan for dealing with civilian complaints. In response to plaintiff's claim that they were entitled to federal equitable relief when a state agency did not take steps to reduce unconstitutional police procedures, the Court declared that "important considerations of federalism . . . [weigh] against" this position. *Id.* at 377-81. The Court emphasized that interference with the state agency was impermissible since there had been no showing of a substantial injury which demanded relief. The discriminatory action was not the result of an official policy but was the result of irresponsible action on the part of two officers.

Where there has been a showing of a substantial injury which warrants interference with state activities, the Supreme Court has not hesitated to grant the necessary relief. *See, e.g.*, AFL v. Watson, 327 U.S. 582 (1946). The Court in *Watson* held that plaintiffs were entitled to an injunction against the Florida Attorney General to enjoin enforcement of the provision of the Florida Constitution which prohibited employees from entering closed shop agreements. *Id.* at 586. The Court acknowledged that "where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent.' " *Id.* at 593. The Court held that plaintiffs had met this strict test by demonstrating that enforcement of this law resulted in the injury to the collective bargaining processes, the unions, and the employees.

21. *E.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971), where the Supreme Court reversed the district court which had ordered reapportionment legislation after finding that the present multi-member district for the election of state senators and representatives served to dilute the political power of the black ghetto. The Supreme Court emphasized that:

missible. The *Gautreaux* opinion indicates that in cases where metropolitan relief is sought, the degree to which the state's activities are affected by the remedy will be a significant factor in determining whether the interference is permissible.[22]

Two years before *Hills v. Gautreaux*, the Supreme Court faced these conflicting principles in the context of school desegregation. In *Milliken v. Bradley*[23] the Court held that the district court had abused its discretion in ordering a metropolitan remedy which encompassed fifty-four independent school districts, fifty-three of which were innocent suburban school districts surrounding Detroit.[24] The suburban districts were not parties to the orignial action and there was no claim that they had committed constitutional violations. The Court asserted that because the scope of the remedy exceeded the nature and extent of the constitutional violation, the order could not stand.[25]

Many commentators thought the Court in *Milliken* had announced a per se rule that relief could not extend beyond the municipal boundaries of the city where the violation occurred.[26] Justice Stewart's concurrence, however, left open the possibility that the Court had

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The court entered judgment without expressly putting aside on supportable grounds the alternative of creating single-member districts in the ghetto and leaving the district otherwise intact, as well as the possibility that the Fourteenth Amendment could be satisfied by a simple requirement that some of the at-large candidates each year must reside in the ghetto.

Id. at 160.

22. 425 U.S. at 305-06.

23. 418 U.S. 717 (1974). In 1972 plaintiffs brought a class action, alleging that the Detroit public school system was racially segregated as a result of the official policies of the state of Michigan and the Detroit School Board.

24. *Id.* at 719. The court relied on the following aspects of the case to support its holding: there was no evidence in the record that the school districts surrounding Detroit had operated segregated schools or committed acts which affected segregation within other districts, *id.* at 745; there was no claim or finding that school district boundary lines had been established with the purpose of promoting racial segregation, *id.* at 751; and there had been no opportunity for the other school districts which had been included to be heard on the propriety of multidistrict relief, *id.* at 752.

25. *Id.* at 744-45. As the Court stated "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 races." *Id.* at 745. "[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Id.*

26. Note, *Race Relations and Supreme Court Decision-Making: Jurisprudential Reflections*, 51 NOTRE DAME LAW. 91, 104-05 (1975) (*Milliken* "is nothing less than an emasculation of the egalitarian and humanitarian goals of *Brown*"); 9 U. RICH. L. REV. 361, 368 (1975) (*Milliken* "effectively quashes the hopes of those who had earlier perceived a remedy to the racial demography of our large metropolitan areas.").

based its holding on facts unique to school desegregation cases.[27] Although *Gautreaux* presented a slightly different question,[28] the Court clarified this confusion about *Milliken* and indicated that metropolitan relief would be permissible in some circumstances.

