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The Inequitable Burden of School Desegregation Remedies: The Effects of Shift in Supreme Court Decisions on the Buffalo School Desegregation Case

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THE INEQUITABLE BURDEN OF SCHOOL DESEGREGATION REMEDIES: THE EFFECT OF SHIFTS IN SUPREME COURT DECISIONS ON THE BUFFALO SCHOOL DESEGREGATION CASE*

Observers of the United States Supreme Court acknowledge the 1970's as a decade of restraint and reevaluation of the considerable constitutional protection afforded minorities by the Warren Court.[1] This dramatic shift is evident in the school desegregation area, where the broad mandate articulated in the southern school desegregation cases has been consistently eroded as the Court struggles with new standards for dealing with de facto segregation in the North. The effect is significant on lower federal courts faced with the complexity of school desegregation cases; efforts to interpret the shifting winds of the Court's decisions result in gross complication and delay in local desegregation efforts, and in inequitable remedies that place a disproportionate burden of desegregation on minority children.

Nowhere is this effort more apparent than in the Buffalo, New York, school desegregation case of *Arthur v. Nyquist*.[2] The case spans the transition from southern to northern desegregation cases, and demonstrates the effects of shifts in the law within the

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1. For examination of the shifts in Supreme Court standards in school desegregation cases in the last decade, *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1038-42 (2d ed. 1978) (summarizing the Court's drawing back in the school desegregation area which began in 1974 with Milliken v. Bradley, 418 U.S. 717 (1974)); Taylor, *The Supreme Court and Recent School Desegregation Cases: The Role of Social Science In a Period of Judicial Retrenchment*, 42 L. & CONTEMP. PROB. 37, No. 4 (1978) (arguing that "the Court has not repudiated either directly or by implication any doctrine that it had adopted before 1973. . . . Rather, the majority has exhibited a reluctance to extend previously announced legal principles to claims for new remedies . . . and has used various braking devices . . . to slow the progress of desegregation." *Id.* at 38.) *See also* the Court's more recent decisions which appear to support the Taylor thesis: Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977) (providing for ancillary relief to remedy the effects of prior desegregation); Columbus v. Penick 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman (*Dayton II*), 443 U.S. 526 (1979) (relaxing the standards for proving intent in de facto cases where dual school systems existed at the time of Brown v. Board of Educ., 347 U.S. 483 (1954)).

2. 415 F. Supp. 904 (W.D.N.Y. 1976), *modified*, 573 F.2d 134 (2d Cir. 1978), *cert. denied, sub nom.* Manch v. Arthur, 439 U.S. 860 (1978).

last decade. This Comment will examine the history of *Arthur v. Nyquist* within the framework of both southern and northern desegregation decisions and show how significant changes in liability and remedial standards have severely hampered efforts to desegregate the Buffalo public schools.

More significantly, examination of the Buffalo case in its historical context reveals that these shifts in legal standards, particularly restrictions on metropolitan desegregation remedies and other limitations on the equitable powers of federal judges, result in serious inequity in school desegregation remedies. Court-ordered desegregation is now achieved at a great cost to black and other minority children, who suffer an inequitable share of the hardships of school closings and one-race busing in the name of improved educational opportunity. Examination of the often hidden inequity in school desegregation demonstrates the need for the Supreme Court to articulate a firm commitment to the achievement of truly equitable solutions by allocating the burden of desegregation between minority and non-minority children in the true spirit of "equal protection of the laws."[3]

I. History of the Buffalo School Desegregation Case

Initial efforts to end segregation within the Buffalo Public School System began in 1964 when parents of Buffalo school children appealed a board of education school districting decision to the New York State Commissioner of Education.[4] The Board, in

3. The fourteenth amendment states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

4. The site and district lines for the Woodlawn Junior High School were debated by the Buffalo Board of Education for nearly two decades. Concerned that selection of the Woodlawn site would inevitably mean a segregated school, pro-integration forces proposed a second site more attractive to whites in adjacent neighborhoods. However, the Woodlawn site was ultimately chosen ostensibly because of economic factors, *i.e.*, less displacement of families, tax advantages, and lower acquisition costs.

The school was the subject of even greater controversy after it was built. The Board of Regents of the State of New York had recently issued a policy requiring integration in public schools which led groups favoring integration to again urge the Buffalo Board of Education to use the opportunity at Woodlawn to create an integrated school. Instead, the Board adopted a plan creating a 99% minority enrollment at the school, over the dissenting vote of the sole black Board member. This time the Board's decision could only be explained by racial motives. The State Commissioner of Education found the districting of Woodlawn contributed to racial segregation in the Buffalo Public Schools. *See* In re Appeal of Yerby Dixon, 4 N.Y. Ed. Dep't Rep. 115 (1965). Later, a liability finding was made in regard to the districting of Woodlawn Junior High School by the federal district court. Arthur v. Nyquist,

drawing district boundaries for the new Woodlawn Junior High School, rejected demands of integration proponents by refusing to zone the district to include white neighborhoods west of Main Street within the boundaries of the school.[5] In 1965, as a result of the parents' appeal of the Woodlawn decision, known as the *Yerby Dixon Appeal,* the New York State Commissioner of Education found the Buffalo Public School System guilty of maintaining racial segregation in its schools.[6] Cautioning that "there is not and cannot be an easy or instant solution,"[7] to the problem of segregated schools, the Commissioner nonetheless ordered the school board to submit a plan for mitigating the problem of racial imbalance by the end of the school year.[8] In the long run, Commissioner Allen's warning regarding an "instant solution" proved prophetic. Eight years later, when the Buffalo school desegregation case arose in federal district court, the Commissioner still retained jurisdiction over the *Yerby Dixon Appeal* because the Buffalo school district failed to adopt and implement an acceptable desegregation plan.[9]

The Buffalo school desegregation case, *Arthur v. Nyquist,* was brought by parents, the Citizens Council for Human Relations, and

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415 F. Supp. 904, at 930-36.

5. The proposal to bus white children to Woodlawn met with considerable opposition in the white community. A petition opposing the plan, signed by over ten thousand white parents, was delivered to the Board of Education. The atmosphere in the white community was described as "akin to panic." Arthur v. Nyquist, 415 F. Supp. at 934. While the Superintendent of Schools did not state the reasons for the eventual decision to make Woodlawn a segregated school, the district court in its liability decision concluded that among the factors considered in the districting decision were the petition and the atmosphere in the community prior to the Board's vote. *Id.* at 934.

6. 4 N.Y. Dep't Ed. Rep. 115.

7. *Id.* at 118.

8. *Id.*

9. The district court found it significant in finding liability on the part of state defendants that officials did not take stronger steps, such as suspending state education funds to enforce compliance with the Commissioner's order. *See* Arthur v. Nyquist, 415 F. Supp. at 949: "[T]he actions of both the State Regents and the Commissioner of Education over the past two decades . . . weave a saga of much talk and insufficient action . . . ."; *Id.* at 951: "[W]hen effective local action is not forthcoming, and no reasonable person could expect that it will be forthcoming, and repeated attempts at cajoling, pleading and coercing the local authorities into action have failed, there comes a time when those individuals with both the power and responsibility to act must assert themselves." *But see* Arthur v. Nyquist, 573 F.2d 134 (2d Cir. 1978), *cert. denied sub nom.* Manch v. Arthur, 439 U.S. 860 (1978), where the Second Circuit found insufficient proof of intentional segregative acts and reversed the liability decision as to state defendants.

the National Association for the Advancement of Colored People in 1972. The complaint charged local and state defendants[10] with "creating, maintaining, permitting, condoning and perpetuating racially segregated public schools in the City of Buffalo and in the Buffalo metropolitan area."[11] In April, 1976, in an extensive liability decision, Chief Judge John T. Curtin, Federal District Court, Western District of New York, found both city and state defendants in violation of "plaintiffs' fourteenth amendment right to equal protection under the laws by intentionally causing and maintaining a segregated school system."[12] On appeal, the Second Circuit subsequently modified Judge Curtin's decision, affirming the liability of city defendants, but reversing and remanding the decision as to state officials.[13]

A. *The Buffalo Plan: Phases I and II*

Following the liability decision of April of 1976, defendants submitted their initial proposal for desegregation of the Buffalo public schools—entitled the Buffalo Plan—which achieved minimal desegregation primarily by closing a small number of segregated schools, and creating two city-wide magnet schools to achieve desegregation on a voluntary basis.[14] The proposal fell far

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10. Defendants include: "Ewald Nyquist, the Commissioner of Education in New York State, the Board of Regents of the State of New York and its individual members [State defendants], Joseph Manch, Superintendent of the Schools of the City of Buffalo at the time [the] suit was brought, and Eugene Reville, the present Superintendent, the Board of Education of the City of Buffalo and its members, the Common Council of the City of Buffalo and its members, and Stanley M. Makowski, Mayor of the City of Buffalo [City Defendants]." Arthur v. Nyquist, 415 F. Supp. at 910-11.

11. *Id.* at 909.

12. *Id.* at 969.

