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Comment: Desegregation -- The Times They Are A-Changin'

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COMMENTS

DESEGREGATION—THE TIMES THEY ARE A-CHANGIN'

Courts are currently concerned over the extent of their powers to integrate racially separate housing and schools within metropolitan areas containing black inner cities and white suburbs. While the overall population of cities is stabilizing or decreasing, the black population within them is increasing,[1] resulting in a heavy concentration of blacks in central city neighborhoods,[2] surrounded by a predominantly white urban fringe and white suburbs.[3] Housing patterns within these areas are racially segregated.[4] There is also widespread racial segregation in cities' schools,[5] sometimes fostered by school board policies which result in schools reflecting the racial makeup of the surrounding community.[6] Consequently, courts have been called upon to approve interdistrict plans to achieve integrated systems.[7]

This Comment is concerned with instances in which it is a proper exercise of a court's equity jurisdiction to fashion a metropolitan or interdistrict remedial order in which the city and its surrounding suburbs are treated as one system. The interdistrict remedial tool

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1. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 16 (1972).

2. *Id.* at 26.

3. *Id.* From 1950 to 1970 the areas surrounding the central cities gained over thirty-five million people, of whom approximately one and one-half million were black. *Id.*

4. U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 12 (1967); *see* Bradley v. Milliken, 338 F. Supp. 582, 586-87 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974).

5. Ribicoff, *The Future of School Integration in the United States*, 1 J. LAW & ED. 1, 10 (1972).

6. Keyes v. School Dist. No. 1, 413 U.S. 189, 222-23 (1973) (Powell, J., concurring in part); PRESIDENT'S COMM'N ON URBAN HOUSING, A DECENT HOME 13 (1969).

7. *See* note 8 *infra.*

has been discussed in five recent cases,[8] including one which arose

8. Milliken v. Bradley, 418 U.S. 717 (1974); Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974); Bradley v. Milliken, 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974); Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided court*, 412 U.S. 92 (1973); United States v. Board of School Comm'rs, 368 F. Supp. 1191 (S.D. Ind. 1973), *rev'd in part*, 503 F.2d 68 (7th Cir. 1974). The Supreme Court has never explicitly stated what would constitute a constitutionally acceptable racially segregated situation. The implication of Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), however, is that a de facto situation would not be actionable; a de jure finding is the predicate to actionable segregation. *Id.* at 198. The difference between de facto and de jure is the purpose or intent to segregate. *Id.* at 208. Two Justices have denounced the distinction. Justice Douglas believes that all school segregation is the result of state action and is therefore remediable. *Id.* at 215 (Douglas, J., dissenting). Justice Powell feels that it is regionally discriminatory to presume continued segregative intent in the South twenty years after segregative legislation is off the books and not so presume in the North where the same segregation exists. Those seeking desegregation should be relieved of the burden of identifying segregative acts and deducing "segregative intent." *Id.* at 224 (Powell, J., dissenting in part). He would hold that "where segregated public schools exist within a school district to a substantial degree, there is a prima facie case that the duly constituted public authorities . . . are sufficiently responsible to [shift to them the] burden to demonstrate they nevertheless are operating a genuinely integrated school system." *Id.*; Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir.), *cert. denied*, 413 U.S. 920 (1972), stated that discriminatory motive and purpose are not necessary elements of a constitutional violation in the field of public education. *Id.* at 149; *see* Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y.), *appeal dismissed*, 497 F.2d 1027 (2d Cir. 1974), *aff'd*, No. 74-2076 (2d Cir. Jan. 27, 1975). *Contra*, Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974); Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143 (W.D. Mich. 1973); Morales v. Shannon, 366 F. Supp. 813 (W.D. Tex. 1973); Zamora v. New Braunfels Independent School Dist., 362 F. Supp. 552 (W.D. Tex. 1973); Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd*, 404 U.S. 1027 (1972). *Milliken's* description of a constitutional violation in terms of "deliberately maintained dual school systems" seems to indicate an element of intent. 418 U.S. at 737. Individual states may act to cure de facto segregation. *See* Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965); Addabbo v. Donovan, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68, *cert. denied*,

in a housing context.[9]

Courts have the task to correct, "by a balancing of the individual and collective interests, the condition that offends the Constitution."[10] The "condition" existing in education is state mandated[11] or deliberately maintained[12] dual systems in which certain schools are for white students and others are for black students. *Brown v. Board of Education (Brown I)*[13] called for the elimination of such dual systems.[14] This is accomplished by a transition to a unitary

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382 U.S. 905 (1965); Vetere v. Allen, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77 (1965); Pennsylvania Human Relations Comm'n v. Chester School Dist., 427 Pa. 157, 233 A.2d 290 (1967). A number of commentators have agreed that the de facto-de jure distinction is outdated. Ribicoff, *The Future of School Integration in the United States*, 1 J. LAW & ED. 1, 20 (1972); Shannon, *Present Direction of Court Decisions Regarding Metropolitan Area Desegregation*, 1 J. LAW & ED. 587, 597-98 (1972); Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285, 302-03 (1965). *But see* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974); Davis v. School Dist., 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968), *cert. denied*, 402 U.S. 943 (1971); Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143 (W.D. Mich. 1973); United States v. Board of School Comm'rs, 368 F. Supp. 1191 (S.D. Ind. 1973), *rev'd in part*, 503 F.2d 68 (7th Cir. 1974); Hoots v. Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973); Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970); Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961).

9. Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974).

10. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

11. Brown v. Board of Educ., 347 U.S. 483 (1954).

12. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

13. 347 U.S. 483 (1954).

14. *See* Milliken v. Bradley, 418 U.S. 717 (1974); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968); Monroe v. Board of Comm'rs, 391 U.S. 450 (1968).

nonracial system[15] in which all vestiges of state imposed segregation have been removed.[16]

The primary responsibility for this transition rests with school authorities;[17] where they fail to act, judicial authority may be invoked.[18] In assessing the effectiveness of school desegregation[19] plans,[20] courts are to be guided by equitable principles.[21] The scope of the remedy may be broad, "for breadth and flexibility are inherent in equitable remedies."[22] In school desegregation cases it is within the court's discretionary power to prevent the creation of new school districts,[23] to order expenditure of public funds,[24] to alter

15. Green v. County School Bd., 391 U.S. 430, 436 (1968).

16. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

17. Brown v. Board of Educ., 349 U.S. 294, 299 (1955).

18. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971). The federal courts are empowered to grant injunctive relief pursuant to 28 U.S.C. §§ 1343(3)-(4) (1970). They may grant declarative relief pursuant to *id.* §§ 2201-02 (1970).

19. Congress has defined desegregation as the "assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools . . . to overcome racial imbalance." Civil Rights Act of 1964, 42 U.S.C. § 2000c(b) (1970), *as amended*, (Supp. II, 1972). The courts have interpreted desegregation as more than adherence to racially neutral policies. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17 (1971). The use of racial classifications must not be arbitrary or unrelated to a legitimate government purpose. McLaughlin v. Florida, 379 U.S. 184, 190 (1964). There must be a strong overriding justification for their use. Loving v. Virginia, 388 U.S. 1, 11 (1967). Racial classifications which are designed to remedy state maintained dual systems are permissible. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971).

20. *See* Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971); Green v. County School Bd., 391 U.S. 430, 439 (1968).

21. Brown v. Board of Educ., 349 U.S. 294, 300 (1955).

22. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

23. *See, e.g.*, Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972).

24. Griffin v. County School Bd., 377 U.S. 218, 233 (1964); *see* Eaton v. New Hanover County Bd. of Educ., 459 F.2d 684 (4th Cir. 1972); Brewer v. School Bd., 456 F.2d 943 (4th Cir.), *cert. denied,* 406 U.S. 933 (1972).

school district lines,[25] and to declare state laws invalid.[26] The issue in each of the recent cases is whether the court has properly exercised its equity jurisdiction.

The first case to consider a metropolitan area remedy was *Bradley v. School Board of the City of Richmond (Richmond),*[27] which held that the district court lacked authority[28] to order enforcement of a plan integrating city schools with those of two suburban counties.[29] The Court of Appeals for the Fourth Circuit found that each of the three school districts had successfully replaced former dual systems with a unitary system.[30] The court in *Richmond* concluded that the desire of the district court to develop a viable racial mix,[31] wherein each school would have a twenty to forty percent minority enrollment,[32] was unwarranted because it constituted a fixed racial quota,[33] contrary to the directive of *Swann v. Charlotte-Mecklenburg Board of Education.*[34] The Fourth Circuit stated that the school district lines would be breachable only if it were shown that their establishment had been racially motivated.[35] Although

25. Milliken v. Bradley, 418 U.S. 717, 744 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27 (1971); Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955).

26. *See* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Brown v. Board of Educ., 347 U.S. 483 (1954).

27. 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided court,* 412 U.S. 92 (1973).

28. 338 F. Supp. 67 (E.D. Va.), *rev'd,* 462 F.2d 1058 (4th Cir. 1972).

29. The three county school districts involved were Richmond, Henrico, and Chesterfield.

30. Richmond began to desegregate in 1963 by means of a freedom of choice plan which was found discriminatory in its administration. Bradley v. School Bd., 317 F.2d 429, 438 (4th Cir. 1963). The plan itself was approved by the lower court. Bradley v. School Bd., 345 F.2d 310, 315 (4th Cir.), *rev'd,* 382 U.S. 103 (1965).

31. 462 F.2d at 1063.

32. *Id.* at 1064.

33. *Id.*

34. 402 U.S. 1, 24 (1971). The *Richmond* court misinterpreted *Swann. Swann* affirmed a lower court's use of a particular ratio of whites to blacks of 71 to 29 percent because it was used merely as a starting point in fashioning a remedy. The twenty percent permissible range with which the district court was working in *Richmond* did not contravene *Swann.*

35. 462 F.2d at 1064.

the court recognized that state and federal action had tended to perpetuate ghettoization within Richmond as well as restricting the housing location of black residents within the surrounding areas,[36] it concluded that this did not justify a metropolitan remedy without a showing of intentional segregation brought about by a conspiracy between the districts.[37]

One year later, in *Bradley v. Milliken (Bradley),*[38] the Sixth Circuit held that a district court could order the enforcement of a plan which would have integrated the schools of up to fifty-four school districts. Contrary to *Richmond,* the Detroit school system operated segregated schools.[39] The Detroit school board was found to have pursued policies which maintained the segregated schools.[40] The

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36. *Id.* at 1065.

