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Milliken v. Bradley in Perspective

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The Supreme Court decision in *Milliken v. Bradley* is, without question, a setback to the cause of school desegregation. There, the Court held that suburban school districts could not properly be included in an order for relief, in the absence of "record evidence that acts of the outlying districts affected the discrimination found to exist in the schools of Detroit." The key question is how serious a setback does this decision represent?

The answer to this question depends, to some extent, on how broadly or narrowly future courts interpret the decision. Further, in vew of the line-up of the Justices—4-1-4—the answer also will depend on how much weight is given to the concurring opinion of the swing Justice, Potter Stewart.

Indeed, in the most recent decision in the series of *Gautreaux* cases, involving public housing, the 7th Circuit Court of Appeals relied heavily on Mr. Justice Stewart's opinion and interpreted *Milliken* narrowly, as confined to the logistical and other complexities that are unique to schools. In *Gautreaux,* the court, per Justice Tom Clark (sitting by designation) held that even in the absence of evidence of discrimination by suburban jurisdictions of Chicago, the failure of the district court to include the suburbs in a comprehensive plan of relief for housing discrimination by the Chicago Housing Authority and the Department of Housing and Urban Development was "clearly erroneous." Thus, for purposes of remedying housing discrimination, the 7th Circuit held that it was not only permissible for the district judge to include the suburbs in the plan for relief even though they had not been shown to have discriminated, he was obligated to do so.

From the perspective of the short time that has passed since the *Milliken* decision, my own view is that its significance lies more in what the Supreme Court declined to do than in what it did. That is, I do not believe the Supreme Court in *Milliken* reneged on its 20-year commitment to school desegregation nor, as Justice Douglas contended, that the decision represents "a step that will likely put the problems of the Blacks and our society back to the period that antedated the 'separate but equal' regime of *Plessy* v. *Ferguson.*" Rather, what the Court did was refuse to lighten the burden that plaintiffs must carry in seeking judicial relief for unlawful school segregation.

What the plaintiffs were asking for—and what the District Court and the 6th Circuit Court of Appeals held they were entitled to—was an order for metro-

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politan-wide school desegregation without having to go through the slogging, time-consuming effort of demonstrating that the suburban jurisdictions subject to the order were guilty of some unlawful conduct. Rather, they would have had to show only that one school district—that of the central city—was unlawfully segregated, that the state, through the doctrine of *respondeat superior,* was responsible and that to assure stable school desegregation, relief had to extend to other parts of the metropolitan area.

If plaintiffs had won in the Supreme Court—and they almost did—the case would have represented a breakthrough of unprecedented proportions, measured by the practical standard of results that could be achieved. For *Milliken,* unlike many other important school desegregation decisions of the past, could have sparked massive school desegregation—and on a metropolitan-wide scale—in the many metropolitan areas in the country where central city school enrollment is heavily or predominantly minority. Its impact probably would have been felt mostly in the north and west, where plaintiffs only infrequently can point to state and local laws that until recently expressly required or authorized school segregation, to assist them in sustaining their burden of showing unlawful conduct by those jurisdictions to be included in an order for relief.

But the Supreme Court narrowly rejected plaintiffs' position and thus the major breakthrough did not occur. That, in my view is the essence of the setback that *Milliken* represents. In short, the case is important more for what was not won than for what was lost.

But what is the plaintiffs' burden after *Milliken* and how supportable is it? If Chief Justice Burger's opinion for the Court is read literally, the burden would seem virtually insupportable. There is a "catch 22" element in this opinion, which flows from its focus on the conduct of school officials, alone. What the Chief Justice seems to be saying is that suburban jurisdictions may be brought under an order for metropolitan-wide school desegregation only if it is demonstrated that their *school* officials have been responsible in some way for the unlawful segregation that exists in the central city schools. Moreover, the majority opinion also implies that this is so even if the disproportionate minority enrollment in central city schools makes it impossible to secure effective relief through an order limited to central city schools alone. Here, too, the Chief Justice indicates, unless suburban school officials are responsible, the suburbs may not be brought under an order for relief. Under this formulation, plaintiffs' task becomes almost hopeless.