After ten years of litigation,[29] the question finally presented to the Supreme Court by *Gautreaux* was whether, in light of *Milliken*, interdistrict relief could be granted for discrimination in public housing without an interdistrict violation.[30] Although the Supreme Court affirmed the Seventh Circuit by holding that interdistrict relief was not impermissible as a matter of law, it was critical of the court of appeals' reasoning.[31] The Supreme Court concluded that a metropolitan remedy

27. Milliken v. Bradley, 418 U.S. 717 (Stewart, J., concurring).

> In the present posture of the case, therefore, the Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather the appropriate exercise of federal equity jurisdiction . . . . 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.

Id. at 753.

28. In *Milliken* the metropolitan order sought was directed to an agency of the state of Michigan and would have required the consolidation of independent, innocent school districts. Thus, the question was whether the innocent governmental entities may be ordered (either directly or indirectly through an order to the state) to participate in remedial action. In *Gautreaux* the metropolitan order sought was directed to HUD, a federal agency, and provided guidelines for the selection of housing applications. Thus the question in *Gautreaux* was to what degree the HUD order may interfere with the activities of local governments. *Gautreaux* did not address the question of whether innocent governmental entities may be forced to participate in a metropolitan remedial order.

29. For a summary of the *Gautreaux* litigation, see Kushner & Werner, *Metropolitan Desegregation After Milliken v. Bradley: The Case for Land Use Litigation Strategies*, 24 CATH. U.L. REV. 187, 197-98 n.47 (1975).

30. 425 U.S. at 292.

31. The Supreme Court was critical of two major aspects of the Seventh Circuit's reasoning. First, the Supreme Court held that the court of appeals erred in holding *Milliken* inapplicable to *Gautreaux*, and cautioned that *Milliken* was not to be interpreted to merely require a "balancing of the particular considerations presented by school desegregation cases." 425 U.S. at 294. The Court emphasized that the *Milliken* decision "rejecting the metropolitan area desegregation order was actually based on fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities." *Id.* at 293. Secondly, the Supreme Court disagreed with the Seventh Circuit's holding that there had been a violation on the part of the suburbs. Although the Seventh Circuit had held *Milliken* to be inapplicable to *Gautreaux*, it continued to apply the *Milliken* test, concluding that the test had been met because there was evidence of a discriminatory violation on the part of the suburbs. 503 F.2d at 937. In the order denying a rehearing, the Seventh Circuit also found an interdistrict segregative effect produced by the segregation in the city. *Id.* at 939-40.

The Supreme Court found no support for either conclusion. The sole basis for the determination by the Seventh Circuit that there had been a violation on the part of the suburbs was an exhibit which showed the location of housing projects within the Chicago metropolitan area but outside Chicago city limits. According to the Supreme Court, this

was appropriate because HUD, which operated on a metropolitan wide basis,[32] was responsible for the segregation.[33] The order to HUD would not impermissibly interfere with innocent governmental entities within the metropolitan area because of the autonomy retained by the local governments. The Court noted that an order directed solely to HUD would not force local governments to apply for HUD funds but would merely reinforce the regulations that HUD uses to determine which housing projects it will fund.[34] The Court also pointed out that under

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exhibit had been interpreted improperly by the Seventh Circuit. The exhibit had been introduced to illustrate the scarcity of integrated housing opportunities for plaintiff's class. Counsel for respondents, when introducing the exhibit, "expressly attempted to avoid the possible misconception" that he was asserting the suburbs were guilty of a violation. The Supreme Court was equally critical of the Seventh Circuit's finding of a segregative effect: "The Court of Appeals' speculation about the effects of the discriminatory site selection in Chicago is contrary both to expert testimony in the record and the conclusion of the District Court." 425 U.S. at 294-95 n.11.