13. Arthur v. Nyquist, 573 F.2d 134 (2d Cir. 1978).

14. A magnet school is one organized around a particular teaching method (*i.e.*, Montessori or traditional) or designed with emphasis on special curriculum (*i.e.*, science or arts), which is open to students from all areas of the city as an alternative to the neighborhood school. Generally, magnet schools are used to make voluntary desegregation attractive, and are a useful component of a systemwide desegregation program so long as they are not relied on, as in the Buffalo plan, as a substitute for busing. For a discussion of the "magnet school movement" and constitutional and other related problems, *see* Orfield, *Research, Politics and the Antibusing Debate*, 42 L. & CONTEMP. PROB. 141, 158-63 (1978). *See also* Levin, *School Desegregation Remedies and the Role of Social Science Research*, 42 L. & CONTEMP. PROB. 1, 25-29, for examination of the conflicting manner in which district courts have dealt with magnet schools.

For a historical review of the events surrounding submission of the Buffalo Plan, *see* Arthur v. Nyquist, Jt. App. Vol. I at 23-25. Plaintiffs sought to restrain defendants from

short of existing constitutional standards for achievement of a unitary school system.[15] Finding that the plan failed to "effectively integrate the BPSS [Buffalo Public School System] to as great an extent as possible as required by law,"[16] the United States District Court directed the Buffalo Board of Education to file a comprehensive desegregation plan which would, to the extent possible, "reflect in each school the majority-minority ratio for all schools in the school district"[17] by October 15, 1976.

In theory, Judge Curtin's remedial order could not have been stronger. It directed desegregation of *every* school to the extent practicable, and placed the burden on defendants to demonstrate, on a case-by-case basis, where desegregation was not possible.[18] In addition, it provided that the defendants' voluntary desegregation approach could not be constitutionally adopted.[19] In the long run, however, the strong directives issued by the court had little impact on future desegregation efforts.

The school board, after obtaining an extension of the October, 1976, deadline, filed its Buffalo Plan, Phase II, in January, 1977. That plan, like the first, relied heavily on school closings, and in addition, converted a number of segregated black schools into city-wide magnet schools with specialized academic programs, in fur-

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implementing the Buffalo Plan due to its constitutional deficiencies. Eight days of hearings were held on the Buffalo Plan and on an alternate school pairing plan which plaintiffs maintained would desegregate the schools on a system-wide basis in conformance with controlling constitutional guidelines. The court in its preliminary remedial order, dated July 9, 1976, allowed implementation of the Buffalo Plan, despite what the court noted were serious deficiencies, but ordered the defendants to submit a system-wide desegregation plan by October 15, 1976. *Id.* at 63.

15. The U.S. District Court summarized controlling constitutional principles guiding formulation of a desegregation plan for the Buffalo public schools. Arthur v. Nyquist, Order of July 9, 1976 (unpublished).

16. *Id.* at 34. While the court found defendants' plan fell "short of a true integration effort," *id.* at 25, it also found plaintiffs' plan deficient, noting that while it set forth "a comprehensive and theoretically ideal arithmetic solution for the complete integration of almost all of the Buffalo schools . . ." it nonetheless failed "to take into account some important practical considerations." *Id.* at 25. Plaintiffs' plan, in the court's view, failed to take into account the need for the "long range support of the community." *Id.* at 26.

17. *Id.* at 64.

18. *Id.* at 65-66.

19. *Id.* at 29-30. The court noted: "any plan that places great reliance on open enrollment or parental choice cannot be constitutionally adopted. Green v. School Bd., 391 U.S. 430 (1968). Furthermore, freedom-of-choice plans have had a long history of failing when they were attempted to be used." *Id.*

therance of the voluntary approach taken in Phase I.[20] Under the Phase II Plan, minority students from converted schools were enrolled in a student transfer program entitled the Quality Integrated Education Program (QIE) and bused to white neighborhood schools, or assigned to other segregated schools in the minority community.[21] White students were not required to participate in the desegregation process except on a voluntary basis by applying for admission to one of the integrated magnet schools. With minor exceptions, no white students were *assigned* to schools in the minority community.[22] As a result, the Buffalo Plan, Phase II, had no impact on at least fifteen all-minority schools, which continued on a segregated basis.[23]

Plaintiffs objected to the Phase II "plan" because it failed to comply with the court's order to desegregate the school system, and because the QIE one-race busing program caused the burden of transportation to be borne by minority students, a large number of whom were *forced* to enroll in the program when their neighborhood elementary schools were converted into magnet schools. Despite these objections, however, the United States District Court issued a preliminary decision and order on May 4, 1977, permitting defendants to proceed with implementation of Phase II.[24]

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20. Arthur v. Nyquist, 473 F. Supp. 830, 835 (W.D.N.Y. 1979).

21. For a thorough examination of the QIE program and the basis for the district court's rejecting it as a long-term solution to the desegregation of the Buffalo Public Schools, *see id.* at 837-47.

22. *Id.* at 840. *See also,* Brief for Plaintiffs-Appellants at 10, Arthur v. Nyquist, 636 F.2d 905 (2d Cir. 1981). Defendants openly acknowledged the school district's policy of not assigning white students to schools in the minority community under Phase II in their Answering Statement to plaintiffs' motion of November 29, 1977. Defendants stated that a major premise underlying the district's formulation of its desegregation approach is that "no major dislocation of educational services will be visited upon majority pupils in our school system." Arthur v. Nyquist, Jt. App. Vol. I at 119. In addition, defendants said: "Endemic to our busing program is that no child is engaged in a school program where busing is required unless that child has volunteered to be part of that program." *Id.* at 120. *See also* Brief for Plaintiffs-Appellants at 11. *But see* Arthur v. Nyquist 473 F. Supp. at 837-38, where the district court found the school district's characterization of its one-race busing program for blacks, the Quality Integrated Education Program (QIE), as a voluntary desegregation program, "highly misleading." *See* text accompanying note 30 *infra.*

23. Arthur v. Nyquist, 473 F. Supp. at 835.

24. Arthur v. Nyquist, Record Dkt., Entry 3, Interim Order, Mar. 4, 1977. In that order, the court allowed implementation of Phase II but promised further action regarding the system-wide remedy sought by plaintiffs:

> It must be recognized that important issues between the parties remain unresolved. One of the most important and difficult of these issues is plaintiffs'

Plaintiffs continued to press for further and more equitable relief, and in November, 1977, filed a motion requesting the court to resolve the question of the remaining one-race schools in accordance with its prior orders.[25] The remedial phase of the case was then beset by a series of technical delays. With plaintiffs' motion pending, the Buffalo defendants moved for reconsideration of the April, 1976, liability decision on the basis of the Supreme Court's decision in *Dayton Board of Education v. Brinkman*,[26] which circumscribed the conditions under which a system-wide remedy could be imposed. Judge Curtin, thereafter, directed the parties to submit proposed findings. Further delay resulted because of the necessity for the court to issue an order directing defendants to make an additional filing on the *Dayton* issue.[27] As a result, a decision on the scope of the remedy pursuant to *Dayton* and resolution of issues raised in plaintiffs' November, 1977, motion was not forthcoming until June, 1979.

Somewhat surprising, in light of narrowing Supreme Court precedents, the June, 1979, decision was largely a repetition of the initial broad remedial order in the case. Judge Curtin reaffirmed his prior finding that the system-wide impact of defendants' discriminatory action required a system-wide remedy,[28] and directed defendants to submit a comprehensive desegregation plan for implementation, this time, in the September 1980-81 school year.[29] While defendants had prior success in delaying the pace of desegregation, the court at last set a final deadline for implementation.

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demand that the remaining all-minority schools be desegregated by pairing these schools with predominantly majority schools. This and other issues will be addressed by the court in detail in a decision which will be filed as soon as possible.

Id. at 1-2. However, the court failed to address the issue of school pairing in its subsequent orders, and that issue continues to remain unresolved.

25. Plaintiffs' evidence in support of the Nov. 29, 1977, motion showed that 45% of minority elementary school children in the Buffalo school system attended schools 80-100% segregated. In addition to requesting the court to resolve the issue of remaining segregated schools, plaintiffs asked the court to appoint a master to oversee future desegregation efforts and to prevent what they perceived to be a plan to "cause underutilization and eventual closing of minority schools." *See* Arthur v. Nyquist, Jt. App. Vol. I at 97-116.

26. 433 U.S. 406 (1977). For the District Court's decision on the *Dayton* motion, *see* Arthur v. Nyquist, 473 F. Supp. at 832-36.

27. *Id.* at 832.

28. *Id.* at 834.

29. Defendants were encouraged, but not required, to devise a comprehensive plan for the 1979-80 school year; the final deadline for full implementation was set for the fall of 1980. *Id.* at 849.

