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Constitutional Law - School Desegregation - Interdistrict Desegregation Order is Within Discretion of District Court When Based upon Finding of One or More Interdistrict Constitutional Violation

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Constitutional Law

CONSTITUTIONAL LAW — SCHOOL DESEGREGATION — INTERDISTRICT DESEGREGATION ORDER IS WITHIN DISCRETION OF DISTRICT COURT WHEN BASED UPON FINDING OF ONE OR MORE INTERDISTRICT CONSTITUTIONAL VIOLATIONS.

Evans v. Buchanan (1977).

Plaintiffs, representing black school children of Wilmington, Delaware,[1] brought suit[2] against the State Board of Education (State Board) and the State Superintendent of Public Instruction, alleging that black children in Wilmington were being forced to attend segregated schools.[3] Plaintiffs contended that defendants had violated prior federal court orders to dismantle their dual school system[4] and had impermissibly infringed upon the rights of the plaintiff class under the equal protection clause of the

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1. Because of the length of the litigation involved, there arose some question as to whether the named plaintiffs continued to fairly and adequately represent the interests of the class. Evans v. Buchanan, 416 F. Supp. 328, 337-38 (D. Del. 1976). Although the action had not been certified as a proper class action prior to 1976, the case had been so treated. *Id.* at 337 n.19. Finding sufficient representation by the named class members who continued to have standing by virtue of the present attendance of some of their children in the schools, the district court held that the action could proceed as a certified class action, subject to the requirement that any "representation 'gaps'" arising at a later date be filled by the addition of new parties. *Id.* at 338.

2. Evans v. Buchanan, 379 F. Supp. 1218 (D. Del. 1974) *and* 393 F. Supp. 428 (D. Del. 1975), *aff'd per curiam,* 423 U.S. 963 (1975), *further proceedings,* 416 F. Supp. 328 (D. Del. 1976), *aff'd,* 555 F.2d 373 (3d Cir.), *cert. denied,* 98 S. Ct. 235-36 (1977). *See also* Appendix.

3. 379 F. Supp. at 1219. It is important in following the passage of the case through the courts to note at the outset that the district court determined before any proceedings had begun that the case would be bifurcated. *Id.* at 1220, n.1. The initial phase would be to determine if there had been any constitutional violations. *Id.* If such findings were made, then consideration of the possible remedies would be treated in a second separate portion of the action. *Id.*

4. *Id.* at 1219-20. Until 1954, Delaware was required to maintain a dual school system. *See* DEL. CONST. art. X, § 2; DEL. CODE tit. 14, § 141 (1953). In 1952, the Supreme Court of Delaware refused to hold that segregation in the public schools was per se illegal. Gebhart v. Belton, 33 Del. 144, 91 A.2d 137 (1952). *Gebhart* was reversed by the United States Supreme Court as a companion case to Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*). *Gebhart* was again consolidated with Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*), and was remanded to the Supreme Court of Delaware for further proceedings to require "a prompt and reasonable start toward full compliance" with *Brown I,* and "to effectuate a transition to a racially nondiscriminatory school system." *Id.* at 300-01. Subsequently, there have been fifteen reported decisions spanning two decades in the Delaware federal district court and the Third Circuit alone relating to this order. For a list of these decisions, *see* Appendix. The list will undoubtedly continue to grow. *See* "Widespread busing plan detailed for Wilmington, suburban pupils," Philadelphia Inquirer, January 10, 1978, at 1-A, Col. 1 (reporting predicted appeals of the actual desegregation plan announced by the district court).

fourteenth amendment.[5] These allegations were based upon three broad grounds.[6] First, according to the plaintiffs, the state continued to maintain a dual school system in New Castle County,[7] within which the City of Wilmington is located.[8] Second, plaintiffs asserted that the exclusion of Wilmington from the Educational Advancement Act of 1968 (1968 Act)[9] operated to support the continuation of primarily black school districts.[10] Finally, plaintiffs contended that various state actions of an ongoing nature resulted in continued segregation in Delaware schools despite the declared duty of the state to desegregate.[11]

After making detailed statistical findings, the district court found that segregation of the Wilmington schools had not been eradicated.[12] In a later opinion[13] based upon further findings,[14] the court held that violations having interdistrict effects had been sufficiently established to allow

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5. 379 F. Supp. at 1219–20. The fourteenth amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

6. 379 F. Supp. at 1219–20.

7. *Id.* New Castle County, the most populous of Delaware's three counties, occupies 435 square miles in area and has a population, according to the 1970 census, of approximately 386,000. 393 F. Supp. at 432. The City of Wilmington occupies approximately 15 square miles and is located roughly at the center of that portion of New Castle County which lies north of the Chesapeake and Delaware Canal. *Id.* In 1970, Wilmington's population was approximately 80,000. *Id.*

8. *Id. See* note 7 *supra.*

9. Educational Advancement Act of 1968, DEL. CODE tit. 14, §§ 1001–1094 (1974). The purpose of the 1968 Act was "to provide the framework for an effective and orderly reorganization of the existing school districts" of the State of Delaware. *Id.* § 1001. For a limited time, the 1968 Act allowed the State Board of Education to consolidate school districts in accordance with the dictates of sound educational administration and certain criteria. *Id.* §§ 1002–1003. The Wilmington School District was expressly excluded from the reorganization powers of the State Board. *Id.* § 1004(c)(4). In addition, Wilmington was excluded by implication from any consolidation plan by § 1004(c)(2), which limited the maximum pupil enrollment in any proposed school district to 12,000. *See* 393 F. Supp. at 438–39.

