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CIVIL RIGHTS AND CIVIL LIBERTIES

DOUGLASS CASSEL, JR.*

More than most lawsuits, school desegregation cases touch basic economic interests and deep-seated psychic sensitivities of entire communities. In this context, legal notions of the "intent" of governmental bodies and the "effect" of their actions on massive, intricate social processes seem eerily abstract. Though limited and necessarily artificial, these legal concepts are nonetheless the jurisprudential links by which courts must legitimize their efforts to define "rights" worthy of recognition in desegregating schools in large urban areas.

This article focuses primarily on this term's decisions of the United States Court of Appeals for the Seventh Circuit involving desegregation of the Milwaukee and Indianapolis public schools.[1] It also briefly reviews the court's decisions this term involving employment discrimination on the basis of race, sex or age,[2] and first amendment freedoms.[3] Related topics which are discussed include the standards of review and the requisites of "state action" in equal protection cases,[4] and federal court deference to state judicial or administrative proceedings which threaten freedom of expression.[5] This term's decisions by the Court of Appeals for the Seventh Circuit in other areas of civil rights and civil liberties law are catalogued, without comment, in the accompanying footnote.[6]

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1. *See* text accompanying notes 7-156 *infra*.
2. *See* text accompanying notes 157-236 *infra*.
3. *See* text accompanying notes 237-284 *infra*.
4. *See* text accompanying notes 158-165 *infra* (standards of review); text accompanying notes 222-230 *infra* (state action).
5. *See* text accompanying notes 272-284 *infra*.
6. The following is a non-exhaustive list of the civil rights and civil liberties decisions of the Court of Appeals for the Seventh Circuit this term involving procedural due process; housing; voting and elections; prisoners' rights; equal protection; jurisdiction, standing, comity, attorneys' fees and immunity in civil rights cases; and the right of privacy.

Procedural due process: Confederation of Police v. Chicago, 529 F.2d 89 (7th Cir.) (demotions and other adverse employment actions taken against police officers affect property interests and must be preceded by procedures conforming with due process, perhaps requiring collective bargaining as a "necessary adjunct"), *vacated and remanded*, 96 S. Ct. 3186 (1976); Stebbins v. Weaver, 537 F.2d 939 (7th Cir. 1976) (no procedural due process required before denying plaintiff tenure, because he had no affected interest in property or liberty, even though when hired he was given some expectation of tenure), *cert. denied*, 45 U.S.L.W. 3460 (U.S. Jan. 10, 1977) (No. 76-609); White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (due process requires uniform standards

for determining eligibility for welfare benefits); Martin-Trigona v. Underwood, 529 F.2d 33 (7th Cir. 1976) (due process not violated by combining investigative and adjudicative functions in committee rejecting plaintiff's bar application, or by placing burden in such proceeding on applicant; equal protection does not require same procedures for bar applicant as for attorneys in disciplinary proceedings); Hill v. Trustees of Ind. Univ., 537 F.2d 248 (7th Cir. 1976) (due process does not require hearing before assigning plaintiff failing grades due to alleged plagiarism, where no further disciplinary action would be taken without notice and hearing); Fern v. Thorp Pub. School, 532 F.2d 1120 (7th Cir. 1976) (plaintiff waived substantive due process claim against dismissal without prior warning for teaching of controversial sex education materials, where he failed to accept hearing offered by defendants); Castanada-Delgado v. Immigration Serv., 525 F.2d 1295 (7th Cir. 1976) (denial of continuance in deportation case, which denied parties sufficient time to obtain counsel, denied Mexican-American plaintiffs procedural due process); Wroblaski v. Hampton, 528 F.2d 852 (7th Cir. 1976) (dismissal of immigration officer for violation of agency regulation by employing aliens did not offend due process); Lambert v. Conrad, 536 F.2d 1183 (7th Cir. 1976) (damages action for termination without due process hearing barred by res judicata because of dismissal of prior action for injunctive relief on same claim); Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150 (7th Cir. 1975) (no due process notice or hearing required before hotel seizes guest's property for nonpayment of rent, because no state action involved), *cert. denied*, 96 S. Ct. 1143 (1976); Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975) (due process requires advance notice of reasons for reduction in food stamp benefits), *cert. denied*, 96 S. Ct. 1484 (1976).

Housing: Wang v. Lake Maxinhall Estates, Inc., 531 F.2d 832 (7th Cir. 1976) (evidence justified inference of racial discrimination from lot-owners committee's refusal to sell property to person of Oriental descent); Nucleus of Chicago Homeowners v. Lynn, 524 F.2d 225 (7th Cir. 1975) (HUD's limited consideration of social and other environmental impact of scattered-site, low-income housing, and its decision not to file full Environmental Impact Statement, did not violate National Environmental Policy Act or HUD regulations), *cert. denied*, 96 S. Ct. 1462 (1976).