More significantly, the court, for the first time, addressed the issue of unequal burden on minority students, and on the basis of extensive findings, directed dismantling of the QIE one-race busing program, holding that it "places a heavy burden on minority children, which under applicable legal standards is neither desirable nor permissible."[30]

The court also issued explicit guidelines for future desegregation efforts:

> The desegregation techniques to be used by the Board in meeting the goals of this order shall consist of those which have been approved by the United States Supreme Court, including pairing or clustering of schools, redrawing of geographic attendance zones, and closing schools, with students reassigned so as to enhance racial balance. The plan may contain voluntary components (such as the magnet schools) as long as such components promise speedy and effective means of desegregation and do not place unequal burdens on any racial group.[31]

Clearly, the court was directing a radical departure from the voluntary character of desegregation efforts thus far.[32] Nonetheless, defendants' Phase III plan continued to rely on a voluntary freedom-of-choice approach for desegregation of the Buffalo Public Schools.

B. *The Buffalo Plan: Phase III*

In response to the court's June, 1979, order, defendants submitted their Buffalo Plan, Phase III, in November, 1979.[33] Like earlier plans, Phase III proposed extensive school closings and conversions of minority schools to magnet schools. New in Phase III were proposals for Early Childhood Centers, which were intended to attract white volunteers to enrich primary and pre-primary programs in segregated minority schools.[34] Contrary to the court's

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30. *Id.* at 837.

31. *Id.* at 849.

32. This was noted by the Buffalo Board of Education staff in an application for Emergency School Assistance Act (ESAA) funds which described the court's June 6, 1979, order as requiring "a radical departure from the voluntary nature of the current desegregation plan. . . ." Arthur v. Nyquist, Jt. App. Vol. I at 613.

33. Arthur v. Nyquist, Jt. App. Vol. II at 815-36.

34. *Id.* at 830. The overall design of the Phase III Early Childhood Program contemplates "associating" Early Childhood Centers in the minority community with primarily white neighborhood schools in the periphery of the city as a means of desegregating both the schools in the minority community and in the clustered white communities. However, consistent with past practices, the Phase III Plan did not provide for *assignments* of white students to the minority Early Childhood Center schools, although it did provide for fixed

guidelines, however, the plan also contemplated leaving a number of wholly or partially segregated schools,[35] and continued a scaled-down version of the QIE program as a primary vehicle for desegregating white neighborhood schools.[36]

Plaintiffs strenuously opposed Phase III on grounds similar to their opposition to Phases I and II,[37] and raised serious constitutional questions regarding the dual treatment of minority children under the desegregation approach taken by defendants.[38] Despite these strong areas of disagreement, settlement negotiations were pursued at the urging of the court, and hearings on the Phase III Plan were suspended.[39] As the end of the 1979-80 school year approached, with settlement negotiations having proven unfruitful, the Board of Education sought approval of its Phase III programs. The court, convinced that implementation of the new Early Childhood Centers would substantially contribute to desegregation ef-

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assignments of minority students to clustered white neighborhood schools in the upper grades—a plan which plaintiffs characterize as a "dual assignment policy." Arthur v. Nyquist, Jt. App. Vol. I at 347, 359, 362-64. In a revised plan, "Phase IIIx," submitted to the court on January 27, 1981, defendants proposed additional Early Childhood Centers and, for the first time, indicated that fixed assignments of white children to segregated minority schools will be made in the 1982-83 school year if voluntary enrollment does not effectively desegregate the minority schools. Arthur v. Nyquist, Buffalo Public Schools: Phase IIIx, Jan. 27, 1981 (revised) at 49.

35. The Phase III Plan did not provide for desegregation of four segregated black elementary schools with large minority enrollments, Arthur v. Nyquist, Jt. App. Vol. II at 837, and one school with a segregated Hispanic population, *id.* at 891, because of the "limited 'surplus of whites' in the system. . . ." *Id.* at 841. Plaintiffs maintained that aside from these five schools, the plan did not provide a realistic means of desegregating eight additional segregated elementary schools (including the upper grades at the Early Childhood Center schools). *Id.* at 873-80.

36. The Board of Education proposed a renamed QIE program under Phase III entitled the Voluntary Integration Program (V.I.P.) to give minority students attending remaining segregated schools an *opportunity* to attend desegregated schools in the white community. Arthur v. Nyquist, Jt. App. Vol. II at 832, 882-83.

37. *See generally A Response By Plaintiffs to Board of Education's November 15, 1979, Submittal* [hereinafter cited as *Hochfield Report*]; Arthur v. Nyquist, Jt. App. Vol. II at 844-972.

38. *Id.* at 853-67. *See also Report and Analysis of Desegregation Plans of Buffalo Board of Education: Two Proposed Plans* (prepared by John A. Finger, Jr., Consultant to Plaintiffs) [hereinafter cited as *Finger Report*]; Arthur v. Nyquist, Jt. App. Vol. II at 979-83.

39. Hearings on the Phase III Plan were suspended in March, 1980, so that parties could participate in settlement negotiations. Jt. App. Vol. I at 294. The district court further directed the parties to continue discussions regarding a negotiated settlement in its order of August 8, 1980, *id.* at 295, based on the court's belief that a settlement would ultimately be in the best interest of both parties and the people of the City of Buffalo.

forts, permitted implementation of Phase III,[40] in apparent contradiction of its June, 1979, order.[41]

Plaintiffs appealed the district court's decision to the United States Court of Appeals, Second Circuit, on two separate grounds: first, that the district court approved a constitutionally deficient freedom-of-choice "plan" which did not accomplish timely and system-wide desegregation;[42] and second, that the dual treatment inherent in defendants' desegregation approach violated the equal protection clause of the fourteenth amendment.[43] Additionally, plaintiffs detailed repeated incidents of additional segregative acts in the remedial phases of the case, which they argued "perpetuated the dual school system."[44]

Defendants maintained that the appeal was premature[45] on the basis of a revised submission to the district court in July, 1980, proposing a final comprehensive plan for system-wide desegregation.[46] Significantly, that proposal suggested, for the first time, a back-up plan for mandatory assignment of white children to desegregate the remaining schools in the minority community in order to achieve system-wide desegregation by the 1983-84 school year.[47] Additionally, defendants denied plaintiffs' allegations of disproportionate burden, citing busing statistics that indicated proportionate numbers of white and black children are bused throughout the system.[48] The school district maintained that the voluntary ap-

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40. *Id.* at 294-336.

41. Plaintiffs' view is that the Phase III Plan does not comply with the desegregation guidelines set forth by the District Court because it "did not eliminate the QIE program"; it "did not eliminate the all-minority schools"; it "did not pair or cluster schools"; "with very limited exception, there was no redrawing of geographic attendance zones"; and, the Board's plan failed to "justify why any all-minority schools should remain." Brief for Plaintiffs-Appellants at 15-16, Arthur v. Nyquist, 636 F.2d 905 (2d. Cir. 1981).

42. *Id.* at 18. Plaintiffs cite grounds of unconstitutionality in the continued reliance on freedom-of-choice options to desegregate the schools, *id.* at 22-24; the failure to desegregate a large number of one-race schools, *id.* at 24-25; the school board's failure to use constitutionally approved student assignment techniques to desegregate the schools, *id.* at 25-27; the failure to effectuate timely relief, *id.* at 27; and defendants' use of "veiled references" to white flight to justify its incomplete remedy, *id.* at 28-29.

43. *Id.* at 30-45.

44. *Id.* at 45-48.

45. *See* Brief for Defendants-Appellees, Arthur v. Nyquist, 636 F.2d 905 (2d Cir. 1981).

46. Arthur v. Nyquist, Jt. App. Vol. II at 1043-1237.

47. *Id.* at 1116-48. This plan was later revised and mandatory assignments of whites were proposed to take place in the 1982-83 school year if voluntary programs fail to desegregate the schools in the minority community. *See* note 34 *supra.*

48. Arthur v. Nyquist, Jt. App. Vol. II at 1225-27. The court previously rejected this

proach taken in the remedial phase of the case is based on sound educational principles and the need for stability which requires taking into account future possibilities of white flight and resegregation.[49] Without reaching the merits, the Second Circuit Court of Appeals remanded the case to the district court for findings of fact and conclusions of law in a decision issued in January, 1981.[50] The Second Circuit, however, retained jurisdiction[51] in *Arthur v. Nyquist,* citing the delay that has characterized desegregation effort,[52] and concerns about the disproportionate burden of desegregation on minority children.[53]

Final resolution of the nearly decade-old case is unlikely; deep philosophical differences over the approach to desegregation remain. The inability of the parties or the district court to resolve these differences can only be understood by examining the shifts that have occurred in Supreme Court decisions since the Buffalo case arose in 1972.

II. Effects of Shifting Supreme Court Decisions

A. *Requirement for Proving Segregative Intent*

It was against the background of the early southern school desegregation decisions that the Buffalo case was brought in federal court. The standards for establishing a constitutional violation were clear; there was no requirement to prove discriminatory intent or motive on the part of state and local defendants.[54] The Su-

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contention in its June, 1979, order, finding that despite busing statistics whites did not share equally in the burden of desegregating the schools. 493 F. Supp. at 840. *See* text accompanying note 111 *infra.*

49. *See* Brief for Defendants-Appellees, Arthur v. Nyquist, 636 F.2d 905 (2d Cir. 1981).