Seldom, if ever, can suburban school officials be shown to be responsible for the segregation in the central city school system, a system from which they are almost totally separated. Indeed, the major cause of the problems facing metropolitan areas today has been the irrational, but largely successful, effort of suburban school and other officials to isolate their communities from the real or perceived problems of the central city. And while the conduct of various suburban officials often can be shown to be responsible, in large part, for the concentration of minorities in the central city and the resulting disproportionate minority enrollment in central city schools, rarely have suburban *school* officials

played other than a minor role in causing this phenomenon. But school officials seem to be the sole subject of inquiry, according to the Chief Justice's opinion, and it is their misconduct alone which can trigger metropolitan-wide relief. This literal reading of Chief Justice Burger's opinion would mean that judicial relief for desegregation on a metropolitan-wide basis—often the only effective relief—could almost never be secured. The burden on plaintiffs, under this narrowly rigid view of governmental responsibility, could rarely, if ever, be sustained.

But there is considerable question whether this reading of the Chief Justice's opinion is warranted. The concurring opinion of Justice Stewart—the swing Justice in *Milliken*—raises hopes that the burden on plaintiffs, while heavy, can be sustained.

According to Justice Stewart, the burden on plaintiffs is not the virtually insupportable one of showing that suburban school officials are responsible for the segregation that exists in the central city school system or for the disproportionate number of minority students enrolled there. It is enough if plaintiffs can show that governmental officials—not necessarily school officials—have contributed to the segregation by such means as drawing or redrawing school district lines or "by purposeful racial discriminatory use of state housing or zoning laws." Thus, Justice Stewart recognized that housing policies and practices can be key factors in creating and perpetuating school segregation and that it is appropriate to consider the conduct of governmental officials in addition to those concerned with schools.

In an important footnote, Justice Stewart elaborated on his view of the constitutional significance of residential segregation in determining appropriate relief for unlawful school segregation. In explaining why he voted with the majority in *Milliken,* the Justice said:

> No record has been made in this case showing that the racial composition of the Detroit school population *or that residential patterns within Detroit and the surrounding area were in any significant measure caused by governmental activity....* (emphasis added)

Presumably, if plaintiffs had shown that the state or its suburban political subdivisions were at least in part responsible for segregated residential patterns in the Detroit metropolitan area, Justice Stewart—the swing Justice—would have voted to affirm the order below for metropolitan-wide relief. Justice Stewart thus broadened the focus of examination of the factors responsible for school segregation beyond the activities of school officials alone, to all other governmental officials, including those concerned with housing. Further, if Justice Stewart is to be taken at his word, housing policies of suburban jurisdictions need not be the sole factor responsible for the residential segregation and the resulting school segregation. They need only have been responsible for the existing residential patterns "in any significant measure."

It also is significant that an examination of Chief Justice Burger's opinion reveals no explicit disagreement with this view. In a footnote, the Chief Justice noted that the District Court "alluded to" policies and practices of housing discrimination by government and private parties in producing residential

segregation in the Detroit metropolitan area. He pointed out, however, that the Court of Appeals had expressly not relied on this factor in affirming the District Court. "Accordingly," the Chief Justice said, "in its present posture, the case does not present any question concerning possible state housing violations."

Under Justice Stewart's formulation, the burden on plaintiffs is lightened considerably from the virtually insupportable one they would be required to sustain if Chief Justice Burger's opinion is read literally. In fact, plaintiffs' burden under Justice Stewart's formulation can in most cases be sustained.

There are a variety of policies and practices by which suburban jurisdictions typically have excluded minorities or assured that they are confined to designated areas isolated from the white community.