Voting and Elections: Baum v. Lunding, 535 F.2d 1016 (7th Cir. 1976) (first-come, first-serve ballot position does not deny later-filing candidate equal protection); Russo v. Vacin, 528 F.2d 27 (7th Cir. 1976) (no claim stated by complaint alleging political gerrymandering of aldermanic ward lines, where no allegations of disproportionate population or indicia of invidious discrimination); Kendrick v. Walder, 527 F.2d 44 (7th Cir. 1975) (complaint alleging that at-large city elections discriminate against blacks by minimizing and cancelling out their voting strength as a group, precluding election of blacks to city council, states claim under fourteenth and fifteenth amendments); Flory v. FCC, 528 F.2d 124 (7th Cir. 1975) (communist party candidate, who declared that he would run as write-in candidate if he did not obtain the necessary signatures to be on ballot, was entitled to "equal time" under FCC regulation); Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975) (no claim proved where voting machines malfunctioned and some voters allowed to vote twice, but no evidence of non-accidental causes); *cf.* Polish American Congress v. FCC, 520 F.2d 1248 (7th Cir. 1975) (fairness doctrine does not require opportunity to reply to Polish ethnic jokes), *cert. denied*, 96 S. Ct. 1141 (1976).

Prisoners' Rights: Kimbrough v. O'Neil, No. 74-1870 (7th Cir. Oct. 29, 1976) (en banc) (prisoner may recover damages under 42 U.S.C. § 1983 for loss of property intentionally taken and retained by deputy sheriff), *rehearing of panel decision*, 523 F.2d 1057 (7th Cir. 1975); Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) (en banc) (prisoner may not recover damages under 42 U.S.C. § 1983 for loss of property because of prison guards' negligence), *rehearing of panel decision*, 517 F.2d 1311 (7th Cir. 1975); Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976) (prison mail censorship regulations overbroad in violation of first and fourteenth amendments) (*see* text accompanying notes 253-265 *infra*); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975) (defendant prison officials were immune from civil rights damages for denying prisoner in isolation access to legal materials, counsel and mail, because they acted in good faith); United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975) (due process requires statement of reasons for denial of parole; requirement satisfied by statement that parole would deprecate seriousness of offense), *cert. denied*, 425 U.S. 94 (1976); Berkeley v. Benson, 531 F.2d 837 (7th Cir. 1976) (decisions requiring meaningful consideration of parole and statement of reasons for denial not retroactive) (alternate holding); Ross v. Mebane, 536 F.2d 1199 (7th Cir. 1976) (habeas corpus jurisdiction over claim that procedures for transfer and loss of good time denied due process).

Equal Protection: Youker v. Gulley, 536 F.2d 184 (7th Cir. 1976) (Illinois statute barring official court reporters from outside employment does not deny equal protection or substantive due

SCHOOL DESEGREGATION

Supreme Court Shadows

As in many northern cities, the public school systems in Milwaukee and Indianapolis are de facto racially segregated. In the Milwaukee case, *Armstrong v. Brennan*,[7] the court this term confronted the core issue raised in suits alleging such segregation to be unconstitutional: the kind and degree of purposefully segregationist governmental action which must be shown. The

process); Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975) (federal government discrimination against illegitimate Indian child, in distribution of intestate property left by collateral heir of plaintiff's deceased mother, denies equal protection under fifth amendment due process clause); Fisher v. Secretary of HEW, 522 F.2d 493 (7th Cir. 1975) (limitations on social security eligibility for domestic workers do not, merely because of disproportionate impact on class of poor Black women, deny equal protection under fifth amendment due process clause); Rubin v. Weinberger, 524 F.2d 497 (7th Cir. 1975) (congressional foreclosure of judicial review of amount of medical benefits claims less than $1000 does not deny equal protection under fifth amendment due process clause).

Jurisdiction in Civil Rights Cases under 28 U.S.C. § 1331: Reich v. Freeport, 527 F.2d 666 (7th Cir. 1976) (jurisdiction granted for first amendment and due process claims against city); Fitzgerald v. Porter Mem. Hosp., 523 F.2d 716 (7th Cir. 1975) (jurisdiction granted for claim of violation of right of marital privacy against public hospital), *cert. denied*, 96 S. Ct. 1518 (1976); Hostrop v. Board of Jr. College Dist. 515, 523 F.2d 569 (7th Cir. 1975) (jurisdiction granted for due process claim against public junior college district), *cert. denied*, 96 S. Ct. 1748 (1976).

Standing in Civil Rights Cases: Calvin v. Conlisk, 534 F.2d 1251 (7th Cir. 1976) (no standing to challenge police department disciplinary procedures on allegation of speculative future harm), *on remand from* 424 U.S. 909 (1976), *vacating* 520 F.2d 1 (7th Cir. 1975).

Comity in Civil Rights Cases: 28 East Jackson Enterprises, Inc. v. Cullerton, 523 F.2d 439 (7th Cir. 1975) (federal statute limiting federal injunctions interfering with state taxation bars federal court attack on allegedly fraudulent real estate tax assessments where adequacy of state remedy is not uncertain), *cert. denied*, 96 S. Ct. 856, *rehearing denied*, 96 S. Ct. 1437 (1976); Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975) (federal court must abstain from considering constitutional issue raised in pending state eminent domain proceedings).

Attorneys' Fees in Civil Rights Cases: Stanton v. Bond, 528 F.2d 688 (7th Cir.) (attorneys' fees properly awarded under equitable "bad faith" doctrine against defendant state officers in their official capacities), *vacated and remanded for further consideration in light of* Civil Rights Attorneys' Fees Awards Act of 1976, 97 S. Ct. 479 (1976).