50. Arthur v. Nyquist, Nos. 427-28 (2d Cir. Jan. 5, 1981).

51. *Id.* at 836.

52. The court noted "too many years have elapsed since this litigation commenced," *id.* at 833, and further cautioned, "[t]he timeliness of the remedy for intentional school segregation . . . is of the utmost constitutional importance" (quoting Green v. County School Bd., 391 U.S. 430, 439 (1968). *Id.*

53. The court noted that the findings of fact and conclusions of law required by Fed. R. Civ. Proc. 52(a) were absent from Judge Curtin's orders approving the Phase III Desegregation Plan. The Second Circuit particularly directed a "careful and detailed analysis to determine whether Phase III impermissibly burdens minority parents and children with the responsibilities and inconveniences of achieving desegregation." *Id.* at 835.

54. This is because the Supreme Court in Brown v. Board of Educ., 347 U.S. 483 (1954), found de jure segregation to be a per se violation of the Constitution. There was no need for definite legal standards to determine constitutional violations in southern states

preme Court, in the decade after *Brown v. Board of Education,*[55] established an "effects" test in *Green v. Country School Board,*[56] which looked to the effect rather than the purpose or good faith of desegregation efforts.[57] To establish liability under *Green,* Buffalo plaintiffs needed to show that the effect of the defendants' actions was racial segregation in the Buffalo schools. This presented little difficulty with regard to the actions of local education officials, since the New York Commissioner of Education, in the *Yerby Dixon Appeal,* previously found them liable for the existence of segregation within the Buffalo Public School System.[58] In addition, the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education,*[59] held the mere existence of one-race schools creates a presumption of discrimination, which places the burden on defendants to prove one-race schools were not created or maintained by state action.[60] The existence of sixty-seven predominantly one-race schools in the Buffalo Public School System created a strong presumption of unconstitutionality under *Swann* standards.[61] The fact no meaningful desegregation occurred during a decade of state mandates and supervision over the *Yerby Dixon Appeal* created a strong presumption of state complicity in compounding the violation of local defendants.[62]

The law, however, underwent considerable transition in the four years between the filing of the lawsuit in 1972 and the liability

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where segregation in the schools was sanctioned under law.

55. 347 U.S. 483 (1954).

56. 391 U.S. 430 (1968). In the second decade after *Brown,* the need for concrete legal standards in school desegregation cases became apparent. Throughout the South, the voluntary "freedom-of-choice" plans under which whites and blacks were each granted the rarely exercised option of attending the other's segregated schools, kept intact the dual systems outlawed in *Brown.* For a review of the early history of noncompliance with the *Brown* mandate, *see* Alexander v. Holmes, 396 U.S. 1218 (1969) (Black, Circuit Justice).

To remedy this, the Court in *Green* invalidated constitutionally deficient voluntary desegregation remedies, 391 U.S. at 440-41, and formulated stricter guidelines for establishing constitutional violations, charging school boards with the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green v. Country School Bd., 391 U.S. 430, at 437-38 (1968).

57. *See* L. TRIBE, *supra* note 1, at 1035.

58. *See* text accompanying notes 4-8 *supra.*

59. 402 U.S. 1 (1971). *See generally* Fiss, *The Charlotte-Mecklenburg Case: Its Significance for Northern School Desegregation,* 38 U. CHI. L. REV. 697 (1971).

60. 402 U.S. at 26.

61. 415 F. Supp. at 916.

62. *See* text accompanying notes 4-8 *supra.*

decision in 1976. Different legal standards emerged as the focus of the Supreme Court turned from the southern schools to the complex problems of segregation in the schools in the North. From the outset, the Court held that the absence of de jure segregation necessitated a stricter legal standard for estabishing a constitutional violation. In the first case arising in a non-southern context, *Keyes v. School District No. 1*,[63] the Court articulated a new standard: in cases involving de facto segregation, only those discriminatory acts attributed to intentional state action violate the Constitution.[64] Although the Court in *Keyes* substantially broadened the *Brown* mandate by finding a constitutional violation in the absence of de jure segregation, imposition of an intent requirement ultimately made it far more difficult to prove discrimination, despite the existence of dual school systems throughout the North virtually identical to those outlawed in the South. The question of how much more difficult depended on interpetation of the new intent requirement.[65] If proof of overt and deliberate segregative acts was required by the Court, the standard would be impossible to meet in the majority of cases. However, if the standard was objective, liability could be inferred from a variety of factors contributing to desegregation, the most common being reliance on the traditional tort test inferring liability from the foreseeable consequences of an act.

Whether such objective proof would satisfy the new constitu-

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63. 413 U.S. 189 (1973).

64. *Id.* at 198, 208. Since the de jure/de facto distinction was first adopted by the majority in *Keyes*, it has been the subject of much controversy. Justice Powell has argued for abandonment of the distinction, *id.* at 217-53 (Powell, J., concurring in part, dissenting in part), but a majority of the Court has been unwilling to follow. Laurence Tribe has criticized the distinction on the basis that "[t]he harms of both *de facto* and *de jure* discrimination are similar, if not identical." *See* L. TRIBE, *supra* note 1, at 1042. He points out the unreasonableness of imposing the intent requirement in de facto discrimination cases where "discriminatory intent [is] much more often present than provable, and with even truly unintended racial consequences often reflecting unconscious bias and blindness." *Id.* at 1042.

The Court's more recent decisions in Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) and Dayton Bd. of Educ. v. Brinkman (*Dayton II*), 443 U.S. 526 (1979), appear to signal a weakening of the distinction by relaxing the intent requirement in cases where dual school systems existed at the time of *Brown*. *See* Note, *Interdistrict Remedies for Segregated Schools*, 79 COLUM. L. REV. 1168, 1171-72 (1979). This caused Justice Rehnquist to accuse the majority of abandoning the distinction altogether. *See* 443 U.S. at 491 (Rehnquist, J., dissenting).

65. *See* McKinney, *Finding Intent in School Segregation Constitutional Violations*, 28 CASE W. RES. L. REV. 119, 160-65 (1977).

tional requirement for proving segregative intent was uncertain as the state of the law existed at the time. It later became clear on the basis of *Washington v. Davis*,[66] a case dealing with employment discrimination under Title VII of the Civil Rights Act of 1964, that motive could not be inferred solely from the discriminatory impact of state action.[67] Something more was required, but the Court seemed reluctant or unable to define what that "something" was. The Court, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[68] a housing discrimination case, did formulate some guidelines for proving discrimination from objective evidence, such as the historic background leading up to official decisions and unexplained deviations from normal procedures in decision making.[69] However, the *Arlington* standards help to establish violations in only the most obvious cases.[70] They provide little guidance for proving intent where there is no widespread official discriminatory policy, but where a dual education system evolved through a long history of discriminatory practices.

The ambiguity in the law after *Keyes* as to the intent requirement for proving de jure segregation[71] forced plaintiffs to prove their case by a number of different legal standards.[72] To satisfy the

66. 426 U.S. 229 (1976).

67. *Davis* held that a written test administered to candidates for the Washington, D.C., police force was racially neutral. In so doing, the Court rejected a challenge to the test in the absence of proof of racially discriminatory purpose, finding the disproportionate impact of the test on minority applicants insufficient to establish a constitutional violation. *Id.* at 240.

68. 429 U.S. 252 (1977).

69. *Id.* at 261.

70. *See* McKinney, *supra* note 65, at 154-57.

71. Because the Court was silent, most circuits adopted an objective foreseeability test for establishing proof of intent. *See* McKinney, *supra* note 65, at 154-57. However, when faced with the constitutionality of such a standard in Austin Independent School Dist. v. United States, 429 U.S. 990 (1977) (*mem.*), the Supreme Court remanded for further clarification in light of *Washington v. Davis*, failing to put the controversy over the foreseeability test to rest. Considerable confusion resulted from the majority's failure to speak out in *Austin*, while the minority in a concurring opinion strongly intimated the foreseeability standard was inappropriate for proving unlawful intent in light of the new doctrine annunciated by the Court in *Davis*. *Id.* at 991 (Powell, J., concurring). This contributed to greater uncertainty regarding the acceptable legal standard for proving intent.

Fortunately, the Court has now made it clear that proof of outright racial motivation is not required in order to prove segregative intent. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1969), where the Court held that official acts which have the foreseeable consequences of causing segregation in the schools, when coupled with other objective evidence, make out a *prima facie* case of discrimination.