10. 379 F. Supp. at 1219–20.

11. 379 F. Supp. at 1220. *See* note 15 *infra.*

12. 379 F. Supp. at 1223. The basis of this finding was the presence of racially identifiable schools in a formerly de jure segregated system. *Id.* The district court concluded that a unitary school system had never been established. *Id.* Therefore, the court found it unnecessary in this opinion to consider possible violations of equal protection through the challenged provisions of the 1968 Act or possible violations through the enforcement and approval of racial discrimination by the state in its laws, customs, usages, and policies. *Id.* at 1224. *See* text accompanying notes 6–11 *supra.* In addition, the court noted that determination of the sufficiency of a Wilmington-only plan in remedying the violation would have to await the second phase of the proceedings. 379 F. Supp. at 1224. Therefore, the court required the submission of both intra- and interdistrict desegregation plans for consideration. *Id.*

13. Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975).

14. *Id.* at 432–46. These further findings were necessary for the court to consider the criteria for interdistrict relief developed in the intervening decision of the United States Supreme Court in Milliken v. Bradley, 418 U.S. 717 (1974). *See* notes 39–45 and accompanying text *infra.*

consideration of both inter- and intradistrict remedies.[15] This holding was summarily affirmed by the Supreme Court.[16]

The district court, having concluded the liability aspect of the bifurcated proceedings,[17] advanced to the consideration of the appropriate remedy to be imposed.[18] After considering a variety of proposed plans,[19] the court rejected an intradistrict plan as ineffective,[20] and ordered that the eleven districts comprising northern New Castle County be reorganized together with the Wilmington School District into a single desegregation area.[21]

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15. 393 F. Supp. at 446-47. The court expressly stated that any consideration as to the scope of the remedy for the violations would be deferred for later determination. *Id.* at 446. Specifically, the district court found violations of eight general types. *Id.* at 433-46. The court ruled that the passage of the 1968 Act was a violation of the equal protection clause and stated that it "contributed to the separation of the races by . . . redrawing school district lines." *Id.* at 438-46. In addition, the court identified seven other groupings of violative actions on the part of the state. *Id.* at 433-38. These included: 1) the location of public housing projects; 2) state subsidies for the interdistrict transportation of students enrolled in private schools; 3) the allowing of optional attendance zones in the Wilmington School District; 4) the recordation in New Castle County of real estate deeds containing racially restrictive covenants; 5) state-mandated ethical rules for realtors that reinforced racial discrimination in housing; 6) prior racially determined interdistrict pupil assignments; and 7) the Federal Housing Administration's mortgage underwriting manual, advocating the maintenance of racially homogeneous neighborhoods through lending practices. *Id.* The court completed the liability phase of the case by declaring unconstitutional the provisions of the 1968 Act that excluded Wilmington from consideration for consolidation, and by ordering the submission of remedial plans of both intra- and interdistrict characters for consideration by the court in the remedy phase of the case. *Id.* at 447.

16. 423 U.S. 963 (1975), *rehearing denied,* 423 U.S. 1080 (1976).

17. *See* note 3 *supra.*

18. Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976).

19. *Id.* at 336-37. The plans submitted were of three basic types: 1) voluntary plans, including free transfer provisions and magnet schools; 2) plans for reorganizing the existing school districts and allowing the new school boards to make assignments of the students, including blacks, within the division; and 3) mandatory assignment plans requiring busing of students among the existing districts for predetermined periods of exposure to the integration experience. *Id.*

20. *Id.* at 341-44. The court noted that there was a 90% minority enrollment in the Wilmington system and that a Wilmington-only plan would not significantly alter the racial patterns found to exist in the schools of Wilmington and its suburbs. *Id.* at 342-44. The court carefully clarified its holding as not based upon "the fact that Wilmington would be a black system surrounded by white systems," or upon a determination that "a majority black system is of necessity segregated." *Id.* at 344. Instead, the court reasoned that "[w]here the plan would result in the maintenance of the traditional racial identity previously established by State action, and that disparity in racial enrollments remains substantial, it cannot be said that it results in the disestablishment of a dual system." *Id.* Therefore, the court held that on the basis of the evidence presented, a Wilmington-only plan would not be a sufficient remedy and an interdistrict remedy would have to be considered. *Id.*

21. *Id.* at 353-55. This area was to be operated as a single system subject to the right of the State Board to propose smaller districts for the area if it could be shown that they did not impede actual desegregation. *Id.* at 351, 352-58.

On appeal,[22] the United States Court of Appeals for the Third Circuit[23] affirmed, *holding* that based upon the Supreme Court's affirmance of the prior findings of interdistrict violations,[24] the interdistrict remedy proposed was not beyond established legal parameters and did not constitute an abuse of the district court's discretion. *Evans v. Buchanan,* 555 F.2d 373 (3rd Cir.), *cert. denied,* 98 S. Ct. 235-36 (1977).