Immunity from Damages in Civil Rights Cases: Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975) (state prosecutor immune from civil rights suit for prosecuting plaintiff despite allegations of malice and lack of probable cause); Hostrop v. Board of Jr. College Dist. 515, 523 F.2d 569 (7th Cir. 1975) (junior college board could be sued for damages for termination of plaintiff's employment without notice and hearing required by due process, where state had waived immunity by authorizing board to be sued), *cert. denied*, 96 S. Ct. 1748 (1976); *cf.* Colton v. Swain, 527 F.2d 296 (7th Cir. 1975) (sheriffs' deputies, defendants in civil rights damages action, could file third-party claim against their insurer for determination of extent of coverage); United States v. Senak, 527 F.2d 129 (7th Cir. 1975) (criminal prosecution for violation of civil rights), *cert. denied*, 425 U.S. 907 (1976).

Right of Privacy: Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976) (fourth amendment prohibits immigration officers from stopping persons of Mexican descent or having Spanish surnames for questioning, without warrant, probable cause or reasonable suspicion based on specific articulable facts that person stopped is an illegal alien), *aff'd in part and vacated in part for modification*, No. 75-2019 (7th Cir. Jan. 26, 1977) (en banc) (stops for mere questioning without detention require only reasonable belief that person stopped is an alien); Fitzgerald v. Porter Mem. Hosp., 523 F.2d 716 (7th Cir. 1975) (right of marital privacy not violated by excluding husband from delivery room), *cert. denied*, 96 S. Ct. 1518 (1976).

7. 539 F.2d 625 (7th Cir. 1976), *aff'g* Amos v. Board of School Directors, 408 F. Supp. 765 (E.D. Wis. 1976), *petition for cert. filed*, 45 U.S.L.W. 3477 (U.S. Dec. 14, 1976) (No. 76-809).

court faced one of the key follow-up questions in the Indianapolis case, *United States v. Board of School Commissioners*:[8] once unconstitutional segregation in central city schools is proved, what more must be shown to support a remedial decree embracing not just the largely black city but the nearly all-white suburbs as well?

In both cases the court labored in the shadows of prior United States Supreme Court rulings. Following the Supreme Court's ruling in the Denver schools case, *Keyes v. School District No. 1*,[9] the court of appeals in *Armstrong* unanimously affirmed the district court's finding, on slender evidence, that segregation in Milwaukee schools was in some measure attributable to intentionally discriminatory governmental action, and hence unconstitutional. In *Board of School Commissioners*, a divided court struggled in the doorway left open by *Milliken v. Bradley*.[10] There the Supreme Court had barred metropolitan-wide remedies for segregation in central city schools except where an "interdistrict violation and interdistrict effect is shown."[11] The *Board of School Commissioners* majority held that Indianapolis fit this "interdistrict" exception, apparently relying on two factors: first, a 1969 state law which in effect unified Indianapolis and its suburbs for purposes of most major government services but not schools, and second, the confinement of all public housing for family occupancy to the central city. It therefore affirmed the lower court's "limited interdistrict remedy," which ordered one-way transfer of black Indianapolis students to the suburbs and enjoined further construction of public housing in the central city.[12] Judge Tone, author of the court's opinion in the Milwaukee case and originally assigned to write the Indianapolis opinion as well, dissented.[13] It was not enough under *Milliken*, he argued, to show that the school district boundary and housing decisions had interdistrict "effect"; in his view their purpose also must be racially discriminatory, and the record was devoid of findings or evidence of such a purpose.[14]

The Indianapolis decision has been reviewed by the Supreme Court, which has vacated the judgment and remanded for further consideration;[15]

8. 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded*, 45 U.S.L.W. 3508 (U.S. Jan. 25, 1977) (Nos. 76-212, 458, 468, 515, 520, and 522), for further consideration in light of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977).
9. 413 U.S. 189 (1973).
10. 418 U.S. 717 (1974).
11. *Id*. at 745.
12. 541 F.2d at 1212.
13. *Id*. at 1224.
14. *Id*.
15. *See* note 8 *supra* and text accompanying notes 135-154 *infra*.

The Court was also asked this term to review an analogous case which involved Wilmington, Delaware, Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976) (three-judge court), but the Court dismissed the appeal for want of jurisdiction, 45 U.S.L.W. 3399 (U.S. Nov. 29, 1976) (Nos. 76-416, 474, 475, 499, 500, 501). While the Court did not explain its reasoning, it may have

and a petition for certiorari has been filed in *Armstrong*.[16] Apart from the substantive and procedural issues they separately raise, these two cases share the distinction of indicating the court of appeals' initial response to the Supreme Court's June 1976 ruling in *Washington v. Davis*,[17] a decision with potentially pervasive implications for the entire field of race discrimination law. In *Davis*, the Supreme Court, "with all due respect" to a host of contrary lower court decisions including three from this circuit,[18] held that "the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose" does not violate the Equal Protection Clause.[19] To be unconstitutional, the law or practice "must ultimately be traced to a racially discriminatory purpose."[20]