72. *See* McKinney, *supra* note 65, at 164-65 where the author suggests that one effect of lack of clarity regarding legal standards for proving segregative intent is the substantial

subjective standard of proof of deliberate segregative acts, plaintiffs compiled evidence from such sources as school board minutes, student transfer records, and faculty assignments, which were carefully analyzed to reveal hidden discriminatory practices used to maintain the dual education system.[73]

In addition to the subjective test, plaintiffs relied on an objective test formulated by the Second Circuit in *Hart v. Community Board of Education,*[74] which held that "a finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by government authorities which have the natural and foreseeable consequences of causing educational segregation."[75] The objective standard was utilized to establish that in eight separate categories of repeated segregative acts of local and state officials, the foreseeable effect was perpetuation of segregation in the Buffalo public schools.[76] This was buttressed by proof that school officials ignored warnings from the United States Department of Health, Education and Welfare that these actions contributed to

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burden such uncertainty places on those seeking to establish constitutional violations in school cases. This is borne out in the Buffalo case where uncertainty over the correct legal standard for proving segregative intent caused plaintiffs to rely on no less than three legal standards of proof: a subjective test, an objective foreseeability test, and a cumulative impact test.

73. Proving discrimination through evidence of subjective intent is extremely difficult. As Judge Gurfein noted in Hart v. Community School Bd., 512 F.2d 37, 50 (2d Cir. 1975), most of us are "as reluctant to admit . . . [we] have racial prejudice as to admit . . . [we] have no sense of humor." Despite these inherent difficulties, some violations in *Arthur* were so deliberate as to constitute proof of outright racial motivation. School board minutes indicated racial motivation in the districting of Woodlawn Junior High School. Testimony by the Director of Pupil Personnel Services acknowledged that transfers of white students from minority schools were routinely granted for racial purposes. The former School Board President conceded that racially biased admissions policies resulted in a system-wide segregation in vocational schools, and the Superintendent acknowledged staff were deliberately assigned in a racially discriminatory manner in order to provide role models for minority children.

74. 512 F.2d 37 (2d Cir. 1975). *See also* Arthur v. Nyquist, 573 F.2d 134, 141-43 (2d Cir. 1978), *cert. denied* 439 U.S. 860 (1978), where the Court of Appeals reviewed the *Hart* standard in light of shifts in Supreme Court standards.

75. 512 F.2d at 50.

76. These included the segregation of staff, siting and construction of schools, manipulation of district lines, use of optional attendance zones and voluntary transfers, failure to implement a meaningful desegregation plan, failure to hire and promote a significant number of minority teachers, discriminatory admissions policies in vocational high schools, and failure to fund a proposed new integrated high school. *See* Arthur v. Nyquist, 415 F. Supp. at 922-60; *see also* 429 F. Supp. 206, 211-212 (W.D.N.Y. 1977) (affirming the original liability decision) for a concise summary of liability findings in *Arthur.*

school segregation.[77] In addition, plaintiffs presented detailed evidence of the cumulative impact of individual violations in creating and perpetuating a dual school system.[78] The case against local defendants was so overwhelming that it withstood the significant shifts which occurred in the law, prompting the Second Circuit to observe that it would be difficult to imagine a set of circumstances more indicative of racial discrimination.[79]

On appeal, the Court's narrowing liability standards had no affect on the district court's findings of liability against the city or local school officials. The narrowing of Supreme Court standards, however, profoundly affected the liability of state education officials. Proof of intentional segregation by state officials rested largely on an argument of omission; the failure of the state during their ten and one-half year jurisdiction over the *Yerby Dixon Appeal* to effect any meaningful desegregation in the Buffalo schools.[80] Under new constitutional standards requiring proof of

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77. An H.E.W. survey of the Buffalo Public School System issued a critical report of segregation in Buffalo schools, citing in particular the discriminatory admissions policies for vocational schools, discriminatory staff hiring policies, and inadequate recruitment of minority staff. *See* Arthur v. Nyquist, 415 F. Supp. at 945-47. In addition, a U.S. Civil Rights Commission report published in 1963 highlighted the segregative effects of optional attendance zones employed to allow white students to attend schools outside their neighborhoods. The district court found that the Board of Education was put on notice by the report, and thus, the segregative effects of continuing such practices were clearly foreseeable. *Id.* at 940.

78. The district court found many instances where individual violations had a system-wide impact on the schools, *i.e.*, in its findings regarding the exercise of transfer options by white students attending segregated minority schools the court held: "In addition to what these stark numbers show . . . there is a certain cumulative impact to consider, since each student who transfers can remain at the transferee school for the duration of his high school career." 415 F. Supp. at 929. A cumulative impact was also found in the psychological effects of racially discriminatory practices of the Board of Education because of the "increased . . . tendency on the part of both school administrators and the public at large to identify certain schools as black." *Id.* at 939.

79. 573 F.2d at 145.

80. Since the State of New York was not involved in the day-to-day decisions that contributed to the dual education system in Buffalo, proving liability of state defendants was difficult in view of uncertain constitutional standards. Not only was there a dearth of objective evidence, but subjective evidence was totally lacking since the Commissioner of Education outwardly manifested a concern for integrated schools. *See* 415 F. Supp. at 955-56. Plaintiffs, therefore, set out to prove state defendants had a legal responsibility to oversee desegregation in the Buffalo public schools and the foreseeable effect of their failure to impose desegregation, by virtue of the authority vested in them, was to further perpetuate the dual system. The ten-year failure of state defendants to effectuate any meaningful desegregation in Buffalo public schools was found to be a sufficient basis for holding state defendants liable by the district court, which held: "Nothing could have encouraged the City defendants' procrastination and recalcitrance more than the lack of effective action by the

discriminatory *acts*, the segregative intent of state officials ultimately proved impossible to substantiate. On appeal, the Second Circuit narrowed their own *Hart* test in the face of uncertain and unarticulated standards for proving motive in discrimination cases,[81] and relieved the New York State Commissioner of Education and the New York State Board of Regents of liability for intentionally causing and maintaining segregated schools in Buffalo.[82] In practical terms, the Second Circuit's reversal of the liability of state officials had a significant impact on future desegregation efforts. Desegregation is an expensive process encompassing expenditures for planning, remedial programs, in-service training, transportation, and human relations programs to name but a few. If state defendants were liable, the state would share desegregation costs. Instead, the Second Circuit's decision left the financially troubled City of Buffalo to bear the entire financial burden.

Overall, the imposition of the intent requirement growing out of the Court's shift from de jure to de facto segregation cases seriously hampered implementation of school desegregation in Buffalo. It imposed a considerable evidentiary burden on parents and civil rights groups challenging segregation in the public schools, greatly protracted litigation, and ultimately relieved the state, which traditionally finances education, from liability for desegregation costs. A more contradictory approach to the Supreme Court's original intent to end racial segregation in the public schools "with all deliberate speed"[83] could hardly be imagined.

B. *Restriction of Metropolitan Remedies*

Along with imposition of the intent requirement for establishing liability in cases of de facto segregation, a second major shift in constitutional standards occurred with regard to remedy. The Court in *Milliken v. Bradley*[84] dealt a blow to effective school de-

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State defendants." 415 F. Supp. at 961.

81. The Second Circuit interpreted recent Supreme Court decisions to require proof of segregative *acts*, finding *inaction* an insufficient basis to establish liability. *See* 573 F.2d at 146. "To argue otherwise would be to . . . collapse[ ] *de facto* and *de jure* segregation, in effect making all continued toleration of segregation *de jure*." *Id.*

82. 573 F.2d at 147.

83. Brown v. Board of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

84. 418 U.S. 717 (1974). In a 5-4 vote the Court overruled a Detroit metropolitan school

segregation by limiting the use of metropolitan remedies to achieve desegregation. *Milliken* applied strict equitable guidelines for fashioning remedies: "[T]he scope of the remedy is determined by the nature and extent of the constitutional violation."[85] Hence, an interdistrict order can only be imposed to remedy an interdistrict violation or where district lines have been "deliberately drawn on the basis of race."[86] Since metropolitan solutions provide the most effective method for achieving desegregation where residential segregation and the concentration of a large minority population in central cities has made urban solutions increasingly unsatisfying, the *Milliken* ruling presents the most significant legal barrier to effective desegregation thus far.

In *Arthur,* restrictions on implementation of metropolitan remedies dealt a severe blow to desegregation efforts. Since the predominantly white suburban school districts surrounding Buffalo could not be held liable for intentionally contributing to segregation in the city schools, the court could not order them to assist in the desegregation process.[87] Once interdistrict solutions are ruled out, fear of white flight takes on a paramount importance in fashioning desegregation remedies. Such fears provide the major justification for reliance on purely voluntary desegregation techniques, intolerable delay in school desegregation efforts, and inequitable remedies, which place the burden of desegregation on minority children.

This result is in sharp contrast to controlling legal and equitable principles for formulating remedies in school cases. First, because the Supreme Court in *Green v. Country School Board*[88] pro-

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desegregation remedy despite a district court finding that "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems . . . ." Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973). For an examination of the current effects of *Milliken, see generally Backers of Busing for Integration Fear Slowdown,* N. Y. Times, Dec. 1, 1980, at 1.

85. 418 U.S. at 744.

86. *Id.* at 745.

87. The district court noted, however, that *Milliken* did not prevent a voluntary metropolitan solution in *Arthur: "Milliken* does not prevent . . . a metro response to what is essentially a metropolitan problem." 415 F. Supp. at 970. Although no full scale voluntary desegregation effort has taken place between city and suburban school districts, the school district began recruitment of suburban children for Early Childhood Center Programs with court approval in Phase III.