37. *Id.*

38. 484 F.2d 215 (6th Cir. 1973), *aff'g* 345 F. Supp. 914 (E.D. Mich. 1972). This action was originally commenced in 1970 by the National Association for the Advancement of Colored People, attacking a Michigan statute. It was held that the statute interfered with the execution and operation of a voluntary plan of partial school desegregation adopted by the Detroit school authorities, in violation of the fourteenth amendment. Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970). On remand, plaintiffs moved for a court order directing implementation of the original plan. Such implementation was held dependent upon a finding that a constitutional violation existed within Detroit schools. Bradley v. Milliken, 438 F.2d 945 (6th Cir. 1971). The requisite segregation was found. Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd,* 484 F.2d 215 (6th Cir. 1973).

39. No clear standard has emerged by which courts are to conclude that actionable school segregation exists; it is dependent upon the facts of each particular case. Keyes v. School Dist. No. 1, 413 U.S. 189, 196 (1973). Courts look at such things as the racial and ethnic composition of the student body, faculty, and staff; the attitude of the community; and the comparative skill of teachers, programs, and facilities within the district. *See generally* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

40. Attendance zones had been altered. 484 F.2d at 222. *See also* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Davis v. School Dist., 443 F.2d 573 (6th Cir.), *cert. denied,* 404 U.S. 913 (1971); United States v. Board of Educ., 429 F.2d 1253 (10th Cir. 1970); United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing,* 380 F.2d 385 (5th

state, by discriminatory authorization of transportation costs,[41] enactment of legislation rescinding a voluntary desegregation plan,[42]

Cir.) (en banc), *cert. denied,* 389 U.S. 840 (1967); Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y.), *appeal dismissed,* 497 F.2d 1027 (2d Cir. 1974), *aff'd,* No. 74-2076 (2d Cir. Jan. 27, 1975); Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143 (W.D. Mich. 1973); Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971); Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y.), *aff'd,* 294 F.2d 36 (2d Cir.), *cert. denied,* 368 U.S. 940 (1961). Optional attendance zones had been instituted. 484 F.2d at 233. *See also* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd,* 474 F.2d 81 (7th Cir.), *cert. denied,* 413 U.S. 920 (1973); Spangler v. Pasadena Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970). School construction policies were pursued which had the natural and foreseeable effect of maintaining segregated schools. 484 F.2d at 235. *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579 (9th Cir. 1973), *cert. denied,* 416 U.S. 951 (1974); Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972), *cert. denied,* 413 U.S. 920 (1973); Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973); Davis v. School Dist., 443 F.2d 573 (6th Cir), *cert. denied,* 404 U.S. 913 (1971); Brewer v. School Bd., 397 F.2d 37 (4th Cir. 1968); United States v. Board of Pub. Instruction, 395 F.2d 66 (5th Cir. 1968); Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143 (W.D. Mich. 1973); United States v. Board of School Comm'rs, 368 F. Supp. 1191 (S.D. Ind. 1973), *rev'd in part,* 503 F.2d 68 (7th Cir. 1974); Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971); United States v. School Dist. 151, 286 F. Supp. 786 (N.D. Ill. 1968); Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y.), *aff'd,* 294 F.2d 36 (2d Cir.), *cert. denied,* 368 U.S. 940 (1961). The *Richmond* court also found that the Detroit school authorities and the school authorities of a suburban school district had participated in a scheme in which black students from the suburban district were bussed from the suburban district into black schools within Detroit, past closer white suburban schools which could have accepted them. 484 F.2d at 227.

41. 484 F.2d at 238. Detroit was denied any allocation of state funds for pupil transportation although such funds were available for students outside Detroit. The equal protection clause relates to equal protection between persons and not between areas. Salsburg v. Maryland, 346 U.S. 545, 551 (1954). A state has wide discretion in deciding which laws have statewide application and which shall operate in only certain counties. *Id.*; *cf.* Griffin v. County School Bd., 377 U.S. 218 (1964).

42. 484 F.2d at 238.

complicity in school construction policies,[43] and approval of busing black suburban pupils into Detroit,[44] was also found to have contributed to the maintenance of segregation within Detroit's schools.[45] Because of the state's involvement[46] in the existing segregation and the state's derivative responsibility for the actions of its local school districts,[47] the metropolitan remedy was held appropriate. The court concluded that a Detroit-only desegregation plan would lead di-

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43. *Id.*

44. *Id.* The state has ultimate control over bus routes. MICH. COMP. LAWS ANN. § 388.1171 (Supp. 1970).

45. 484 F.2d at 241.

46. State action is found when school boards act. States act through their agents. *Ex parte* Virginia, 100 U.S. 339, 347 (1880). School boards are agents of the state. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Pennsylvania v. Board of Directors, 353 U.S. 230 (1957). A school board acts when it sets policies on attendance zones, faculty employment, assignments, school construction, closings, and consolidations. Keyes v. School Dist. No. 1, *supra* at 227 (Powell, J., concurring in part); *see* United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972). Lower courts have utilized three standards to find the requisite intent necessary for actionable segregation. *See* note 8 *supra.* The oldest standard required something approaching direct evidence. Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967). More recent cases have found the intent upon a showing that school authorities were aware of the results of their policies. *See, e.g.*, Keyes v. School Dist. No. 1, 303 F. Supp. 279 (D. Colo. 1969), *rev'd on other grounds,* 413 U.S. 189 (1973). Other cases have held school authorities to have intended the natural, foreseeable, and probable consequences of their acts. Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143, 160 (W.D. Mich. 1973); Hoots v. Pennsylvania, 359 F. Supp. 807, 823 (W.D. Pa. 1973); Bradley v. Milliken, 338 F. Supp. 582, 592 (E.D. Mich. 1971), *aff'd,* 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds,* 418 U.S. 717 (1974); *see* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564, 584 (1965); Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation,* 38 U. CHI. L. REV. 697, 706 (1971). In Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), the Supreme Court noted another instance in which malevolent intent may be inferred; where a finding of intentional segregative state action is found with reference to a meaningful part of the school system, and segregated schools exist within other parts of the same system, the burden shifts to the school authorities to prove the latter segregation is not the result of intentional state action. *Id.* at 208.