Will *Davis* be a watershed or merely force some courts to follow a different route to the same result? As the Supreme Court was careful to note and as Mr. Justice Stevens highlighted in his thoughtful concurring opinion, purpose may of course be inferred from "the totality of the relevant facts" including racially discriminatory effect, which sometimes suffices to establish a prima facie case.[21] In *Armstrong*, the court of appeals sustained such an inference by the trial judge; *Davis* does not appear to have altered substantially the analysis, and to date has not altered its result.[22] In *Board of School Commissioners*, on the other hand, *Davis* has already led to a remand and may yet alter the result. Judge Tone's dissent cast *Davis* in a leading role.[23] *Davis* mattered to him not only because the district court *had not* attributed the school district boundary and housing decisions to racially discriminatory governmental purpose, but because in his view it *could not* do so on the record.[24] Perhaps the comparative judicial inexperience in assessing the types of governmental decisions attacked in *Board of School Commissioners*, in

accepted the Solicitor General's arguments that the three-judge court had no jurisdiction to issue the remedial order and that the court of appeals had jurisdiction over any appeal from the three-judge court's ruling. N.Y. Times, Nov. 30, 1976, at 32, col. 3 (city ed.). *See* text accompanying notes 78-79, 90 *infra*.

16. *See* note 7 *supra*.
17. 426 U.S. 229 (1976).
18. *Id*. at 244. The three cases from this circuit included Metropolitan Hous. Dev. Corp. v. Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *vacated and remanded*, 97 S. Ct. 555 (1977) (zoning); Gautreaux v. Romney, 448 F.2d 731, 738 (dictum) (7th Cir. 1971) (public housing); and United States v. City of Chicago, 385 F. Supp. 543, 553 (N.D. Ill. 1974) (public employment). Another early reaction of the court of appeals to *Washington*, involving race and sex discrimination in hiring and promotion within the Chicago Police Department, was issued too recently to include in this review. United States v. City of Chicago, Nos. 76-1113, 1152, 1205 and 1344 (7th Cir. Jan. 11, 1977), *aff'g in part, rev'g in part and remanding for further proceedings*, 411 F. Supp. 218 (N.D. Ill. 1976).
19. 426 U.S. at 244.
20. *Id*. at 240.
21. *Id*. (majority) and *id*. at 253-54 (Stevens, J., concurring).
22. *See* 539 F.2d at 633-34.
23. 541 F.2d at 1224-25.
24. *Id*.

contrast to the familiar local school board ploys involved in the Milwaukee case,[25] made Judge Tone less ready to infer discriminatory purpose in the absence of direct evidence. While it is clearly premature to be definitive, *Armstrong* and *Board of School Commissioners* together suggest that the court of appeals' likely reaction to *Davis* may in each case turn on the extent of precedent for inferring discriminatory purpose from comparable fact patterns.

Armstrong

Armstrong applies the law established in *Keyes* and precedent from this circuit[26] to new but not very different facts. It exemplifies how little evidence is needed for a district court properly to find a governmental purpose to discriminate, and how lenient the court of appeals will be with such a finding once made, even after *Davis*.

In a context of clear, system-wide statistical racial imbalance,[27] the district court found defendants' school boundary and siting decisions, busing practices, open transfer policies and faculty assignments to have contributed often slightly, sometimes considerably, to the racial imbalance, and almost never to have alleviated it.[28] From these acts having racially discriminatory effect, from ambiguous but suggestive testimony,[29] and from defendants' refusal to adopt integration proposals,[30] the district court inferred a racially discriminatory purpose, even though defendants "always had a nondiscriminatory explanation for their acts:"[31]

> While the explanations 'on an isolated basis seem reasonable and at times educationally necessary,' when considered together, the acts demonstrated, the judge found, 'a consistent and deliberate policy of racial isolation and segregation. . . .' . . . The court found it 'hard to believe that out of all the decisions made by school authorities under varying conditions over a twenty-year period, mere chance resulted in there being almost no decision that resulted in the furthering of integration.'[32]

"Viewing all the evidence," the court of appeals concluded that the district court was "not clearly erroneous" in finding segregatory purpose. "While arguably no individual acts carried unmistakable signs of racial

25. For example, the court characterized the "intact busing" program of the *Armstrong* defendants as a " 'commonly used', 'classic segregative technique.' " 539 F.2d at 635 (quoting Higgins v. Board of Educ., 508 F.2d 779, 787 (6th Cir. 1974)).

26. *See* the decision on the merits in the Indianapolis case, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973), and United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968). It was not always so. *See* Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963).

27. *See* 539 F.2d 625, 633 (7th Cir. 1976).

28. *See id.* at 629-32, 635-37, for a discussion of these district court findings.

29. *Id.* at 634-35.

30. *Id.* at 636-37.

31. *Id.* at 634 (quoting 408 F. Supp. at 818-19).

32. 539 F.2d at 634 (quoting 408 F. Supp. at 819).

purpose, it was not unreasonable to find a pattern clear enough to give rise to a permissible inference of segregative intent."[33] Invoking the rule that it would not reverse findings of fact unless it was "left with the definite and firm conviction that a mistake has been committed," the court tolerated instances of "unexplained hiatus between the specific findings of fact and conclusory findings of segregative intent" and accorded the district court "a presumption of consistency."[34]

Plaintiffs' success to date in *Armstrong* may augur little outside the Milwaukee city limits. In most northern school desegregation cases, the decisive issue is whether defendants' purpose is discriminatory or racially neutral. The literal import of the court of appeals' opinion in *Armstrong* is that in resolving the question of purpose the district court has extremely broad leeway—either way. Even though plaintiffs in *Armstrong* compiled a massive amount of evidence, in the end their proof of discriminatory purpose amounted to no more than the stuff of which "permissible inferences" are made. In theory at least, another district judge could have decided this case or another one like it the other way, and in that event the court of appeals' reasoning in *Armstrong* would almost certainly compel affirmance of that opposite result.