88. 391 U.S. 430 (1968). The *Green* Court held: "[I]f there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion

hibited reliance on voluntary freedom-of-choice measures when more effective approaches—such as student assignments, school pairing, and the redrawing of school boundaries—were available to achieve speedier and more effective desegregation. Second, because following *Green,* the Court in *Swann v. Charlotte-Mecklenburg Board of Education*[89] entrusted district courts with broad remedial powers to order busing, racial quotas, and redistricting in the absence of voluntary effective compliance with desegregation mandates,[90] and imposed an affirmative duty on local school boards found in violation of the law to "make every effort to achieve the greatest possible degree of actual desegregation."[91] Third, the Supreme Court has never permitted public hostility or threats of white flight to interefere with the affirmative duty to desegregate schools once the existence of a dual school system has been established. Very early in school desegregation history, the Court in *Cooper v. Aaron*[92] unanimously ruled that the mandate to end segregation in the nation's schools would not "yield in the face of public hostility"[93] despite the precipitation of one of the greatest constitutional challenges of modern times. In *United States v. Scotland Neck City Board of Education,*[94] the Court made it clear that white flight, while "cause for deep concern, . . . cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system."[95] To hold otherwise

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to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable." *Id.* at 441.

89. 402 U.S. 1 (1971).

90. *Id.* at 25-31.

91. *Id.* at 26.

92. 358 U.S. 1 (1958).

93. *Id.* at 16. In a rare opinion signed by each of the nine justices, the Court held that a judicially approved desegregation plan for Little Rock, Arkansas, could not be suspended because of the volatile climate in the state, which included the dispatching of State Police by the Governor to prevent black students from attending a formerly white school. The Court concluded that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights." *Id.*

94. 407 U.S. 484 (1972).

95. *Id.* at 491. In *Scotland Neck,* the Court declared unconstitutional a plan for creating a segregated minority school district within Halifax County, North Carolina, to counter the effects of white pupils leaving the schools to avoid desegregation. *Cf.,* Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437 (1980) (Powell, J., dissenting), where Justice Powell argued that the unique circumstances in *Scotland Neck* distinguish it from "more usual" desegregation cases for which it "affords no guidance." *Id.* at 449 n.15. Despite the dissent's attempt to do so, the constitutional issue underlying the proposition that white flight cannot justify an incomplete desegregation remedy is not so easily distinguished. *See*

would undermine the protected status afforded minority rights under the Constitution. Yet, in effect, the entire thrust of the Court's more recent decisions curtailing the powers of district courts in the formulation of equitable remedies has been to seriously limit the protection formerly afforded minority children to ensure a desegregated education.

C. *Local Control Over School Desegregation*

Aside from the significant restrictions on the use of interdistrict remedies, further limitations on lower courts' remedial powers are found in *Milliken* and subsequent cases.[96] These cases give deference to local school boards in fashioning desegregation remedies—in sharp contrast with early decisions that gave broad equitable powers to district courts to dismantle dual education systems in the South. The Court's approach has a restrictive effect because deference to local school officials and the exercise of strong remedial powers by federal courts are often incompatible notions. When they conflict, it is no longer clear when the court has a duty to step in to enforce compliance, or what measures should be taken when compliance is not forthcoming. While it must be acknowledged that local school officials may possess the knowledge and skill to make desegregation a workable process, the fallacy of this approach lies in the assumption that school boards found guilty of maintaining segregation will comply with their affirmative duty to desegregate the schools once in control of the desegregation process. This is at best a questionable assumption given nearly three decades of delay and noncompliance with the *Brown* mandate.

The Court's approach raises additional questions regarding the widespread practice of appointment of special masters or court-appointed consultants to fashion impartial remedies and monitor desegregation efforts. On the surface, appointment of an external consultant or monitor is at least somewhat at odds with

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text accompanying note 120 *infra*.

96. The tradition and importance of local control over public schools was advanced by the Court in *Milliken* as a justification for the restriction on metropolitan remedies. 418 U.S. at 741-44. The Court significantly departed from earlier Southern cases in noting that initial responsibility for designing desegregation plans belongs to school authorities, *not* to the district court. Deference to local school authorities is also advocated by Justice Rehnquist, in his dissenting opinion in Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 489 (1979).

the notion of local control. The alternative, to leave planning and implementation to school systems already found guilty of equal protection violations, seriously limits the court's power and increases the probability of delay and noncompliance. The history of *Arthur v. Nyquist* illustrates the consequences of allowing a school district to control desegregation planning and monitor its own compliance.[97] Throughout the remedial phase of the case, the school district has unquestionably controlled the pace and direction of desegregation efforts. Monitoring, according to a recent H.E.W. evaluation of the magnet school programs in Buffalo, has been characteristically weak.[98] Recently, problems in overseeing the desegregation process have been exacerbated by the indefinite disbanding of the citizens monitoring commission.[99]

The court, in issuing strong remedial orders and at the same time refusing to take responsibility for formulating a constitutional desegregation remedy or entrusting ongoing monitoring to a neutral source, appears to be steering a course between the broad precedents formulated in the early Southern decisions, and the Northern decisions clearly circumscribing the remedial powers of lower courts. This may explain the inconsistencies between the district court's strong remedial orders, on the one hand, and continued approval of voluntary desegregation measures—which fail to desegregate the schools on a system-wide basis as directed by the court.

The court's reluctance to take stronger measures to enforce compliance with its own directives has met with strong criticism from plaintiff civil rights groups, who maintain it deprives them of redress of proven constitutional wrongs. Highlighting the gap that exists between the law and the remedy afforded after nearly a decade of litigation, plaintiffs addressed this issue on appeal to the

97. This observation is based on the unwillingness of the federal district court to appoint a special master or monitor in *Arthur v. Nyquist*, and on the wide latitude the court has given to defendants in fashioning a remedy. The district court has clearly stated that its role is not that of a "super-school board," Arthur v. Nyquist, 415 F. Supp. at 910, and that "primary responsibility for devising a desegregation plan rests on school authorities . . . . It is their duty to run the school system, and they are in the best position to make the difficult decisions regarding the use of resources and the structure of the school system." 473 F. Supp. at 850.

98. *See* Royster, Baltzell & Simmons, *Study of the Emergency School Aid Act Magnet School Program* 19, prepared for the OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (Contract No. OE-300-77-0393) (Feb. 13, 1979).

99. Arthur v. Nyquist, U.S. District Court Order of November 21, 1979 (unpublished).

Second Circuit:

> Indeed, there is a wide disparity between the legal principles espoused in the written opinions of the court below and what in fact the court has knowingly permitted to proceed in the name of equitable relief. It is this very pattern of lofty opinions and seriously deficient remedy which brings the victims [of segregation] before this court to seek redress.[100]

The redress plaintiffs seek is a final plan for elimination of one-race schools[101] and an end to the current desegregation approach, which they maintain places the burden of desegregation almost exclusively on minority children in violation of the equal protection clause of the fourteenth amendment.[102] It is this final issue of burden—and the district court's inability to deal with it in a meaningful way—that has been the most serious effect of the Supeme Court's marked pulling back in the school desegregation area.

III. The Inequitable Burden in *Arthur v. Nyquist*

The Buffalo case is not unique in its voluntary approach and resulting inequitable burden on minority children.[103] What is unique is the complex approach the Buffalo school district adopted to achieve substantial desegregation without forced busing of white students. Detailed analysis of the Buffalo School Board's desegregation plans reveals an approach to desegregation that has afforded preferential treatment to whites, while forcing blacks and other minority children to absorb a disproportionate share of mandatory reassignments. Plaintiffs describe the Board's plan as follows:

> The basic character of the Buffalo Board of Education's desegregation plans and moves from 1976 to the present time can be stated very simply: *It is a*

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100. Brief for Plaintiffs-Appellants at 29, Arthur v. Nyquist, 636 F.2d 905 (2d Cir. 1981).

101. In plaintiffs' view, the school district's voluntary approach to desegregation has consistently fallen short of desegregating the schools on a system-wide basis as mandated by law. In the 1979-80 school year, twenty-three of the system's sixty-five elementary schools, and two high schools were not desegregated within court guidelines. Under the current Phase III, desegregation appears to have gone backwards; according to enrollment figures for 1980-81, twenty-four out of the sixty-one elementary schools and two high schools are not desegregated. *See* Reply Brief for Plaintiffs-Appellants at 1-2, Arthur v. Nyquist, 636 F.2d 905 (2d Cir. 1981).

102. *Id.* at 49.