47. 484 F.2d at 242.

rectly to a single segregated Detroit school district, overwhelmingly black, surrounded by a ring of suburban school districts overwhelmingly white.[48]

The United States Supreme Court, in *Milliken v. Bradley (Milliken)*,[49] reversed the court of appeals and held that a metropolitan remedy was improper. In an opinion written by Chief Justice Burger, the Court held that an erroneous standard had been applied[50] and that the lower court's ruling was not supported by evidence that the acts of the suburban school districts had effected the discrimination.[51] According to the Court, an interdistrict remedy is dependent upon finding an interdistrict violation;[52] a constitutional violation[53] within one district, committed either by the state or one or more local school districts, must produce a significant segregative effect in another district.[54] The Chief Justice framed the controlling principle to be that "the scope of the remedy is determined by the nature and extent of the constitutional violation."[55]

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48. *Id.* at 249; *accord*, United States v. Board of School Comm'rs, 368 F. Supp. 1191 (S.D. Ind. 1973).

49. 418 U.S. 717 (1974).

50. *See* note 46 *supra* and text accompanying notes 46-48 *supra*.

51. 418 U.S. at 752.

52. *Id.*

53. *See* notes 8, 11-12 *supra* and accompanying text.

54. 418 U.S. at 744. An interdistrict order would have been proper had a showing been made that segregated schools within Detroit produced a significant segregative effect in the suburbs, or that suburban segregative acts produced a significant segregative effect in other districts, or that the state deliberately drew district lines on the basis of race. *See* Haney v. County Bd. of Educ., 429 F.2d 364 (8th Cir. 1970); United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *aff'd in part*, 447 F.2d 441 (5th Cir.), *cert. denied*, 404 U.S. 1016 (1971).

55. 418 U.S. at 744. The nature of the violation refers to state action which results in racial segregation in public schools. The extent of the violation refers to who has committed the violation and over whom the court may properly exercise its equity jurisdiction. For the purposes of a remedial order the *Milliken* Court has distinguished the state from each of its agencies. A finding of discriminatory activity must be made against each school district in order to make it subject to a court's equity jurisdiction, unless it can be shown that another state agency's discriminatory acts have had significant segregative effects in the district under the former state agent's control. *Id.* at 745.

Prior to *Milliken* the school segregation cases decided by the Supreme Court had successively expanded courts' equity jurisdiction. *Brown I*[56] held that a cause of action would lie for state imposed racial segregation in schools, but specifically excluded consideration of the permissible parameters of a remedial order.[57] A companion case, *Bolling v. Sharpe*,[58] applied the same principles to federally imposed racial segregation in schools. *Brown v. Board of Education (Brown II)*[59] was the first case in which the Court spoke of remedial relief. It left the specifics to be worked out by district courts,[60] but noted that these courts could consider such problems as school administration, physical condition of the schools, school transportation systems, personnel, and revision of school district and attendance areas.[61] There was no indication that the Court in *Brown II* considered any one of these factors more important than any of the others.[62]

Brown II recognized that weighing these various factors and local complexities could be a time consuming process.[63] Thirteen years later, in *Green v. County School Board*[64] the Court concluded that school authorities operating dual systems were obligated to formulate desegregation plans which would work immediately.[65] *Green* had before it the narrow issue of whether a freedom of choice plan, racially neutral on its face, which did not result in any change in the racial indentifiability of the county's schools, was an acceptable compliance with the school board's duty to desegregate. *Green* held it was not.[66] In its next major school desegregation decision,

56. 347 U.S. 483 (1954).
57. *Id.* at 495.
58. 347 U.S. 497 (1954).
59. 349 U.S. 294 (1955).
60. *Id.* at 299.
61. *Id.* at 300.
62. *Id.*
63. *Id.*
64. 391 U.S. 430 (1968).
65. *Id.* at 439. The Court subsequently rejected efforts to slow down the speed with which segregation was to be accomplished. *See* Northcross v. Board of Educ., 397 U.S. 232 (1970); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Carter v. West Feliciana Parish School Bd., 396 U.S. 226 (1969).
66. 391 U.S. at 441; *see* Raney v. Board of Educ., 391 U.S. 443 (1968);

Swann,[67] the Court specifically dealt with the responsibility of school authorities in desegregating dual systems.[68] It upheld the authority of lower courts to use racial percentages as a starting point in shaping remedies,[69] to cluster and group attendance zones,[70] and to order the busing of pupils.[71]

One year later, *Wright v. Council of the City of Emporia*[72] upheld a lower court's equity jurisdiction to enjoin the creation of a new school district from an existing district which had not yet completed the process of desegregation.[73] The Court stated that "desegregation is not achieved by splitting a single school system operating 'white schools' and 'Negro schools' into two new systems, each operating unitary schools within its borders, where one of the two new systems is, in fact, 'white' and the other is, in fact, 'Negro'."[74]

Milliken, in limiting a desegregation order to the school district in which violations have been found, cited most of the above cases for the proposition that it is only within the context of established geographic and administrative school systems that terms such as "unitary," "dual," and "racially identifiable" have meaning.[75] While it is true that the cited cases arose in the context of established school systems, it does not necessarily follow that they stand for the proposition that a stricter test need be met to bridge school district lines than, for instance, attendance zones.[76] None of the cases cited by the Chief Justice ever intimated that established

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Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) (free transfer plan held inadequate).