The fountainhead from which all school desegregation cases have sprung is *Brown v. Board of Education (Brown I).*[25] In *Brown I,* the United States Supreme Court struck the "separate but equal" doctrine[26] from the field of public education.[27] The *Brown I* Court held that the maintenance of racially segregated schools violated the equal protection clause of the fourteenth amendment.[28] Cases subsequent to *Brown I* emphasized that purposeful racial discrimination accomplished by a state or its officials, or by a school board or school officials, or by others acting under color of law,[29] is a prerequisite to a finding that a school system is segregated in violation

22. Defendants' direct appeal to the Supreme Court of the order entered pursuant to the district court opinion was denied on jurisdictional grounds. 429 U.S. 973 (1976). This denial prompted appeal to the United States Court of Appeals for the Third Circuit. 555 F.2d 373 (3d Cir. 1977).

23. The case was heard by the court en banc. Judge Aldisert wrote the majority opinion in which Judges Van Dusen, Adams and Weis joined. Judge Garth filed a dissenting opinion, in which Judges Rosenn and Hunter joined.

24. 423 U.S. 963 (1975). *See* notes 51 & 52 and accompanying text *infra.*

25. 347 U.S. 483 (1954) (*Brown I*).

26. In Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court stated that "the object of the [14th] amendment was undoubtedly to enforce the absolute equality of the two races before the law," however, "[l]aws permitting, and even requiring, their separation . . . have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." *Id.* at 544.

27. 347 U.S. at 493-95. *See generally* Wise, *Desegregation in Education: A Legal Bibliography,* 52 NOTRE DAME LAW. 733 (1977).

28. 347 U.S. at 493-95. For the pertinent text of the fourteenth amendment, *see* note 5 *supra.*

29. *See* United States v. Price, 383 U.S. 787, 794-95 n.7 (1966); Cooper v. Aaron, 358 U.S. 1, 16 (1958). The equal protection clause prohibits only improper *state* action. *See* note 5 *supra.* The action may be executive, legislative, or judicial. *Ex parte* Virginia, 100 U.S. 339, 346-47 (1879). The fact that the violator is a political subdivision or other entity to which the state has delegated some of its functions has not presented obstacles to the finding of state action, although some barriers have been met in the implementation of appropriate remedies. Milliken v. Bradley, 418 U.S. 717 (1974). *But see* Hills v. Gautreaux, 425 U.S. 284 (1976).

of the Constitution.[30] In *Brown v. Board of Education (Brown II)*,[31] the Supreme Court stated that remedies for proven constitutional violations are equitable in nature[32] and expressly designated the "revision of school districts and attendance areas into compact units to achieve a system of determining admissions to the public schools on a non-racial basis" as an appropriate remedial effort.[33]

In *Swann v. Charlotte-Mecklenburg Board of Education*,[34] the Supreme Court addressed the scope of the duty of school authorities and district courts in implementing *Brown I* and *II* and announced that the goal of a desegregation remedy was "to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."[35] General remedial principles, according to the Court, required that judicial power extend "only on the basis of a constitutional violation."[36] Although it realized that "as with any equity case, the nature of the violation determines the scope of the remedy,"[37] the Court emphasized that the remedial process of desegregation must "achieve the greatest possible degree of actual desegregation."[38]

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30. *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause); Washington v. Davis, 426 U.S. 229 (1976) (official action is not unconstitutional merely because of disproportionate impact; intent to accomplish such impact must be shown); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

The Court in *Keyes* defined the proscribed de jure segregation as actions with the *intent* to segregate. *Id.* at 208. Such purposeful segregation is to be distinguished from de facto segregation which is unintentionally discriminatory in effect. *Id. See generally* Note, *"Intention" as a Requirement for De Jure School Segregation*, 37 OHIO ST. L.J. 653 (1976); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976). *See also* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972).

31. 349 U.S. 294 (1955).

32. The *Brown II* Court noted that "[i]n fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.* at 300 (footnotes omitted).

33. *Id.* at 300–01.

34. 402 U.S. 1 (1971) (remedy for segregation within a single school district).

35. *Id.* at 16.

36. *Id.*

37. *Id.*

38. *Id.* at 26. Applying this formula for determining the details of the plan to be implemented in eradicating past discrimination, the Supreme Court affirmed the remedy ordered by the district court. *Id.* at 32. This plan included the use of ratios of majority to minority students or faculty, alteration of attendance zones, and busing of students. *Id.* at 22–30. *See also* Davis v. Board of School Comm'rs, 402 U.S. 33 (1971). The Court in *Davis* stated that "[h]aving once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Id.* at 37. Thus, in *Davis*, it was found to be error to consider the eastern part of the county as an isolated area, where such isolation would leave those schools 90% black, despite the fact that the county was divided by a major north-south highway. *Id.* at 37–38. *See also* Comment, *School Desegregation After* Swann: *A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421 (1972); Note, *Schools, Busing and Desegregation: The Post-*Swann *Era*, 46 N.Y.U.L. REV. 1078 (1971).