If the law indeed permits such unpredictably inconsistent decisions in school desegregation cases, that state of affairs should be disconcerting to practitioners on both sides and even more so to the public, for whom momentous issues of social policy in that event turn largely on a single judge's weighing of subjective, elusive evidence. But if uncertainty reigns, *Armstrong* cannot be blamed. The court of appeals did no more than follow the Supreme Court's edict in *Keyes* that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[35]

In a cogent concurring opinion in *Keyes*, Mr. Justice Powell warned that this test would lead not just to cases like *Armstrong*, but also to cases reaching opposite results on analogous facts.[36] The *Keyes* majority's focus on intent, he argued, is both unfair and unrealistic. It is unfair because "the facts deemed necessary to establish de jure discrimination present problems of subjective intent which the courts cannot fairly resolve."[37] The results of litigation "will be fortuitous, unpredictable and even capricious"; most importantly, "[a]ny test resting on so nebulous and elusive an element as a school board's segregative 'intent' provides inadequate assurance that minor-

33. 539 F.2d at 636-37.
34. *Id.* at 634, 636.
35. 413 U.S. at 208 (original emphasis), *quoted in* Armstrong v. Brennan, 539 F.2d at 633.
36. 413 U.S. at 208.
37. *Id.* at 225.

ity children will not be shortchanged in the decisions of those entrusted with the nondiscriminatory operation of our public schools."[38]

One might respond that courts every day are faced with problems of determining subjective intent, and that potential and actual inconsistency in the determination is an inherent imperfection in our judicial system. But in such inquiries courts are not unaided by rules which structure decisions, setting boundaries upon and establishing criteria for the exercise of discretion. Mr. Justice Powell's point in *Keyes* is not that intent should be abandoned as an element of the cause of action,[39] but rather that trial judges should be afforded more precise guidance, related to objective, ascertainable facts, for determining subjective intent. Specifically, he proposes "quite simply" that "[a] prima facie case of constitutional violation exists when segregation is found to a substantial degree in the schools of a particular district."[40] A demonstration of clear racial imbalance, such as that found in the Milwaukee schools, would shift the burden to the defendants to prove the segregation not purposeful.[41] Although Mr. Justice Powell does not so state, such a burden would be difficult to meet and the results of litigation in most cities would be uniform: plaintiffs would prevail.[42]

But is it justifiable, in the name of uniformity of decision, to structure the rules so that one side always loses? Mr. Justice Powell's answer requires some explaining.

> [S]egregated schools—wherever located—are not solely the product of the action or inaction of public school authorities. Indeed, . . . , there can be little doubt that the principal causes of the pervasive school segregation found in the major urban areas of this country, whether in the North, West, or South, are the socioeconomic influences which have concentrated our minority citizens in the inner cities while the more mobile white majority disperse to the suburbs.[43]

But, he adds later in his opinion,

> there is also not a school district in the United States, with any significant minority population, in which the school authorities—in one way or another—have not contributed in some measure to the

38. *Id.* at 233, 227.

39. If his concurring opinion in *Keyes* left any doubt on this score, it was resolved by his joining the majority opinion in *Davis*. 426 U.S. at 231.

40. 413 U.S. at 224 and n.10.

41. Mr. Justice Powell actually goes a bit further in *Keyes*. He would have the burden shift to defendants to demonstrate that they are "operating a genuinely integrated school system," by which he means one in which school officials "make and implement their customary decisions with a view toward enhancing integrated school opportunities." *Id.* at 224, 226. However, one need not venture so far beyond the majority's view in *Keyes* to utilize a prima facie rule. For example, as the text suggests, the burden, once shifted, might simply require defendants to demonstrate that their actions were not purposefully segregatory.

42. This certainly seems to be the result Mr. Justice Powell expects. *See id.* at 223, 228-30, 236, 252-53.

43. *Id.* at 235-36.

> degree of segregation which still prevails. Instead of recognizing the reality of similar, multiple segregatory causes in school districts throughout the country, the Court persists in a distinction whose duality operates unfairly on local communities in one section of the country [the South] and on minority children in the others.[44]

In other words, under a "purpose" test defendants are doomed to lose in the South, where a recent history of openly purposeful segregation is easily proved, while some Northern defendants, equally culpable for present segregation, may be let off the hook by evidentiary accident. Mr. Justice Powell's prima facie case rule would keep the Northerners on the hook too.

But his predictions of arbitrary inconsistency, defensible enough in theory, have apparently not come to pass in cases applying the *Keyes* test. Indeed, the prima facie case rule he advocated in *Keyes* may already have been implicitly adopted by the lower federal courts. Despite their discretion to refuse to find segregatory intent, district judges have generally inferred it from facts like those in *Armstrong* in suits in Boston,[45] Brooklyn,[46] Detroit,[47] Denver,[48] and elsewhere,[49] as well as in the Milwaukee and Indianapolis cases reviewed here. Thus *Armstrong* may be an exemplar of the "new prima facie case": if a city's public schools are substantially racially imbalanced, and if the effect of school siting, boundary, busing, faculty assignment policies and the like has been in some measure to contribute to this imbalance;

44. *Id.* at 252-53.

45. Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

46. Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975) (single junior high school).

47. Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd in part, vacated and remanded on other grounds*, 484 F.2d 215 (6th Cir. 1973) (en banc), *rev'd on other grounds*, 418 U.S. 717 (1974).

48. In Keyes v. School Dist. No. 1, 368 F. Supp. 207 (D. Colo. 1973), the opinion on remand from the United States Supreme Court, the district court found system-wide segregation. Compare that court's opinions before the Supreme Court ruling, 303 F. Supp. 279 (D. Colo. 1967) and 313 F. Supp. 61 (D. Colo. 1970), *aff'd in part and rev'd in part*, 445 F.2d 990 (10th Cir. 1971), *modified and remanded*, 413 U.S. 189 (1973).

49. Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143 (W.D. Mich. 1973), *aff'd*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (Kalamazoo, Mich.); Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974) (Dayton, Ohio), *cert. granted on other grounds sub nom.* Dayton Bd. of Educ. v. Brinkman, 45 U.S.L.W. 3485 (U.S. Jan. 18, 1977) (No. 76-539); Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 539 (C.D. Cal. 1974), *on remand from* 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974) (Oxnard, Cal.); Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973) (Clarke County, Las Vegas, Nev.); Davis v. School Dist., 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971) (Pontiac, Mich.); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970) (Pasadena, Cal.); and Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *remanded on other grounds sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc) (Washington, D.C.).

But see Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974) (Grand Rapids, Mich.), discussed at note 50 *infra*; United States v. School Dist., 389 F. Supp. 293 (D. Neb. 1974), *rev'd*, 521 F.2d 530 (8th Cir. 1975), *cert. denied*, 423 U.S. 946, *on remand*, 418 F. Supp. 22 (D. Neb.), *aff'd*, 541 F.2d 708 (8th Cir.) (en banc), *petition for cert. filed*, 45 U.S.L.W. 3477 (U.S. Nov. 19, 1976) (No. 76-705), discussed at note 51 and accompanying text *infra*.

then a prima facie case of segregatory purpose on the part of responsible officials is established. The burden shifts to defendants to prove that their purposes were non-discriminatory.

But if this is the de facto rule of decision in these cases, it should be formalized to avoid the fluke, but potentially unfair and disruptive, possibility that some city—perhaps Chicago—could have its desegregation case decided by a judge who rejects the pattern of decisions elsewhere and refuses to find segregatory purpose on facts like those in *Armstrong*.[50] Indeed, the Court of Appeals for the Eighth Circuit has already formalized such a rule, holding that "a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequences of which is to bring about or maintain segregation."[51]

Moreover, experience in these cases reinforces Mr. Justice Powell's argument in *Keyes* that the prima facie case rule should be streamlined even further. Since racial segregation in schools has been consistently found attributable in significant part to actions by school officials,[52] courts can fairly dispense with the requirement that plaintiffs, to prove causation, amass

50. It is debatable whether the Grand Rapids, Michigan case is such a fluke. Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974). The district court's findings for defendants were accepted as not "clearly erroneous" and were also concurred in by the court of appeals, despite evidence of purposeful segregation. 508 F.2d at 783, 797. The clearest evidence of purpose was in the faculty assignment, which the district court found had been on a racially discriminatory basis; but this was not a "substantial or significant contributing cause of school segregation." *Id.* at 783, 788. In addition, there were a "few instances of changes of boundary lines and feeder patterns," *id.* at 786, and defendants had abandoned their voluntary integration plan, after first shaping it to prevent "white flight," by closing black schools and integrating blacks into white schools, not the other way around. *Id.* at 789, 793-95.

On the other hand, *Higgins* is so distinguishable from cases like *Armstrong* that its result might be the same even under the prima facie rule suggested in the text. First, the degree of racial segregation in schools, regardless of its cause, was less in Grand Rapids than in Milwaukee; indeed, less than in Knoxville, Tennessee, which the same court of appeals had recently found to have attained "a unitary system after earlier court-ordered desegregation." *Id.* at 787 (citing Goss v. Board of Educ., 482 F.2d 1044 (6th Cir. 1973)), *cert. denied*, 414 U.S. 1171 (1974). More importantly, such racial balance as did exist in Grand Rapids was largely attributable to the Board of Education's voluntary integration plan which, despite its shortcomings, clearly impressed the court with the board's good faith and which contrasted sharply with the recalcitrance of school officials in Milwaukee. *Id.* at 787, 794, 795. In addition, "many of the more commonly used or classic segregative techniques found in other cases were absent in Grand Rapids." *Id.* at 787. These last two factors might, in context, suffice to rebut the prima facie inference of discrimination, which itself is less forceful than in other cases because here there was less segregation.

Nonetheless, while these distinctions make the Grand Rapids board less culpable than others, it is difficult entirely to exculpate school officials from the segregation and, as Justice Powell suggests, too much should not be made of distinctions in the degree of fault in contributing to school segregation. If the Grand Rapids case bears a lesson for school officials, it is that an ounce of voluntary desegregation now may prevent a pound of court-ordered desegregation later. That lesson, learned nationwide, would produce results neither uniform nor fair.