103. For an examination of other voluntary desegregation plans nationwide, *see generally Study of the Emergency School Aid Act Magnet School Program, supra* note 98; Orfield, *supra* note 14.

minority school closing plan. For the most part, minority schools are closed or converted to magnet schools and minority students are pushed out either to white neighborhood schools or to segregated minority schools.[104]

In a system that is almost equally divided between white and minority students, the unequal burden of school closings is seen in the fact that while 7,473 minority students were affected by school closings and conversions under Phases I and II of the defendants' school desegregation plans, only 1,354 white students were so affected.[105] The full extent of the burden, however, is revealed in the "dual assignment policy":

> [M]inority students from closed schools are one-way bused to white neighborhood schools often at considerable distance or are reassigned . . . and bused to segregated minority schools. Many black students have no guaranteed school district assignment and must go to a school outside their neighborhood wherever space is available. White students from closed schools are rezoned to . . . nearby white neighborhood schools and have the choice of attending a desegregated white neighborhood school or a magnet school.[106]

Illustrations used to demonstrate the dual character of student assignments from closed and converted schools throughout the remedial phase of the case indicate that, for desegregation purposes, whites and blacks have been treated differently. Reassignments of white students from closed neighborhood schools have been almost exclusively to other white neighborhood schools[107] in adjacent or nearby school districts (located in the nonshaded areas of Map A), rather than to schools in the minority community (located in the shaded area of minority population concentration in Map A), where they would further effectuate the desegregation process.

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104. *Hochfield Report, supra,* note 37 at 853.

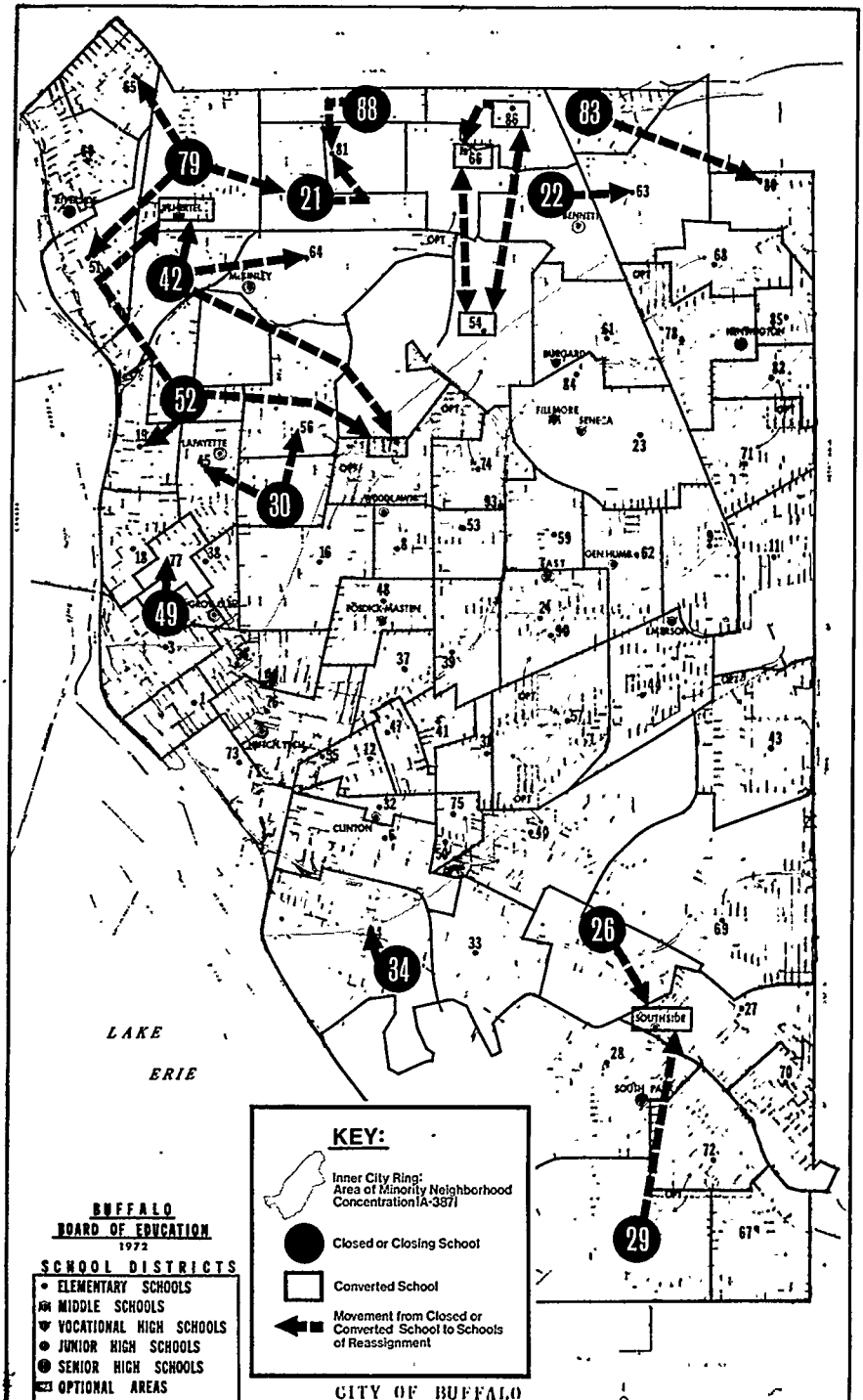
105. *Id.* at 857. Under Phase III, defendants argue the burden has been equalized by closing an equal number of white and minority schools. Plaintiffs maintain, however, that due to the large resident enrollments in the closed minority school districts, school closings under Phase III continue to disproportionately burden minorities. *See Hochfield Report, supra,* note 37 at 862: "The closing of both schools 23 and 62 would leave two adjacent minority school districts in which over 2,200 students reside, without a neighborhood school . . . ."

106. *Id.*

107. Reply Brief for Plaintiffs-Appellants at 16, Arthur v. Nyquist, 636 F.2d 905 (2d Cir. 1981).

MAP A
REASSIGNMENTS FROM CLOSED, CLOSING OR CONVERTED WHITE NEIGHBORHOOD DISTRICT SCHOOLS

1976-80

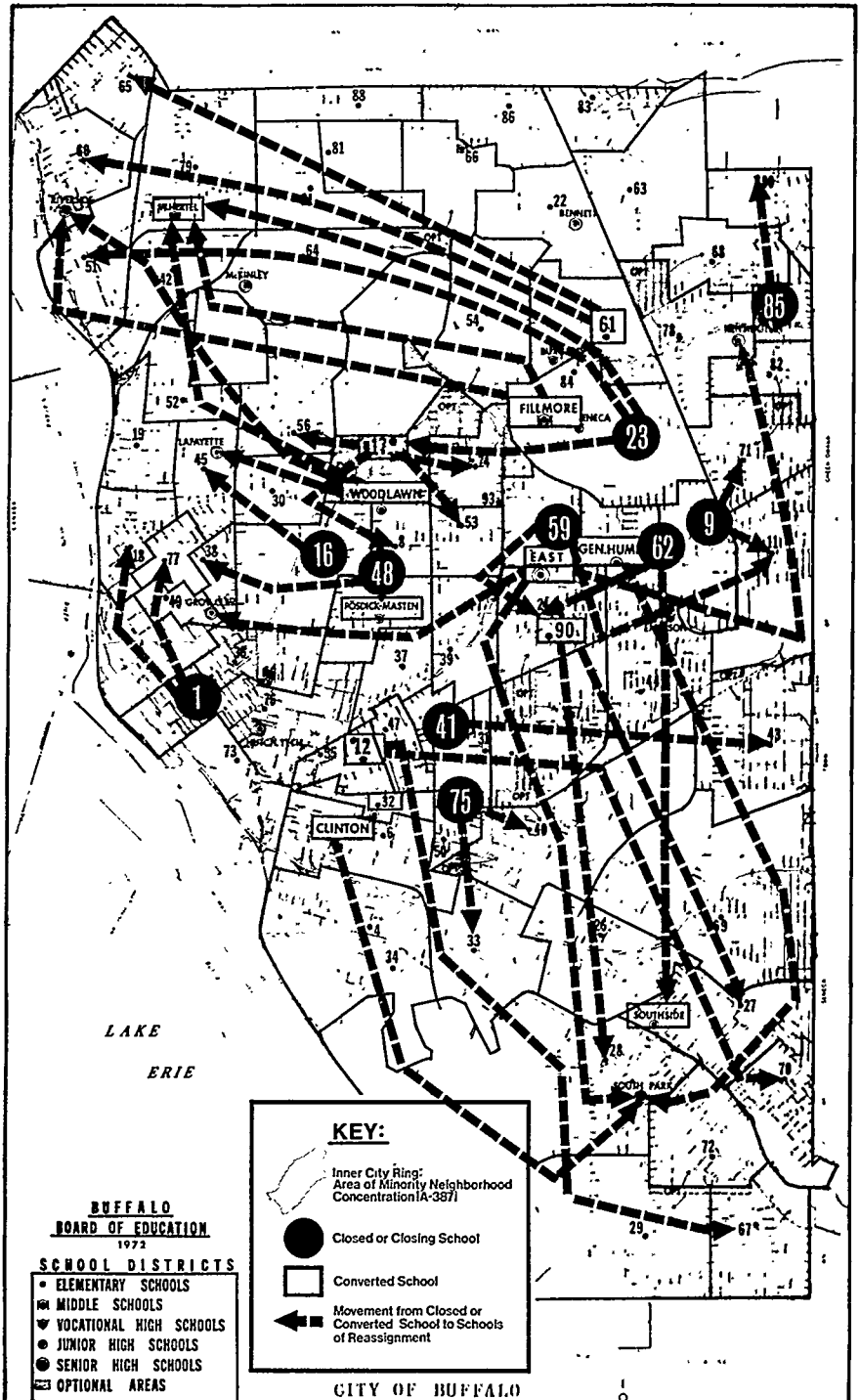


By way of contrast, Map B,[108] showing the reassignment of students from closed or converted schools in the minority community, illustrates that minority students have been rezoned or reassigned to white neighborhood schools throughout the city, often at great distances from their neighborhoods.