32. 425 U.S. at 299. That the relevant geographical area is the Chicago housing market or the metropolitan area, rather than the Chicago city limits, is evident upon examination of federal guidelines and HUD's own policies. The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1970), directs HUD to "administer its housing programs on a regional basis to achieve equal opportunity in housing." Rubinowitz & Dennis, *School Desegregation Versus Public Housing Desegregation: The Local School District and the Metropolitan Housing District*, 10 URBAN L. ANN. 145, 167 (1975). *See* 42 U.S.C. §§ 3605, 3608(d)(5) (1970). The Housing and Community Development Act of 1974 also emphasizes regional cooperation:

> Activities assisted under this section shall, to the maximum extent feasible, cover entire areas having common or related development problems. The Secretary shall encourage cooperation in preparing and carrying out plans among all interested municipalities, political subdivisions, public agencies, and other parties in order to achieve coordinated development of entire areas.

HCDA § 401(a), 42 U.S.C. § 4231 (Supp. IV 1974) (cross reference to 40 U.S.C. § 461(a) (Supp. IV 1974)). "[I]t is further the intent of this section to encourage comprehensive planning on a unified basis for States, cities, counties, metropolitan areas, districts, regions, . . . and the establishment and development of the organizational units needed therefore." 40 U.S.C. § 461(f) (Supp. IV 1974). *Id.* § 401.

In its administration of federal housing assistance programs, HUD recognizes "housing market areas" which encompass "the geographic area 'within which all dwelling units . . .' are in competition with one another as alternatives for the users of housing." 425 U.S. at 299, *quoting* INSTITUTE FOR URBAN LAND USE AND HOUSING STUDIES, HOUSING MARKET ANALYSIS: A STUDY OF THEORY AND METHODS, c.2 (1953). "The housing market area 'usually extends beyond the city limits' and in the larger markets, 'may extend into several adjoining counties.' " 425 U.S. at 299, *quoting* DEP'T OF HUD, FHA TECHNIQUES OF HOUSING MARKET ANALYSIS 12 (Jan. 1970).

33. 425 U.S. at 299.

34. *Id.* at 303. HUD's Project Criteria for evaluation of 98 applications indicates its responsibility to locate housing projects in integrated neighborhoods: "The site shall not be located in . . . an area of minority concentration . . . [or a] racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area." 24 C.F.R. § 880.112(c) (1976). Also, "[t]he 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." *Id.* at § 880.112(d).

the new section eight program,[35] the major housing program operated by HUD, local governments have the right to comment on and, "in certain specified circumstances, to preclude the Secretary of HUD from approving the application."[36]

The Supreme Court may, however, have overemphasized the degree of autonomy retained by local governments.[37] The decision to apply for HUD funds will not be voluntary for those communities needing HUD resources. In practice, communities are often compelled to apply for HUD funds, potentially bringing themselves within the scope of *Gautreaux*.[38] Secondly, a local government's power to preclude the Secre-

35. Section 8 provides financial support for lower-income families to live in already constructed housing which meets statutory qualifications. The Secretary of HUD is authorized to make assistance payments to the owners of these dwelling units, either directly or through a public housing agency. HCDA § 201(a), 42 U.S.C. § 1437f (Supp. IV 1974). The section 8 program has largely replaced the traditional low-income housing programs. 425 U.S. at 303.

> For fiscal year 1975 estimated contract payments under the section 8 program were approximately $10,700,000 as compared to a total estimated payment of $16,350,000 for all federal subsidized housing programs. The comparable figures for fiscal year 1976 indicate that $22,725,000 of a total $24,800,000 in estimated contractual payments are to be made under the section 8 program.

Id. at 303-04 n.19.

36. 425 U.S. at 304. The Court referred to HCDA §§ 213(a)-213(c), 42 U.S.C. §§ 1439(a)-1439(c) (Supp. IV. 1974).