67. 402 U.S. 1 (1971).

68. *Id.* at 18.

69. *Id.* at 25. Courts may not use racial percentages as an inflexible requirement. *Id.*

70. *Id.* at 27. The attendance zones need not be contiguous or compact. *Id.*

71. *Id.* at 30. The busing is limited by the risk to the health of students and significant impingement on the educational process. *Id.*

72. 407 U.S. 451 (1972).

73. *Id.* at 470.

74. *Id.* at 463. The same principle was applied in a companion case, United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972), where the creation of a new school district by statute was invalidated.

75. 418 U.S. at 746.

76. *See* text accompanying note 62 *supra*.

school district boundaries were anything other than convenient, nor did they involve lower court findings of direct state participation in the maintenance of a segregated established school system.[77]

Milliken rejected the conclusion that school district lines were no more than arbitrary lines drawn on a map for political convenience which can be casually ignored.[78] The Chief Justice stated:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.[79]

The difficulty with this position is that it does not consider that parental concern and interest over the education of one's child is not apt to diminish simply because the controlling school board has shifted location.

Milliken noted that Michigan provides for a large measure of local control over education.[80] Yet, it has long been established that inferior state entities are merely subordinate governmental instrumentalities created by the state to assist in carrying out governmental functions.[81] School districts in Michigan have been held to be state agencies,[82] created and empowered by the state;[83] state control is pervasive,[84] extending to consolidation and merger of school districts

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77. *Brown I* was concerned with a statute that permitted but did not require school segregation. 347 U.S. at 486 n.1. Neither *Green, Swann*, or *Emporia* contained any findings of direct state involvement in the extant school segregation. There was direct state involvement in United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972), but it did not arise until an interim desegregation order had been submitted; no claim of state creation or perpetuation was involved. *Id.* at 486-87.

78. 418 U.S. at 741-42.

79. *Id.*

80. *Id.* at 742 n.20. The local school district, *inter alia*, establishes attendance zones, MICH. COMP. LAWS ANN. § 340.589 (1967), hires and contracts with personnel, *id.* § 340.566, and levies taxes for operations, *id.* § 340.563.

81. Reynolds v. Sims, 377 U.S. 533, 575 (1964); Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

82. School Dist. v. State Bd. of Educ., 367 Mich. 591, 600, 116 N.W.2d 866, 870 (1962).

83. Board of Educ. v. Elliot, 319 Mich. 436, 29 N.W.2d 902 (1947).

84. The legislature contributes a large portion of the operating funds

without the district's approval.[85]

The majority in *Milliken* evidenced a reluctance to become further involved in the educational thicket. The Court expressed concern that district courts would initially become a de facto "legislative authority" and then "school superintendent" for the entire area.[86] Though the issue of local application is for the district court,[87] the Supreme Court in *Milliken* listed a number of difficult issues with which a district court would have to deal.[88] It did recognize, however, that school district boundaries are not sacrosanct, and where they "conflict" with the fourteenth amendment federal courts have the duty to prescribe appropriate remedies.[89]

The Chief Justice felt that *Bradley* was based upon the conclusion that even total desegregation of Detroit would not produce the racial

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of the local school districts with funds raised through statewide taxation. MICH. COMP. LAWS ANN. § 388.1111 (Supp. 1974). In *Milliken,* the state contributed an average of 34% of the operating budgets of the 54 school districts in the proposed area; 11 of them were supplied with over 50% of their operating budget from state revenues. 418 U.S. at 795 n.6 (Marshall, J., dissenting).

85. Attorney General v. Lowrey, 131 Mich. 639, 92 N.W. 289 (1902), *aff'd,* 199 U.S. 233 (1905). This power had been used in Michigan to reduce the number of school districts from 7,362 in 1912 to 738 in 1968. 418 U.S. at 796 (Marshall, J., dissenting). In *Richmond,* the institutionalization of local control was more pervasive. Local education was within the exclusive jurisdiction of local officials, as opposed to the state board of education. *See* County School Bd. v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963). Primary and secondary education was completely financially dependent upon the local governing body. Bradley v. School Bd., 462 F.2d 1058, 1067 (4th Cir. 1972). In addition, in order for a multi-unit school district to be created, the approval of a majority of the school board of each of the affected counties and/or cities, and the approval of the state board of education had to be obtained. VA. CODE ANN. §§ 22-100.1-.13 (1973).

86. 418 U.S. at 743-44.

87. *See* text accompanying note 60 *supra.*

88. 418 U.S. at 743. For instance, what would be the status and authority of the present popularly elected school boards? What boards would levy taxes for school operations in the consolidated districts? *Richmond* also discussed administrative inconveniences. 462 F.2d at 1068; *see* Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem,* 58 NW. U.L. REV. 157, 187-88 (1963).