108. *Id.* at 17.

MAP B
REASSIGNMENTS FROM CLOSED, CLOSING OR CONVERTED MINORITY NEIGHBORHOOD DISTRICT SCHOOLS

1976-80



The extent of this dual treatment becomes clearer on examination of the school district's desegregation practices. In the past, the closing and conversion of a large number of schools in the minority community, without providing fixed pupil assignments for students from the closed schools, created a pool of "floaters"[109] or "disenfranchised"[110] minority students who were bused to white neighborhood schools to desegregate those schools in compliance with court guidelines. As Map A demonstrates, however, a separate policy was followed when white schools were closed, in order to avoid compulsory busing of whites to inner city schools.

While a large number of white students are *voluntarily* bused to specialized magnet schools in the minority community, this contrasts vividly with the separate policy of disenfranchisement and one-race forced busing of minority students under the district's Quality Integrated Education Program. As the court determined in its June 1979 order directing the dismantling of QIE:

> It is true that some majority students participate in the desegregation program by opting to attend one of the City's ten magnet schools. But the magnet schools have special educational programs which are not available to the remaining elementary schools, whether they be QIE receivers or all minority senders. As far as desegregating the regular neighborhood schools, the entire burden falls on QIE students. Moreover, majority students receive an integrated education whether they remain in their neighborhood school or enroll in a magnet school. In contrast, minority youngsters who wish to obtain an integrated education must travel to either a magnet or a QIE receiving school. It therefore is clear that majority students do not share equally in the burden of desegregating the elementary schools.[111]

The gross inefficiencies of the QIE minority transfer program, which continue, pending adoption of a more equitable plan, attest to the extent the school system is willing to go to prevent busing of white children. For example, in the 1979-80 school year, minority students from a single segregated minority school district in Buffalo were bused under the QIE program to forty-one different receiving schools, located primarily in white neighborhoods.[112] Aside from the physical burden and the significant loss of the neighborhood school to the minority community, an additional burden of the QIE program has been the psychological notions of inferiority

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109. *Hochfield Report, supra* note 37, at 849.
110. *Finger Report, supra* note 38, at 981-83, 1023-25.
111. 493 F. Supp. at 840.
112. *Hochfield Report, supra* note 37, at 924-25.

suffered by minority students. These very notions predicated the Supreme Court's decision in *Brown v. Board of Education.*[113] The psychological burden in *Arthur v. Nyquist* was detailed by Dr. John Finger, a national school desegregation consultant, in his report to the court on the status of desegregation in the Buffalo Public Schools:

> Minority children attending desegregated schools in white neighborhoods must contend with attending a school which is not their own. They are the ones who are bused in. They have to be signaled out to go get on the buses or be waited for if the buses are late. Even under the most benign circumstances they cannot help but be viewed and view themselves as inferior, a situation exacerbated by the School Board policy that black children can be bused to white schools, but white children are not required to be bused to black schools.[114]

The blatant inequities and psychological burdens of QIE may eventually be eliminated under the Buffalo school district's new proposals providing for fixed assignments and busing of white students to Early Childhood Center Schools in the minority community.[115] Even under new proposals, however, serious inequities remain in the grade structures proposed for clustered schools which require significantly greater displacement and busing of minority students.[116] While a precise allocation of burden may not be feasible, defendants' desegregation plan requires substantial revision to achieve minimal levels of justice and fairness in treating white and minority students on an equal basis.

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113. The Court in *Brown* cited extensive social science research to support its conclusion that separation of the races in the public schools has a harmful psychological effect on minority children in that it "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494. The extent to which the Court relied on social science evidence, 347 U.S. at 494 n.11, has been the subject of extensive debate. *See* Taylor, *supra* note 1, at 39.

114. *Finger Report, supra* note 38, at 980.

115. *See* notes 34 & 47 *supra.*

116. The overall design of Phase III contemplates placing grades Pre-K-2 at Early Childhood Centers in minority neighborhood schools and grades 3-8 in white neighborhood schools. Minority pupils, under the plan, will be bused for at least six years of their elementary education as compared to white students who will be bused for four years, assuming attendance in pre-kindergarten and kindergarten—which is not mandatory under New York State law. *See generally* Arthur v. Nyquist, Buffalo Public Schools: Phase IIIx, Jan. 27, 1981 (revised).

CONCLUSION

Although recent shifts in Supreme Court school desegregation decisions are the subject of unlimited comment, there are few attempts to illustrate their impact on ongoing litigation. Examination of the effects of these shifts reveals the existence of inequity and dual treatment in desegregation remedies which go to the heart of the *Brown* mandate. The full implication of the Court's "mounting hesitation in the school desegregation area"[117] is now becoming evident. While constitutional violations can now be proven in only obvious cases of intentional discrimination, the Court has additionally circumscribed the remediation of even these most serious violations, by requiring district courts to defer to local authorities in desegregation planning and restricting the use of metropolitan remedies when necessary to achieve desegregation.

As a result, the threat of white flight has become a paramount concern in desegregation planning and a major justification for unequal treatment and delay.[118] This effect is all too evident in the history of the desegregation of the Buffalo Public Schools. In *Arthur v. Nyquist,* the dual approach to desegregation and the inequitable burden on minority children has been consistently justified out of fear that a more equitable approach would lead to white flight and resegregation.[119] All but forgotten, is the historical reason for the Supreme Court's reluctance to permit the threat of white flight to justify inequitable and incomplete desegregation efforts; the constitutional rights of minority children cannot be sacrificed to placate the local community.[120] At a minimum, constitu-

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117. L. TRIBE, *supra* note 1, at 1039.

118. Apart from constitutional arguments against permitting evidence of white flight to influence desegregation remedies, the reliability of such data has come under serious question. *See generally* Pettigrew & Green, *School Desegregation in Large Cities: A Critique of the Coleman White Flight Thesis,* 46 HARV. EDUC. REV. 1, reprinted in BUSING U.S.A. 132 (N. Mills, ed. 1979). For a thorough examination of the current controversy among social scientists, *see* BUSING U.S.A., *supra,* at 119-257, which exchanges critical articles between T. Pettigrew, R. Green, and J. Coleman, whose research originally identified the white flight phenomenon.

119. For examples of the Buffalo Board of Education's reliance on the white flight threat as a justification for its continued reliance on voluntary desegregation techniques, *see* Buffalo Public Schools Desegregation Plan: Phase III, Additional Documentation, Arthur v. Nyquist, Record, Dkt. Entry 29, at 1-6; Jt. App. Vol. II at 1051-57, 1236-37. *See also* Brief for Plaintiffs-Appellants at 28-29, Arthur v. Nyquist, 636 F.2d 905 (2d Cir. 1981).

120. *See* notes 92-95 and accompanying text *supra.* The Court has not directly ruled on the issue of white flight since *Scotland Neck.* When faced with the issue indirectly in Estes

tional principles require fair and equitable redress for the infringement of equal protection rights of the victims of segregation. The overwhelming evidence, however, points to the conclusion that the unequal treatment declared unconstitutional in *Brown v. Board of Education* continues in the very process designed to remedy it.[121]

DENISE E. O'DONNELL

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v. Metropolitan Branches of the NAACP, 444 U.S. 437 (1980) (*per curiam*), the Court dismissed its prior grant of certiorari, thereby upholding a Fifth Circuit decision remanding a district court approved desegregation plan in Dallas, Texas, which justified leaving a large number of segregated schools intact, partially on the basis of white flight. Tasby v. Estes, 572 F.2d 1010, 1014 (5th Cir. 1978). Although the majority in *Estes* was silent, the upholding of the Fifth Circuit ruling is a strong indication that the Court is continuing to adhere to the standards of *Swann* and *Scotland Neck. But see* Estes v. Metropolitan Branches of the NAACP, 444 U.S. 437, 449-50 (Powell, J., dissenting), where the minority argues that evidence of white flight and resegregation justifies a more cautious approach to desegregation.

For a summary of the conflicting treatment of the white flight issue by lower courts, *see* Levin, *School Desegregation Remedies and the Role of Social Science Research*, 42 L. & CONTEMP. PROB. 1, 8-25 (1978).

121. For a critical analysis of the legitimization of racial discrimination through Supreme Court doctrine of the last twenty-five years, and a helpful perspective from which to view the unequal treatment in the remedial phase of *Arthur v. Nyquist*, *see* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).