37. The autonomy reserved to the local governments differs depending on whether the HUD Program is a traditional one or a section 8 program. Under the traditional programs HUD makes loans for the construction of housing projects and provides annual subsidies to retain the low-income character of the project. HCDA § 201(a), 42 U.S.C. §§ 1437b, 1437c (Supp. IV 1974). The traditional programs allow a local government to retain the most control. The local government has the option of applying for HUD funds or, if a local housing authority (LHA) applies for funds, approval by the local government is essential before the Secretary of HUD may contract with the LHA. *Id.* § 201(a), 42 U.S.C. § 1437c(e)(2). A local housing authority is "any . . . governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low-income housing." *Id.* § 201(a), 42 U.S.C. § 1437a(6).

The Section 8 program provides for rent supplements to low-income families to live in already constructed housing. *Id.* § 201(a), 42 U.S.C. § 1437f. The LHA's contract with HUD and then contract with private owners, or HUD may contract directly with private owners. *Id.* § 201(a), 42 U.S.C. § 1437f(b)(1). The role of the local government is thus reduced considerably. The only opportunity for input from the local government for a section 8 program within its boundaries is provided for in HCDA § 213, 42 U.S.C. § 1439 (Supp. IV 1974). This section allows a government to object only if the anticipated section 8 program conflicts with the community's housing assistance plan. See Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development*, 7 URBAN LAW. 189, 202-03 (1975).

38. Of the 1349 communities eligible for funds under the Housing and Community Development Act of 1974, only 17 did not apply. This indicates that very few communities can afford to pass up federal funds for which they are qualified simply because they prefer not to bring themselves within federal guidelines such as the HUD order.

tary of Hud from approving applications may be more limited than the Court indicated. Section 213 of the Housing and Community Development Act of 1974 (HCDA)[39] provides that upon receipt of an application for housing assistance from a public housing authority, the Secretary of HUD must provide the relevant local government an opportunity to comment on the application. The local government may object to the application only if it believes that the application is inconsistent with its own housing assistance plan. A housing assistance plan must be submitted if the community wants to qualify for any funds under HCDA.[40] Since the housing assistance plan must comply with federal guidelines and objectives, it is doubtful that a housing assistance application which complies with a remedial court order will be inconsistent with a community's housing assistance plan. The remedial court order and the housing assistance plan both must promote integration.[41]

Telephone interview with Mr. Daniel Louck, Director of the Data System and Statistics Division, Office of Management under the Secretary for Community Planning and Development, Washington, D.C. It should be noted that the above figures represent the number of communities eligible for funds under the *entire* Housing and Community Development Act of 1974, 88 Stat. 633 (codified in scattered sections of 5, 12, 15, 18, 20, 23, 26, 31, 38, 40, 42, 49 U.S.C. (Supp. IV. 1974)), not just under the Housing provisions of Title II. Most communities are anxious to apply for Title I funds (Community Development) (HCDA §§ 101-118, 42 U.S.C. §§ 5301-5317 (Supp. IV 1974)) since the use of these funds is relatively unrestricted and provides considerable flexibility for the community. Fishman, *supra* note 37, at 202-03. In order to apply for these funds however, a community must submit a Housing Assistance Plan (HAP), HCDA § 104(a)(4), 42 U.S.C. § 5304(a)(4) (Supp. IV 1974). To prepare the Housing Assistance Plan, a community must survey the assistance needs of resident lower-income persons, specify a realistic, annual goal of units which will be built for these persons, and indicate the general locations for such housing units. *Id.* In this sense a community must commit itself to provide public housing if it wants to qualify for Title I funds. In this indirect manner, many communities are forced to seek public housing funds if they want to qualify for the highly desirable Title I funds.

39. Housing and Community Development Act of 1974, 88 Stat. 633 (codified in scattered sections of 5, 12, 15, 18, 20, 23, 26, 31, 38, 40, 42, 49 U.S.C. (Supp. IV 1974)).

40. Every application for community development funds must include a housing assistance plan. *Id.* § 104(a), 42 U.S.C. § 5304(a). *See* note 38 *supra*.