In 1974, the Supreme Court in *Milliken v. Bradley*[39] applied the guidelines of *Brown I* and *II* and *Swann* in defining the situations in which the reorganization of school districts or other forms of interdistrict relief would be justified.[40] In *Milliken,* the lower court had ordered an interdistrict remedy where constitutional violations were found to exist in only one of the fifty-four school districts involved in the metropolitan area desegregation plan.[41] On appeal, the Supreme Court rejected this attempt to disregard permissibly drawn school district lines.[42] In establishing the standards for the granting of an interdistrict remedy, the *Milliken* Court analyzed both the purpose of a remedy and the means of achieving the purpose. The purpose of the remedy, according to the Court, must be "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct,"[43] while the means of accomplishing the purpose must be consistent with the "principle . . . that the scope of the remedy is determined by the nature and extent of the constitutional violation."[44] Based upon this analysis, the Court described the circumstances that would warrant the imposition of interdistrict relief: 1) where a violation in one district has produced a "significant segregative effect" in another district; 2)

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39. 418 U.S. 717 (1974).

40. *Id.* at 737-41, 744-45. Prior to *Milliken,* the Supreme Court had established the principle that the discriminatory use of boundaries *themselves* could support an order of interdistrict relief; school district lines that had been drawn or changed to effectuate impermissible segregation could be ignored. Wright v. Council of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972). *See also* Haney v. County Bd. of Educ., 429 F.2d 364, 366 (8th Cir. 1969); United States v. Texas, 321 F. Supp. 1043, 1050-51 (E.D. Tex. 1970), *aff'd,* 447 F.2d 441 (5th Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972). This, however, is to be distinguished from the question in *Milliken* whether boundary lines, which were not established for discriminatory purposes, may be transgressed to remedy other constitutional violations.

41. 418 U.S. at 735-36.

42. *Id.* at 741-44. The Court stated that "[b]oundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country." *Id.* at 741.

Recently, the Supreme Court indicated, in a case involving the discriminatory placement of public housing by the Chicago Housing Authority, that an interdistrict *housing* remedy will be permitted even without satisfaction of the preconditions to such relief established by *Milliken* when such an order will not restructure or consolidate local governmental entities. Hills v. Gautreaux, 425 U.S. 284, 293, 305-06 (1976). This decision will have little effect on school desegregation cases, however, where an interdistrict consolidation order will by definition work some restructuring of the local control of school districts which the Court has recognized as "separate independent governmental entities responsible for the operation of autonomous public school systems." *Id.* at 295-96. For an excellent examination of the possibilities of using the broad *Hills* housing remedies as a long-range school integration tool, *see* Kanner, *Interdistrict Remedies for School Segregation After* Milliken v. Bradley *and* Hills v. Gautreaux, 48 MISS. L.J. 33 (1977).

43. 418 U.S. at 746. The Court stated that "[d]isparate treatment of white and Negro students occurred within the Detroit school system and not elsewhere, and on this record the remedy must be limited to that system." *Id.*

44. *Id.* at 744.

where two or more districts have each committed violations; or 3) where district lines have been influenced by purposeful adaptation to perpetuate segregation.[45]

Despite the delineation in *Milliken* of the prerequisites to the imposition of an interdistrict remedy, considerable Supreme Court activity continued in the school desegregation area.[46] However, the Supreme Court had never

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45. *Id.* at 744-45. The *Milliken* Court stated:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation.

Id. However, the Court added: "Conversely, without an interdistrict violation *and* an interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Id.* at 745 (emphasis added). The Court's expression of the various circumstances in which interdistrict relief would be appropriate is, thus, not entirely clear. This language could be read to imply that multidistrict relief necessitates finding a violation on the part of each district to be included. *See* Freilich, *Down with the Doughnut — Up with the Whole: The Need for Metropolitan Relief in School and Housing Integration,* 7 URB. LAW. xi, xiv (1975); Wolf, *Social Science Data and the Courts: The Detroit Schools Case,* 42 PUB. INT. 102 (1976). Later commentaries have recognized that *Milliken* will permit interdistrict relief in districts where, although no violation has been committed, significant segregative effects can be found that were caused by violations that occurred elsewhere. *See* Kanner, *supra* note 42, at 36-37.

46. This activism can be seen in an examination of the cases reviewed by the Supreme Court for the 1976-77 term involving school desegregation issues.

Of thirteen cases, certiorari was denied in six. However, none of these six cases involved findings of extensive constitutional violations. Only one involved an order of a desegregation remedy. Board of Educ. of Jefferson County v. Newburg Area Council, Inc., 429 U.S. 1074 (1977). Two cases dealt with very narrow issues regarding remedial plans. McDonough v. Morgan, 429 U.S. 1042 (1977) (appointment of a temporary receiver to implement the school district desegregation plan); Cuthbertson v. Charlotte-Mecklenburg Bd. of Educ., 429 U.S. 831 (1976) (dismissal of a challenge to the propriety of racially based pupil assignments as part of a desegregation remedy). Two other cases denied review of procedural issues. St. Louis Bd. of Educ. v. Caldwell, 433 U.S. 914 (1977) (proper intervening parties); Young v. Midland Ind. School Dist., 430 U.S. 983 (1977) (propriety of mandamus). The final case in which certiorari was denied concerned a finding of no constitutional violation. Board of Educ. of Ind. School Dist. No. 53 v. Board of Educ. of Ind. School Dist. No. 52, 429 U.S. 894 (1976).