51. United States v. School Dist., 521 F.2d 530, 535-36 (8th Cir. 1975). For history, *see* note 49 *supra*; *but see* Austin Independent School Dist. v. United States, 97 S. Ct. 517, 517 and n.1 (1977) (Powell, J., concurring).

52. *But see* Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974), discussed at note 50 *supra*.

evidence of myriad siting, busing, pupil-transfer and other decisions by local officials. Instead, the prima facie case should be deemed made whenever plaintiffs prove a substantial degree of racial segregation in a school system. Such a rule would place the burden of adducing evidence about their past decisions on defendants, the party with more ready access to this evidence. This allocation of burdens would not only be fair to the parties, but might promote more efficient and expeditious litigation by minimizing discovery and introduction of evidence.[53]

Board of School Commissioners

The remedial decree in *Board of School Commissioners*, which provides for transferring Indianapolis students across district lines into suburban districts, is arguably not "interdistrict" in the *Milliken* sense. The transfer of students is within the area which, but for assertedly discriminatory acts by the state, would have been a single, metropolitan-wide school district. If *Milliken* is nonetheless regarded as controlling, the Indianapolis case presents the issue of what constitutes an "interdistrict violation and interdistrict effect" under *Milliken*,[54] sufficient to authorize a metropolitan-wide, interdistrict remedy for segregation in central city schools.

Neither the majority nor the dissent in *Board of School Commissioners* purported to address this general issue directly. Instead, both opinions focused on an aspect of the question: must the government actions which constitute the interdistrict violation, and which have interdistrict effect, also have a segregatory purpose to justify interdistrict relief under *Milliken*? On the Indianapolis facts, the majority seemed to say no. Judge Tone disagreed and dissented, perceiving no evidence or findings of segregatory purpose in the school district boundary and housing site decisions claimed as interdistrict violations. The Supreme Court, in its subsequent order of remand, has implied that a finding of segregatory purpose is a necessary predicate for the student transfer orders, while leaving open the possibility that such a finding can properly be made, either on this record or on the basis of further proceedings.[55]

53. "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." United States v. New York, N.H. & H. R.R., 355 U.S. 253, 256 n.5 (1957). Of course, a presumption in the interest of fairness and convenience, such as the one suggested in the text, must be supported at least by "some rational connection between the fact proved and the ultimate fact presumed." Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35, 44 (1910) (legislative presumption in a civil case); *see generally* Weinberger v. Salfi, 422 U.S. 749, 767-85 (1975). The connection between school segregation and purposeful state action, as argued in the text, is at least rational. Arguably, it meets even the more stringent standard for legislative presumptions in criminal statutes, which are valid only if "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 6, 34 (1969).

54. Milliken v. Bradley, 418 U.S. 717 (1974).

55. *See* note 8 *supra*.

In earlier phases of this litigation the central city school board had been found culpable of purposeful segregation by the district court in 1971,[56] and the court of appeals had affirmed this ruling in 1973.[57] The district court had then ordered a "broad interdistrict remedy"[58] after finding that desegregation within the central city would only lead to resegregation by provoking white flight to the suburbs, and that the State of Indiana, with power over suburban school districts, had participated in the central city segregation.[59] On appeal, the central city portion of the remedy and the findings against the state were affirmed. But the portion of the order involving suburbs outside the boundaries of the metropolitan governmental unit known as "Uni-Gov" was reversed, while that involving suburbs within "Uni-Gov" was remanded for further proceedings in light of *Milliken*, which the Supreme Court had just decided.[60]

On remand, the district court ordered a "limited interdistrict remedy" involving the one-way transfer of black Indianapolis students in grades one through nine to suburbs within "Uni-Gov," in such numbers that within two years all but two suburban school districts would become fifteen percent black in total enrollment.[61] To support this remedy, the district court apparently relied on three factors.[62] First was the "Uni-Gov" act passed by the Indiana

56. 332 F. Supp. 655 (S.D. Ind. 1971).

57. 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

58. The remedy is so characterized in the most recent court of appeals opinion. 541 F.2d at 1213.

59. 368 F. Supp. 1191 (S.D. Ind. 1973); *see also* 368 F. Supp. 1223 (S.D. Ind. 1973).

60. 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

61. 419 F. Supp. 180 (S.D. Ind. 1975). The remedy, characterized as "limited" by the court of appeals, 541 F.2d at 1212, is detailed at 419 F. Supp. at 185-86. By the second year, approximately 10,000 black students would be transferred. 541 F.2d at 1215.

The Indianapolis school board raised in its petition for certiorari some interesting questions not raised by the other petitioners, and not addressed by the court of appeals, about the procedures used by the district court in issuing the remedial order, and about the order's unfairness toward blacks, the central city school district, city residents and city teachers. The questions are important in this case and could become important nationwide if the resolution of the threshold issues discussed in this article leads to metropolitan-wide remedies in other cities. Among these questions were: (1) whether the court exceeded its statutory jurisdiction or improperly exercised its equitable powers by issuing the order without giving school districts and other affected parties opportunity to present alternative plans, "without hearing and determining feasibility and propriety thereof," without making findings required by 20 U.S.C. §§ 1713 and 1755, and without providing opportunity for community participation in development of voluntary remedial plan as required by 20 U.S.C. § 1758, Petition for Certiorari, United States v. Board of School Comm'rs, 45 U.S.L.W. 3372, 3372 (U.S. Nov. 16, 1976); (2) whether it was proper to order "solely involuntary transfer of black students to school systems of which their parents are not voting constituents, without any corresponding requirement for transfer of white students and without any conditions to assure that educational opportunities offered transferred black students will be thereby improved," *id.*; (3) whether the order improperly "financially burdens and discriminates against city school system by requiring payments under state law to suburban school systems in excess of their increased costs attributable to transferred students," *id.* at 3372-73; and (4) whether the order was proper even though it "necessarily will require closing of substantial number of city school facilities without proof of their inferiority and dismissal of substantial number of teachers and staff without requiring employment of any additional staff by suburban schools?" *Id.* at 3373.