Section 213 of HCDA, 42 U.S.C. § 1439(a)(1)(A) (Supp. IV 1974), provides that within 10 days of receiving an application for housing assistance under the major housing acts the Secretary of HUD must notify the relevant local government. The local government may then object to approval of the application "on the grounds that the application is inconsistent with its housing assistance plan." *Id.* If the local government objects "the Secretary may not approve the application unless he determines that the application is consistent with such housing assistance plan." *Id.* § 213, 42 U.S.C. § 1439(a)(2).

41. The housing assistance plan must indicate the general location of proposed low-income housing "with the objective of . . . promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons. . . ." *Id.* § 104(a)(4)(c), 42 U.S.C. § 5304(a)(4)(C). As the Supreme Court acknowledged, "[i]n view of these requirements of

Finally, the HUD Secretary makes the final determination as to whether the application is indeed inconsistent and thus whether it will be funded.[42] Given these limitations on the community's opportunity to object, the "certain specified circumstances" in which a local government may preclude the Secretary from approving an application appear to be very few. By overemphasizing the control retained by local governments the Supreme Court deemphasized the actual impact of the HUD order on local governments, especially those dependent on HUD funds.

Despite this problem in the Court's analysis, the *Gautreaux* opinion provides guidelines to determine what circumstances will warrant a metropolitan remedy. The most important factor is the extent to which the order will affect the innocent governmental entities which may be involved. In *Milliken*, the Court refused to approve a metropolitan remedy since innocent suburban school districts would have been consolidated or restructured.[43] On the other hand, in *Gautreaux* the Court permitted metropolitan relief since, in view of the Court's analysis, the potential effect on local governments appeared minimal. Because the Court deemphasized the potential effect of its decision on local governments it is not clear how closely one must scrutinize the impact of the metropolitan remedy on local governments. When the practical effects of the *Gautreaux* decision are considered, however, it is apparent that some local governments will never be affected by the decision (i.e., those communities which do not need HUD funds). Moreover, even those governments which are within the scope of the remedial order will not necessarily be drastically affected. At most such local governments will be forced to locate public housing in different areas of their municipality because of the decision.[44] This impact is insignificant when compared with the substantial effect the *Milliken* order would have had on local school boards.

Although the Supreme Court stressed the impact on innocent governmental entities is the decisive factor in assessing the validity of a metropolitan order,[45] other factors in *Gautreaux* made it an ideal case

the Act, the location of subsidized housing in predominantly white areas of suburban municipalities may well be consistent with the communities' housing assistance plans." 425 U.S. at 305 n.21.

42. *See* note 40 *supra*.

43. 418 U.S. at 743-47.

44. Arguably, however, the location of public housing within a particular community may generate significant adverse reaction by neighborhood residents. Adverse community sentiment may in turn create problems for the local government.

45. "[T]he Court's decision [in *Milliken*] rejecting the metropolitan area desegrega-

for the Supreme Court to declare metropolitan relief appropriate. Because of the segregated nature of Chicago, a metropolitan remedy was essential to provide integrated housing opportunities.[46] Second, the decision merely reinforces HUD's established guidelines to promote integration.[47] A district court order stands on very firm ground when the violating agency, by its own guidelines, acknowledges its responsibilities. Third, unlike the order in *Milliken* which was addressed to the state of Michigan,[48] the *Gautreaux* decision was addressed to a federal agency.[49] The federalism problem was thus not as significant in *Gautreaux*.[50] Fourth, unlike many school segregation cases,[51] a housing segregation case more readily lends itself to a metropolitan remedy. As HUD acknowledged, for purposes of plaintiffs' housing opportunities, the relevant geographical area "is the Chicago housing market, not the Chicago city limits."[52]

While the above considerations rendered *Gautreaux* an appropriate

tion order was actually based on fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities." 425 U.S. at 293. "The District Court's desegregation order in *Milliken* was held to be an impermissible remedy . . . because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation." *Id.* at 296. "The more substantial question under *Milliken* is whether an order against HUD affecting its conduct beyond Chicago's boundaries would impermissibly interfere with local governments and suburban housing authorities not implicated in HUD's unconstitutional conduct." *Id.* at 300. "Here unlike . . . *Milliken*, a judicial order directing relief beyond the boundary lines of Chicago will not necessarily entail coercion of uninvolved governmental units." *Id.* at 298.