In the remaining seven of the thirteen desegregation related cases, certiorari was granted in six. Only one case resulted in affirmance, and the issue presented was limited to upholding compensatory educational programs as a proper desegregation remedy. Milliken v. Bradley, 433 U.S. 267 (1977). The remaining five cases, each involving findings of constitutional violations or extensive remedies, were vacated and remanded for further findings. Brennan v. Armstrong, 433 U.S. 672 (1977); School Dist. of Omaha v. United States, 433 U.S. 667 (1977); Dayton School Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Board of School Comm'rs of Indianapolis v. Buckley, 429 U.S. 1068 (1977); Austin Ind. School Dist. v. United States, 429 U.S. 990 (1976). The final case of the thirteen was the appeal in the instant case which was dismissed for want of jurisdiction. Delaware St. Bd. of Educ. v. Evans, 429 U.S. 973 (1976).

accepted, either by affirming or refusing review, a lower court order consolidating city school systems of high minority-group enrollments with surrounding, predominantly white, suburban districts.[47] Thus, although interdistrict remedial measures would be a highly effective tool in desegregating racially concentrated metropolitan areas, a lower court order that imposed such a comprehensive interdistrict desegregation remedy can not be considered to have come clearly before the Court and settled by a simple denial of review.

In the instant case, the Third Circuit explicitly noted that the district court had applied the *Milliken* standards in determining that interdistrict segregation was present.[48] Observing that the affirmance by the Supreme Court of the district court's prior order would bind later determinations by the concept of the law of the case,[49] the court first analyzed what the summary affirmance of the prior order determined.[50] Although conceding that "it is not always crystal clear what exactly was adjudicated by the Supreme Court" in a summary affirmance,[51] the court held that one or more interdistrict violations had been concluded in the prior proceedings and were binding upon it in evaluating the validity of the ordered remedy.[52]

Proceeding to the consideration of the remedy ordered by the district court, the majority emphasized that as a reviewing court, it was "not

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47. *But cf.* Cunningham v. Grayson, 541 F.2d 538 (8th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977) (denial of review of comprehensive remedy not involving court ordered consolidation of school districts); United States v. Missouri, 515 F.2d 1365 (8th Cir.), *cert. denied,* 423 U.S. 951 (1975) (interdistrict consolidation not involving urban-suburban desegregation).

48. 555 F.2d at 376.

49. *Id.* at 376-78. In general, the concept of the law of the case requires that within one action, regarding issues of law previously determined in that action, a determination once made will be treated as correct in all subsequent stages of the proceeding, unless the question is reviewed by a higher court. Thus a question decided in an interlocutory appeal will be treated as conclusively determined by the same appellate court, as well as all lower courts for purposes of later review. *See* F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE § 11.5 (2d ed. 1977). *See also* Vestal, *Law of the Case: Single Suit Preclusion,* 1967 UTAH L. REV. 1, 5-10 (1967).

50. *Id.* at 377. The court determined that the Supreme Court reviewed both the findings of constitutional violations and the validity of the district court's order to submit interdistrict plans based upon these violations. *Id.* The court also rejected a contention that it was incumbent upon it to consider the continued legitimacy of affirmed violations merely because of intervening expressions by the Supreme Court that did not significantly alter the legal basis of the earlier determinations. *Id.* at 377-78, *citing* Insurance Group Comm. v. Denver & Rio Grande W.R.R., 329 U.S. 607 (1947).

51. 555 F.2d at 377.

52. *Id.* at 377-78. What the court believed to have been bindingly determined is not immediately apparent. Although stating that "we conclude that the Supreme Court affirmed the finding of one or more interdistrict constitutional violations," the court further noted that "[i]f the defendants believe that some of the eight violations were not affirmed, they should take, or perhaps previously should have taken, appropriate steps to obtain review of this matter, or a clarification, by the Supreme Court." *Id.* at 377. However, the court next reverted to the prior language regarding what had been established as the law of the case, stating: "We hold, therefore, that one or more interdistrict constitutional violations were found by the district court and affirmed by the Supreme Court." *Id.* at 378.

empowered to consider the matter *de novo*," [53] because the "fashioning of a remedy is committed 'to the exercise of the district judge's discretion.' "[54] Stating that an improper use of discretion would be found only when the court's action "is arbitrary, fanciful, or unreasonable, or when improper standards, criteria or procedures are used,"[55] the court discussed whether the district court's remedy constituted an abuse of discretion.[56] After reviewing the enunciated purpose of the remedial order,[57] the court stated two legal limitations upon the exercise of remedial power: first, the scope of the remedy may only encompass the extent of the effects of the violation;[58] and second, no *particular* degree of racial balance may be mandated.[59] Based upon these limitations, the Third Circuit concluded that within the narrow framework of permissible review, it could not determine that the result ordered by the district court constituted a misuse of discretion.[60] With minor modification,[61] the remedy ordered by the district court mandating an interdistrict desegregation area including most of northern New Castle County was affirmed.[62]

Judge Garth, in his dissenting opinion, asserted that the majority opinion was insufficient in two critical respects.[63] First, it had failed to enumerate the constitutional violations being remedied.[64] Second, it

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53. *Id.* at 378.