89. 418 U.S. at 744.

balance perceived as desirable.[90] Two dissenting opinions took issue with this view, stating that the lower court's focus was upon desegregating Detroit's schools.[91] They were concerned that a Detroit-only plan would leave many of Detroit's schools seventy-five to ninety percent black,[92] and, due to white attrition,[93] would ultimately result in all black systems.[94] The majority's willingness to accept these figures indicates a fundamental difference of interpretation of what constitutes a desegregated education system. For the dissent, it appears to be a system in which blacks and whites go to school together,[95] in which there are neither black schools nor white schools but a system of "just schools,"[96] within practicable limits.[97] The

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90. *Id.* at 740.

91. *Id.* at 767 (White, J., dissenting); *id.* at 785 (Marshall, J., dissenting).

92. *Id.* at 767 (White, J., dissenting).

93. White flight, with its attendant "tipping point" (the percentage of nonwhite concentration in a given area at which whites move out), has been noted by a number of courts. Wright v. Council of City of Emporia, 407 U.S. 451 (1972); Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973); Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y.), *appeal dismissed*, 497 F.2d 1027 (2d Cir. 1974), *aff'd*, No. 74-2076 (2d Cir. Jan. 27, 1975); United States v. Board of School Comm'rs, 368 F. Supp. 1191 (S.D. Ind. 1973); Mapp v. Board of Educ., 366 F. Supp. 1257 (E.D. Tenn. 1973); Hoots v. Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973); Calhoun v. Cook, 332 F. Supp. 804 (N.D. Ga. 1971). It has been noted by commentators as well. *See, e.g.*, Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974); Kaplan, *Equal Justice in an Unequal World, The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Note, *The Benign Housing Quota: A Legitimate Weapon to Fight White Flight and Resulting Segregated Communities?*, 42 FORDHAM L. REV. 891 (1974). The tipping point in any given area is dependent upon a number of variables such as the area's income level, its distance from nonwhite ghettos, and the ethnic makeup of the surrounding white community. Kaplan, *supra* at 393.

94. 418 U.S. 765, 787.

95. *Id.; see* Green v. County School Bd., 391 U.S. 430, 435 (1968).

96. The existence of a small number of one race, or virtually one race schools is not in and of itself an unconstitutionally segregated system. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27 (1971).

97. 418 U.S. at 802 (Marshall, J., dissenting); *see* Davis v. Board of

Court's opinion points out that the Constitution neither requires any particular degree of racial balance within a school district,[98] nor within each grade, school, or classroom.[99] A desegregated, unitary system may be one in which all the schools have large black majorities.[100]

The concurring opinion of Justice Stewart was crucial, for without his vote there was no majority. He agreed with Chief Justice Burger that the metropolitan remedy was not commensurate with the constitutional violation, that the violation was to be viewed within the context of a school district, and that there were no findings of constitutional violation by suburban school districts[101] presumptively administered in accord with the Constitution.[102] He based his concurrence on the tradition of local control over the schools and the undue administrative inconveniences of judicially supervised restructuring of local school administration.[103]

Justice Stewart's opinion is most notable for its assertion that an interdistrict remedy would be appropriate were it shown that state officials had contributed to the separation of the races by purposeful discriminatory use of state housing or zoning laws.[104] Though aware

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School Comm'rs, 402 U.S. 33, 37 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971).

98. 418 U.S. at 740. *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971).

99. 418 U.S. at 740-41. *See also* Spencer v. Kluger, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd*, 404 U.S. 1027 (1972).

100. 418 U.S. at 747 n.22.

101. *Id.* at 754-55.

102. *Id.* at 755. However, a finding of significant racial imbalance in schools within a school district shifts to the school authorities the burden of disproving racial discrimination. *Id.* at 741 n.19.

103. *Id.* at 741.

104. *Id.* Restrictive zoning produces the same racial composition as past policies of official segregation. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 294 (1972). However, state action, neutral on its face, is not a denial of equal protection merely because it more often burdens blacks than whites. James v. Valtierra, 402 U.S. 137, 142 (1971). In order to invalidate the zoning it would be necessary to show deliberate racial discrimination; mere disproportionate impact is not sufficient. Goodman, *supra* at 299-302. For a discussion of suburban zoning, see Sager, *Tight Little Islands: Exclusion-*

that blacks were highly concentrated within Detroit and almost nonexistent in the surrounding suburbs,[105] he did not believe that this was attributable to any governmental activity.[106] It is not clear from his opinion what proof would be considered sufficient to conclude that the containment of blacks within cities is attributable to governmental activity. The only case in which containment was an issue was *Richmond,* where the court of appeals recognized governmental involvement but declined to grant the requested relief.[107]

In fact, practices of the federal, state, and local governments, at every level, have contributed to the housing segregation existing today.[108] Racially restrictive covenants were enforceable by state courts until 1948.[109] Local housing authorities explicitly assigned people to public housing on the basis of race,[110] and public housing

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ary Zoning, Equal Protection, and the Indigent, 21 STAN. L. REV. 767 (1969).

105. 418 U.S. at 756 n.2.

106. *Id.* The district court had concluded that the segregated housing patterns in the Detroit metropolitan area were in part attributable to governmental action. 338 F. Supp. at 587. The Sixth Circuit, however, did not rely on evidence pertaining to segregated housing, except as caused and maintained by school construction programs. 484 F.2d at 242. Justice Stewart stated: "[S]egregative acts within the city alone cannot be presumed to have produced—and no factual showing was made that they did produce—an increase in the number of Negro students *in the city as a whole.* It is this essential fact of a predominantly Negro school population in Detroit—caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears—that accounts for 'the growing core of Negro schools,' a 'core' that has grown to include virtually the entire city." 418 U.S. at 756 n.2 (emphasis in original).