46. The Seventh Circuit found: "After careful consideration and reflection we are obliged to conclude that on the record here it is necessary and equitable that any remedial plan to be effective must be on a suburban or metropolitan area basis." Gautreaux v. Chicago Housing Auth., 503 F.2d 930, 936 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976).

47. *See* note 34 *supra*.

48. 418 U.S. at 748.

49. 425 U.S. at 296.

50. This may or may not be a significant difference. For even when a metropolitan remedial order is addressed to a federal agency the question remains to what degree innocent governmental entities are affected by the agency's implementation of the order. This question, however, would seem to present a less direct federalism problem because there is no initial inquiry into the federal court's power to order a federal agency to act.

51. Especially in northern school segregation cases a court confronts the problem of whether it may order a metropolitan remedy which encompassese innocent governmental entities. Northern school districts are usually drawn along municipal lines, while southern school districts often cover entire counties. Therefore a southern school district would tend to cover an entire metropolitan area and an order directed to the district would be metropolitan in scope. Note, *Interdistrict School Desegregation Remedies After* Milliken v. Bradley, 56 B.U.L. REV. 357-58 (1976).

52. 425 U.S. at 299; *see* note 32 *supra*.

case in which to grant metropolitan relief, the decision should not be read to require all of these factors before a metropolitan remedy is permissible. To do so would allow district courts to grant metropolitan relief only rarely, for very few cases will present this same fact pattern.[53] *Gautreaux* should instead be read more broadly. While a favorable balance of the above factors is important, the essential criterion in determining whether a metropolitan remedy is permissible in the absence of a metropolitan violation is the impact of such a remedial order on innocent governmental units.

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53. *See, e.g.*, Vann v. Kansas City Housing Auth., No. 76-CV-72-W-3 (W.D. Mo., filed Feb. 5, 1976), *reported in* 9 CLEARINGHOUSE REV. 888 (1976). Since the same facts present in *Gautreaux* appear to be present in *Vann*, the district court should be in a strong position to grant metropolitan relief. Plaintiffs charged the Kansas City Housing (KCHA) Authority and HUD with causing "racial impaction within public housing units in Kansas City" by site location and tenant selection procedures. They also claim that HUD's implementation of the section 8 program (*see* note 37) *supra* has contributed to racial impaction by confining eligible dwelling units to those which are older and located in declining areas of the city. Plaintiffs seek metropolitan relief in two ways: (1) they want new units constructed outside of Kansas City but within the metropolitan area, and (2) they want section 8 procedures revised so the section 8 tenant may live outside Kansas City. *See* 9 CLEARINGHOUSE REV. 888 (1976).

Because the fact pattern is almost identical to *Gautreaux*, all factors in *Gautreaux* appear to be present in *Vann*. A remedial order would be addressed to HUD, a federal agency which operates on a metropolitan basis, reinforcing HUD's already existing responsibilities. The effect of the order on innocent local governments would be minimal. As in *Gautreaux*, the governments voluntarily apply for funds, and have the opportunity to object to the project. The only significant difference between *Vann* and *Gautreaux* is the challenge in *Vann* to HUD's implementation of the section 8 program. Remedial action which is also addressed to HUD's performance under section 8 would not appear to alter the propriety of a metropolitan order by impermissibly interfering with local governments. Although HUD's section 8 procedures were not specifically challenged in *Gautreaux*, the Supreme Court discussed the section 8 program and concluded that because the local governments retained sufficient power to object to applications, a metropolitan remedial order would not impermissibly interfere with their activities. 425 U.S. at 303-05.