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

55. 555 F.2d at 378-79, *citing* Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 115-16 (3d Cir. 1976).

56. 555 F.2d at 379-80.

57. *Id.* This purpose was to eliminate unconstitutional racial discrimination "root and branch." *Id.*, *quoting* Green v. County School Bd., 391 U.S. 430, 438 (1968). The schools were to be returned to the approximate position they would have been in but for the constitutional violations found. 555 F.2d at 380.

58. 555 F.2d at 379. The court stated that "[t]he existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed if there had been no constitutional violation." *Id.*

59. *Id.* at 379, *citing* Milliken v. Bradley, 418 U.S. 717, 740-41 (1974), *and* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971).

60. 555 F.2d at 380. *See* note 74 *infra*.

61. *Id.* The court expressly disapproved of any interpretation of the district court opinion suggesting that any racial quotas would be required in an enrollment or pupil assignment plan, specifically holding that "no particular racial balance will be required in any school, grade, or classroom." *Id.* The court also added a requirement that state authorities file with the district court a report describing their efforts to accomplish desegregation within the remedial area. *Id.* at 381.

62. *Id.* at 382. For clarity, the court proceeded to draft the precise order to be entered. *Id.* at 381-82. The remedy provided for the entire desegregation area to be consolidated under one governing authority. *Id.* The order did not detail the actual process by which desegregation was to be accomplished. *Id.* These minutiae of pupil assignments, funding, and other specific procedural matters were left for further resolution in the district court. *Id.* This plan has since been formalized and was made public on January 9, 1978. *See* Philadelphia Inquirer, *supra* note 4. As reported at the time, there is a substantial likelihood of further appeal concerning the propriety of the process implementing the ordered remedy within the desegregation area. *Id.* at 2-A.

63. 555 F.2d at 383 (Garth, J., dissenting).

64. *Id.*

contained no findings regarding the effects such violations had upon the racial composition of the schools within the area designated for remedial action.[65] The dissent predicted that the result of this failure would be further, time-consuming appeals.[66]

Utilizing a limited interpretation of the jurisdictional basis of the prior Supreme Court review,[67] the dissent found that the summary affirmance meant only that the enactment of the 1968 Act[68] constituted an interdistrict violation.[69] Subsequent to this determination, according to the dissent, the Supreme Court "had no occasion to inquire into the validity of any of the other seven interdistrict violations found by the district court."[70] Based upon this reasoning the dissent determined that the other seven possible violations should be remanded for consideration in light of the Supreme Court cases decided subsequent to the decision of the district court.[71] The purpose of this remand, according to the dissent, would be to supplement the evidence with findings as to the required racially discriminatory intent.[72] The dissent argued that only after determining precisely which of the

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65. *Id.*

66. *Id.* The basis of this objection was the fear of subsequent piecemeal challenges of each separate constitutional violation possibly affirmed by the Supreme Court. *Id.*

67. *Id.* at 386-89 (Garth, J., dissenting). In the appeal to the Supreme Court, review was obtained under 28 U.S.C. § 1253 (1970), which allows appeals "from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 555 F.2d at 386-89 (Garth, J., dissenting). *See* 379 F. Supp. at 1220.

68. *See* note 9 *supra.*

69. 555 F.2d at 386-89 (Garth, J., dissenting).

70. *Id.* at 389 (Garth, J., dissenting). The dissent conceded that since the lower court order constituted a permanent rather than a preliminary injunction, the Supreme Court did not approve merely the "raising of serious questions" as to the constitutionality of the 1968 Act, but its unconstitutionality in fact. *Id.* at 387-88 (Garth, J., dissenting). Judge Garth, by limiting his interpretation of the scope of the statutory review under § 1253, implicitly rejected the possibility that when an appeal is authorized under § 1253, jurisdiction could extend to review of all of the issues of the case. *Cf.* Buchanan v. Evans, 423 U.S. 963 (1975) (Rehnquist, J., dissenting).

Judge Garth agreed with the majority that it was not the province of the court to reexamine, on the basis of subsequent Supreme Court decisions, the constitutional violations that were affirmed. 555 F.2d at 388-89 (Garth, J., dissenting). However, the dissent did not agree that the Supreme Court necessarily affirmed the interdistrict character of permissible remedial plans. *Id.* at 389 (Garth, J., dissenting). Judge Garth admitted that this disagreement would have no effect on the instant case since an interdistrict remedy could have been considered solely on the basis of the 1968 Act violation, which, he conceded, had been affirmed. *Id.*

71. 555 F.2d at 389 (Garth, J., dissenting). *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976) (intent or purpose to racially discriminate required to find violation of equal protection). The district court opinion in *Evans,* in which the interdistrict violations were described, was written before *Washington* was decided. Judge Garth maintained that "[n]ot only did the district court fail to find that these actions were motivated by a racially discriminatory intent, but there is language in the court's opinion which may imply that the court felt that the opposite was true." 555 F.2d at 389 (Garth, J., dissenting) *citing* 393 F. Supp. at 435.