107. *See* text accompanying notes 36-37 *supra.* The court in *Richmond* shared Justice Stewart's view that the causes of black concentration within the cities were not known. 462 F.2d at 1065.

108. Hart v. Community School Bd., 383 F. Supp. 699, 735 (E.D.N.Y.), *appeal dismissed,* 497 F.2d 1027 (2d Cir. 1974), *aff'd,* No. 74-2076 (2d Cir. Jan. 27, 1975), *quoting* SENATE COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, TOWARD EQUAL EDUCATIONAL OPPORTUNITY, S. REP. No. 92-000, 92d Cong., 2d Sess. 121-22 (1972).

109. Shelley v. Kraemer, 334 U.S. 1, 23 (1948).

110. Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill.) (summary judgment motions), *order entered on merits,* 304 F. Supp. 736

policies, neutral on their face, have resulted in segregated housing.[111]

The federal government is involved in housing in two ways: credit and home financing,[112] and housing construction.[113] Until 1948 it pursued a racially discriminatory housing policy.[114] For instance, the 1938 Underwriting Manual of the Federal Housing Administration (FHA), still used in the 1950s,[115] called for the occupation of various properties by the same racial and economic groups[116] in the interest of residential stability.[117] It also recommended the use of restrictive covenants against inharmonious racial groups, and model covenants were included in the manual.[118] Land adjoining that of blacks and Mexican-Americans was considered undesirable.[119] These policies helped to concentrate racial minorities in older, more deteriorated neighborhoods as new housing built in the suburbs was denied to them.[120] Until 1948 the FHA had not insured a single integrated project;[121] a 1959 study estimated that less than four percent of new

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(N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

111. Otero v. New York City Housing Authority, 484 F.2d 1122, 1134 (2d Cir. 1973).

112. National Housing Act of 1934, 12 U.S.C. §§ 1701-50 (1970), *as amended*, (Supp. III, 1973) (creating the Federal Housing Administration (FHA)); Federal Home Loan Bank Act, 12 U.S.C. §§ 1421-49 (1970).

113. Housing Act of 1954, 12 U.S.C. § 1750 (1970); United States Housing Act of 1937, 42 U.S.C. §§ 1401-41 (1970); Housing Act of 1949, 42 U.S.C. §§ 1441-90 (1970).

114. *See* text accompanying notes 115-21 *infra.*

115. Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143, 182 (W.D. Mich. 1973).

116. C. ABRAMS, FORBIDDEN NEIGHBORS 230 (1955) [hereinafter cited as ABRAMS].

117. *Id.*

118. *Id.* at 231. " '[N]o persons of any race other than ____ [race to be inserted] shall use or occupy any building or any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenants.' " *Id.* at 230, quoting FHA UNDERWRITING MANUAL (1938).

119. ABRAMS 236.

120. R. WEAVER, THE NEGRO GHETTO 72 (1948); *see* ABRAMS 237.

121. ABRAMS 234. As of December 2, 1949, the FHA agreed not to insure mortgages on property subject to racially restrictive covenants filed after February 15, 1950. *Id.*

homes insured by the FHA from 1946 had been made available to nonwhites.[122] President Kennedy's Executive Order 11063 declared that the federal government's policies were to be nondiscriminatory.[123] The order, however, did not reach the millions of suburban units subsidized by the federal government under its prior policies.[124]

Several courts have found that the Civil Rights Act of 1964[125] and the Fair Housing Act of 1968[126] place an affirmative duty upon housing officials to consider the effect of their policies on integration.[127] However, a 1967 survey of FHA insured housing built after the Executive Order found that less than four percent of the units had been sold to blacks;[128] four years later the figure had remained approximately the same.[129] In addition, as of 1971, none of the federal housing agencies had adequate provisions for assuring that housing would be available on a nondiscriminatory basis,[130] nor had equal housing opportunity procedures for mortgage lending institutions been established.[131]

The history of public housing is somewhat different. Prior to 1948, nonwhites were not totally excluded from government largess; twenty-five percent of the units were nonwhite.[132] However, the ma-

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122. U.S. COMM'N ON CIVIL RIGHTS, HOUSING 63 (1961).

123. Exec. Order No. 11,063, 3 C.F.R. 652-56 (1959-63 Compilation, 1964); *see* 42 U.S.C. § 1982 (1970) (historical note).

124. U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 22 (1967).

125. 42 U.S.C. § 2000 (1970).

126. *Id.* § 3601.

127. Otero v. New York City Housing Authority, 484 F.2d 1122, 1134 (2d Cir. 1973); Shannon v. Department of Housing and Urban Dev., 436 F.2d 809, 816 (3rd Cir. 1970). The Department of Housing and Urban Development must consider the racial impact of its site selections. Blackshear Residents Organization v. Housing Authority, 347 F. Supp. 1138 (W.D. Tex. 1972); Croskey St. Concerned Citizens v. Romney, 335 F. Supp. 1251, 1257 (E.D. Pa. 1971), *aff'd*, 459 F.2d 109 (3d Cir. 1972).

128. U.S. COMM'N ON CIVIL RIGHTS, SUMMARY OF A REPORT 7 (1971).

129. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER 44 (1971).

130. *Id.* at 56-57.

131. *Id.* at 67-68.