For example, in the early part of the century many municipalities, particularly in the south, enacted racial zoning laws to assure that whites and blacks live apart from each other. Although these racial zoning ordinances were declared unconstitutional as early as 1917 in *Buchanan* v. *Warley,* many such ordinances were discovered to have remained on the statute books as late as the 1950s, and, undoubtedly, still others can be found lurking in municipal codes even today. Further, these ordinances helped establish segregated residential patterns which, once established, have persisted to the present time.

Further, in virtually every area of the country—north and south—there exists the phenomenon of racially restrictive covenants. These covenants, which are most prevalent in suburban jurisdictions, provide for the total exclusion of minorities from particular neighborhoods, in some cases, from entire communities. They became popular during the 1920s and 1930s, and were strongly advocated by the Federal Housing Administration during the period of rapid suburban expansion. Although these covenants were private agreements among neighboring landowners, they were given the status of law through enforcement by state and federal courts. In 1948, the Supreme Court, in *Shelley* v. *Kraemer,* ruled that they were judicially unenforceable. Nonetheless, these covenants were a formidable factor in developing and perpetuating the pattern of residential segregation in metropolitan areas that exists today. Moreover, in many cases, they remain on deeds, are read and taken seriously by purchasers as binding obligations.

There are more subtle ways in which suburban housing policy and practice contribute to residential segregation, both through action and inaction. Minority enclaves have been selected as sites for public improvements, with resulting displacement of the minority families who live there. In some cases, no provision at all for their relocation has been made and they have been forced to leave. In others, they are relocated into public housing projects in the central city. In either case, minority families are effectively removed from the community.

Efforts to build subsidized housing in which minority families will live have frequently been blocked by suburban officials through such means as refusing to establish a public housing authority or declining to agree to the construction of public housing by another public housing authority with jurisdiction to build in the community. When private builders have sought to build subsidized hous-

ing, their efforts too, have been blocked by such means as denying a request for needed rezoning, refusing to permit the project to hook up with existing water and sewer lines, or simply denying a building permit. All of these actions typically are explained with some rational justification or other, but on analysis, the justification often turns out to be a thin disguise for maintaining minority exclusion.

These are among the common policies and practices through which it can be shown that state and local government have been significant factors in establishing and perpetuating residential segregation. The job of demonstrating that some or all of these policies and practices have been utilized will require a good deal of digging and investigation, the kind of digging and investigation that would not have been necessary if plaintiffs had prevailed in *Milliken*. But it can be done.

If the broader view of Justice Stewart represents the burden that plaintiffs must carry, several questions still remain to be answered.

First, how important a factor must governmental conduct be in establishing and perpetuating residential segregation? The standard used by Justice Stewart—"in any significant measure"—is an imprecise, but familiar legal standard clearly suggesting something less than total responsibility and something more than insubstantial impact. A precise definition of the standard will have to be determined on a case-by-case basis.

Second, must plaintiffs demonstrate as a condition to securing metropolitan-wide relief that each of the jurisdictions they seek to include in the school desegregation plan has maintained policies and practices that have caused residential segregation? If so, plaintiffs' burden may again be virtually insupportable in that the task of investigating all of the jurisdictions in the metropolitan area—in Detroit there were 86—may tax the limited resources of typical plaintiffs and their attorneys beyond their capacity. Further, it is possible that even the most exhaustive investigation would fail to disclose sufficient evidence of wrongdoing by the one or two suburbs that are the key to effective desegregation. Are they to be excluded from the order for relief even though the other suburbs have been found guilty of unlawful conduct and their absence from the order for desegregation will doom the plan to failure? Here too, the answer is not certain.

These are among the key questions raised by *Milliken*—particularly by Justice Stewart's concurrence—that remain to be answered. Indeed, civil rights advocates may not like the answers we ultimately get. But it is much too soon to assume the answers will be unsatisfactory.

To be sure, the effort to achieve a major breakthrough in *Milliken* failed. But it was a noble failure and well worth the effort. In failing, plaintiffs focused the Court's attention on the basic reality of the interrelationship between school segregation and residential segregation and may have laid the basis for success in the future.