72. 555 F.2d at 389 (Garth, J., dissenting).

original violations were still legally sufficient could the district court ascertain the direct segregative effects of those violations and design a plan to eradicate them.[73]

The principal criticism of the majority opinion, it is submitted, is its paucity of explanatory analysis.[74] Nevertheless, while it is submitted that the questions raised by the dissent were not satisfactorily explained in the majority opinion, it is suggested that close attention to the result of the decision may resolve these objections.

It appears that the necessary implication of the Third Circuit's holding — that the scope of the remedy should encompass an interdistrict desegregation area — was consistent with the district court's exercise of discretion. In light of the district court's finding that sufficient evidence was shown of *some* segregative effects in the districts consolidated[75] and the Third Circuit's finding of "one or more inter-district violations,"[76] designation of an interdistrict desegregation area was supportable,[77] particularly since the district court findings are accorded deference.[78]

In addition, it is suggested that the determination that the scope of the remedy across school district boundaries was the only issue that could be settled without remanding to the district court or venturing into uncertain areas which could have led to reversal.[79] The dilemma facing the Third

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73. *Id.* at 390 (Garth, J., dissenting).

74. *See id.* at 383-86 (Garth, J., dissenting). The court merely enunciated the legal principles involved, including the highly deferential standard of review to be applied, and concluded: "Viewed in this context, we cannot say that the result ordered by the district court was a misuse of discretion." *Id.* at 380.

75. 416 F. Supp. at 338-41, 353-55. The district court stated:

> We need not catalogue the set of violations . . . set forth in the last opinion affirmed by the Supreme Court. Nor need we rehearse the reasons why we held the 1968 Act to be an unconstitutional "redrawing of district lines." It suffices to say that the acts described in the prior opinions were the acts of the state and its subdivisions, and had a substantial, not a de minimus, effect on the enrollment patterns of the separate districts."

Id. at 339 (footnotes omitted).

76. *See* note 52 and accompanying text *supra*. The one violation conceded by even the dissent to have been bindingly determined, the enactment of the 1968 Act, would in itself seem to support the holding delineating the scope of the remedy as being within the northern New Castle County area. *See* note 69 and accompanying text *supra*.

77. *See* 416 F. Supp. at 338-41, for a review of the principles upon which such a determination may permissibly be based. *See* notes 31-33, 36 & 45 and accompanying text *supra*.

78. 555 F.2d at 378-80.

79. The principal of Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), is instructive. In *Dayton,* the Supreme Court remanded to the district court a Sixth Circuit decision that had been based upon violations not expressly found unconstitutional as purposefully discriminatory. *Id.* at 421. Concededly, *Dayton* was handed down by the Supreme Court after the decision of the Third Circuit in *Evans,* but it is clear that a holding based upon alleged violations subsequently determined not to have been affirmed by the Supreme Court would run the risk of reversal in light of the requirement of a finding of purposeful discrimination emphasized by the Supreme Court in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), and Washington v. Davis, 426 U.S. 229 (1976), both decided after the affirmance of *Evans*. *See* note 30 *supra*.

Circuit was that the Supreme Court, despite requests for clarification,[80] and the pointed objections of three Justices,[81] twice refused to indicate the exact import of its summary affirmance.[82] The Third Circuit thus could not with assurance base a holding upon the assumption that all eight violations were affirmed,[83] nor upon the assumption that any violations were affirmed other than that involving the 1968 Act, which even the *Evans* dissent conceded to have been determined.[84] It is submitted that this dilemma, combined with the court's desire to reach a final disposition of the scope of the remedy to be implemented, resulted in an extremely limited holding, which shunned the details of the remedial plan in order to avoid the need to remand to the district court.

In this light, the dissent's objection to the majority's failure to elucidate the explicit constitutional violations that were still extant[85] could be viewed as a disagreement of timing rather than of substance. The dissent's desire to remand for further findings before determining the scope of the remedy[86] seems misplaced, because it appears that a remand is unnecessary to the remedial scope determination.[87] Instead, it is submitted that the sufficiency of the other violations can be appropriately considered at the time of the formation of the actual desegregation plan. Thus, the majority's holding seems to defer the resolution of the validity of the other violations rather than abdicate their consideration entirely.

Furthermore, it is suggested that the dissent's second objection, the lack of findings on the actual effects of constitutional violations to be remedied,[88] could also be regarded as a matter of timing. It is submitted that these findings were unnecessary to the limited holding of *Evans* regarding the area included in the desegregation plan,[89] and would be resolved more appropriately when a specific remedial plan is accepted.[90] Accordingly, the

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80. 423 U.S. 1080 (1976) (request for rehearing of summary affirmance denied on jurisdictional grounds).

81. 423 U.S. 963 (1975). Justice Rehnquist, joined by Chief Justice Burger and Justice Powell, dissented from the summary affirmance on both substantive and jurisprudential grounds. *Id.* at 964. Regarding the latter, Justice Rehnquist explained:

> [T]his is one of those cases in which an opinion of the Court seems to me to be necessary, not merely to resolve an issue concededly present, but to denominate for the benefit of the parties and the District Court what issues the Court conceives to be resolved by its summary affirmance. My dissent from that sort of affirmance here is based on my conviction that it is extraordinarily slipshod judicial procedure as well as my conviction that it is incorrect.