132. R. WEAVER, *supra* note 120, at 73-74.

jority of the projects were either all black or all white.[133] The public housing program has served to intensify the concentration of the poor and nonwhite in the central cities.[134] For instance, public housing projects can only be constructed where local communities have a workable plan for community development.[135] Courts in recent years have found many instances in which local communities[136] and the federal authorities[137] have been guilty of racial discrimination. The discrimination has been found in tenant selection procedures,[138] and in the selection[139] and denial[140] of public housing sites.

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133. U.S. COMM'N ON CIVIL RIGHTS, HOUSING 4, 17 (1961).

134. U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 23 (1967).

135. Housing Act of 1949 § 101(c), 42 U.S.C. § 1451(c) (1970). Failure to develop a workable plan for low rent public housing is not violative of the fourteenth amendment, even where it is shown that such failure results in perpetuating racial segregation in the absence of showing actual discrimination. Mahaley v. Cuyahoga Metropolitan Housing Authority, 500 F.2d 1087 (6th Cir. 1974); Citizens Comm. for Faraday Wood v. Lindsay, 362 F. Supp. 651 (S.D.N.Y. 1973).

136. *See, e.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Blackshear Residents Organization v. Housing Authority, 347 F. Supp. 1138 (W.D. Tex. 1972); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill.) (summary judgment motions), *order entered on merits*, 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

137. *See, e.g.*, Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969).

138. *See, e.g.*, Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill.) (summary judgment motions), *order entered on merits*, 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

139. *See, e.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

In a recent housing case, *Gautreaux v. Chicago Housing Authority*,[141] the Seventh Circuit ordered the district court to consider a metropolitan remedy. The lower court was charged with the duty of approving a comprehensive plan to remedy the effects of public housing segregation imposed by the Chicago Housing Authority and the Department of Housing and Urban Development.[142] An order to increase the housing supply, if limited to Chicago's boundaries, would not disestablish the segregated housing system in Chicago. To be effective, the remedial plan would have to be on a metropolitan scale.[143]

The court in *Gautreaux* was aware of the *Milliken* decision but felt it was distinguishable. Focusing upon Justice Stewart's concurring opinion in *Milliken,* the court noted that local control in public housing is dissimilar to that in education—the latter being federally supervised and based on federal statute.[144] The administrative inconveniences present in *Milliken* dwarf those found in public housing.[145] *Gautreaux* found evidence of suburban discrimination that was apparently absent in *Milliken,*[146] and all parties agreed that the metropolitan area was a single relevant locality for low rent public housing purposes.[147] In addition, the Seventh Circuit noted that the public housing authorities have both constitutional and statutory

140. *See, e.g.*, Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill.) (summary judgment motions), *order entered on merits*, 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971). *See generally* Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970).

141. 503 F.2d 930 (7th Cir. 1974).

142. *Id.*

143. *Id.* at 936.

144. *Id.*; *see* 42 U.S.C. § 1401 (1970).

145. 503 F.2d at 936. Only five housing authorities are potentially involved.

146. The conclusion was based upon evidence that of 12 suburban housing projects 10 were located in or adjacent to overwhelmingly black census tracts. *Id.* at 937.

147. *Id.*

responsibilities.[148] The Constitution requires housing authorities to refrain from racial discrimination,[149] while the statutory requirements call for actions which further integration.[150]

The *Milliken* decision has left little promise that a court ordered metropolitan remedy in the field of public education would be upheld. The initial problem is to show significant segregative effect in a second district. The opinions give no clear indication of what the majority had in mind, but presumably the segregative impact must be in the schools of the second district. If one were to assume that the racial composition of the schools is at least partly responsible for a family's decision of where to live, segregation in the city's schools would then tend to keep whites within the city. On the other hand, city discrimination would not explain the failure of blacks to move to the suburbs where they would find an integrated education. Where the suburbs are overwhelmingly white, with no history of segregation in public education (perhaps due to the fortuitous circumstance of a scarcity of nonwhites), in the absence of demonstrating a conspiracy to keep blacks out of white suburban schools it is difficult to imagine a segregative impact in the city. The easiest case would appear to be where the suburbs have themselves been guilty of racial discrimination in public education and are therefore open to the charge that blacks were deterred from moving there, at least in part, because the education of their children would still be segregated.

The second problem to be overcome is perhaps insurmountable. Assuming, arguendo, that an interdistrict violation was found, the policy considerations present in *Milliken*—local control over the schools and judicial inconvenience—would still be present. As no particular degree of racial balance is required, it may still be held that removing the bar to migration provides complete relief, without an interdistrict plan.

The *Milliken* decision did not indicate whether its principle that an interdistrict remedy requires an interdistrict violation extends to housing litigation. The only interdistrict housing case, *Gautreaux*, held it did not. The Seventh Circuit, however, did make findings it

148. *Id.* at 936; *see* Otero v. New York Housing Authority, 484 F.2d 1122 (2d Cir. 1973).

149. *See* cases cited in note 139 *supra.*

150. *See* cases cited in note 127 *supra.*

felt sufficient to meet the *Milliken* test enunciated by Justice Stewart, though it is unclear whether he would apply the same standard in a housing case. There are no Supreme Court guides for housing desegregation other than by analogy to education cases such as *Milliken*.

The *Milliken* decision has served notice that the history of the United States Supreme Court as an instrument for reversing the "separation of the races" tradition in our country has entered a new phase. For the first time since *Brown I* a lower court order which sought to promote the integration of the races after finding unconstitutional segregation has been reversed.

Larry M. Storm