Id. at 975 (Rehnquist, J., dissenting).

82. *See* notes 80 & 81 *supra.*

83. *See* notes 51 & 52 and accompanying text *supra.*

84. *See* notes 52 & 69 and accompanying text *supra.*

85. *See* note 64 and accompanying text *supra.*

86. 555 F.2d at 389-90 (Garth, J., dissenting).

87. *See* text accompanying notes 75-78 *supra.*

88. *See* note 65 and accompanying text *supra.*

89. The interdistrict remedy could be ordered on the basis of the 1968 Act violation. *See* note 76 and accompanying text *supra.*

90. *But see* 555 F.2d at 389-90 (Garth, J., dissenting) (dissent would require remand as to causation of segregative effects remedied).

fault with the majority opinion, it is suggested, lies not in the court's deferral of these questions but in the failure expressly to acknowledge their continued presence.

It is clear that the fate of New Castle County has been determined to some degree. On the basis of at least one conclusively established violation, the Third Circuit has at a minimum designated that it was within the proper bounds of discretion for the district court to define the territorial scope of the appropriate remedy as that of northern New Castle County.[91] It must be noted, however, that the unexpressed limits of the majority's holding regarding the seven questionable constitutional violations raises the strong possibility that the parties and the district court will be unable to act with any certainty on the basis of this decision.[92] In addition, if the plan of desegregation ordered within the remedial area is not clearly traceable to eradication of the precise effects of validly determined constitutional violations, it seems apparent that appealable issues have not been foreclosed.[93]

Furthermore, the denial by the Supreme Court of petitions for writs of certiorari[94] would seem to reveal the Court's determination to apply the *Milliken* standards[95] to comprehensive interdistrict remedies in urban-suburban school desegregation cases. By refusing review, the Supreme Court has apparently indicated that henceforth, when the focus has gone beyond the validity of the constitutional violations underlying the ordered remedy, the propriety of ordering a comprehensive interdistrict desegregation plan which judicially consolidates urban and suburban school districts will not be subject to Supreme Court review.[96]

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91. *See* text accompanying notes 52 & 60-62 *supra*.
92. *See* 555 F.2d at 383-85 (Garth, J., dissenting).
93. *See id.* at 385-86 (Garth, J., dissenting).
94. 98 S. Ct. 235-36 (1977).
95. *See* notes 42-44 and accompanying text *supra*.
96. *Evans* was the first case subsequent to the formulation of the *Milliken* standards for interdistrict relief in which the Supreme Court denied petitions for writs of certiorari to *Evans* thereby refusing to review a lower court order of interdistrict remedial scope in an urban-suburban setting. *See* notes 46 & 47 and accompanying text *supra*.

In several recent school desegregation cases the Court has vacated and remanded for further consideration regarding the constitutional violations found, or their effects. *See* Brennan v. Armstrong, 433 U.S. 672 (1977); School District of Omaha v. United States, 433 U.S. 607 (1977); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Board of School Comm'rs. of Indianapolis v. Buckley, 429 U.S. 1068 (1977); and Austin Ind. School District v. United States, 429 U.S. 990 (1976). None of these cases involved direct review of the propriety of an interdistrict consolidation remedy based upon adequate supporting violations, as, it is submitted, was the case in *Evans*. *See also* note 46 and accompanying text *supra*.

APPENDIX

Opinions rendered to date by the United States District Court for the District of Delaware and the United States Court of Appeals for the Third Circuit concerning the Wilmington desegregation problem:

1. 435 F. Supp. 832 (D. Del. 1977).
2. 555 F.2d 373 (3d Cir.), *cert. denied,* 98 S. Ct. 235-36, *rehearing denied,* 98 S. Ct. 442-43 (1977).
3. 424 F. Supp. 875 (D. Del. 1976).
4. 416 F. Supp. 328 (D. Del.), *appeal dismissed for want of jurisdiction,* 429 U.S. 973 (1976).
5. 393 F. Supp. 428 (D. Del.), *aff'd per curiam,* 423 U.S. 963 (1975), *rehearing denied,* 423 U.S. 1080 (1976).
6. 379 F. Supp. 1218 (D. Del. 1974).
7. 207 F. Supp. 820 (D. Del. 1962).
8. 195 F. Supp. 321 (D. Del. 1961).
9. 281 F.2d 385 (3d Cir.), *application for stay of execution and enforcement of order denied,* 364 U.S. 802 (1960), *cert. denied,* 364 U.S. 933 (1961).
10. 173 F. Supp. 891 (D. Del. 1959).
11. 172 F. Supp. 508 (D. Del. 1959).
12. 256 F.2d 688 (3d Cir.), *cert. denied,* 358 U.S. 836 (1958).
13. 152 F. Supp. 886 (D. Del. 1957).
14. 149 F. Supp. 376 (D. Del. 1957).
15. 145 F. Supp. 873 (D. Del. 1956).