62. *See* 419 F. Supp. at 182-83.

General Assembly in 1969, when the Indianapolis school desegregation suit was already pending.[63] Uni-Gov transformed Marion County, within which Indianapolis and ten other school districts were located, into a metropolitan government responsible for most government services, including police and fire services. Some services were excluded, most conspicuously among them schools.[64] In addition, within Uni-Gov there remained three "excluded cities," which retained their own local governments while receiving some services from Uni-Gov.[65] The district court found that by excluding schools from Uni-Gov, the Indiana legislature "signaled its lack of concern with the whole problem and thus inhibited desegregation [of the Indianapolis Public School District]."[66] Its order transferring Indianapolis black students involved only school districts within Uni-Gov.[67]

Second, the district court apparently relied on the fact that the eleven public housing projects for family occupancy in the Indianapolis area, all predominantly black, had all been sited within the boundaries of the central city school district, including six on or near the district boundary.[68] The district court found that these siting decisions "obviously tended to cause and to perpetuate the segregation of black pupils in [Indianapolis Public School District] territory."[69] In addition to grounding the pupil transfer orders partly on this finding, it separately enjoined the housing authority from building any future public housing projects within the boundaries of the central city school district.[70]

63. *Id.* at 183. For a discussion of Uni-Gov, *see* 541 F.2d at 1214, 1215-16, 1220-22. The court noted: "It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this action was pending in the district court." *Id.* at 1220.

64. *Id.* at 1216. Other excluded functions were "[f]or example, the airport authority, the county courts, the building authority, and the hospital corporation." *Id.* School services stand out as exceptional among these excluded services because of the federal suit involving schools which was then pending, the greater threat of desegregation orders affecting large numbers of suburban residents posed by a metropolitan-wide school district, and the contemporaneous repeal of a prior Indiana statute which had required school district boundaries to expand with those of a city annexing its suburbs. Indianapolis was considering annexation if Uni-Gov did not pass, and the court referred to the duo of Uni-Gov and the annexation repeal statute as "fail-safe" measures designed to keep the Indianapolis school district from expanding to include suburbs. *Id.* at 1220.

65. *Id.* at 1216. The cities are Speedway, Perry and Lawrence.

66. 419 F. Supp. at 183.

67. *Id.* Students were ordered transferred only to the eight most white of the ten suburban school districts within Uni-Gov. All eight appealed to the court of appeals, 541 F.2d at 1215, and five of the eight, including the three districts corresponding to the "excluded cities" under Uni-Gov, then appealed to, or petitioned for certiorari to, the United States Supreme Court.

68. 419 F. Supp. at 182. *See also* 541 F.2d at 1216. Before Uni-Gov, the local housing authority, which was authorized to build up to five miles outside the city limits upon agreement with suburban governments, had been uniformly jilted by the suburbs. After Uni-Gov, the authority was empowered to build without agreement in most suburbs, but still it had never done so, arguing that adequate transportation and other services did not exist. "There was evidence however, that these services could have been arranged." *Id.* at 1216.

69. 419 F. Supp. at 182.

70. *Id.* at 186. *See* text accompanying notes 130-134 *infra*.

The district court also apparently relied on a third factor, "the customs and usages of both the officials and inhabitants" of Indianapolis suburbs "to discourage blacks from seeking to purchase or rent homes therein."[71] The court of appeals, however, did not discuss or appear to rely on this factor separately from the public housing site selections.

In short, the district court found both Uni-Gov and public housing siting to have the effect of perpetuating segregation on both sides of the Indianapolis Public School District boundary, but did not explicitly find either to have a segregatory purpose.

The court of appeals majority affirmed, holding that a purpose to segregate was unnecessary, at least with respect to Uni-Gov.[72] Citing *Brown II*[73] and *Green v. County School Board*,[74] the two major Supreme Court decisions on the affirmative obligation of school officials to desegregate once past de jure segregation is proved, the majority opined that the Indiana General Assembly, at the time it enacted Uni-Gov, "had an obligation to alleviate the segregated condition in IPS."[75] Omitting schools from Uni-Gov had violated this obligation. Considerations of tax levels and citizen participation, which perhaps underlay retention of separate school districts, "although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact."[76]

By this, the majority may have meant that Uni-Gov, racially discriminatory in effect if not in purpose, supplied the "interdistrict violation and interdistrict effect" which had been missing in *Milliken*. Next, however, the majority's reasoning suggested that a *Milliken* interdistrict violation was not really necessary to support the remedy granted below because this case was not truly interdistrict:

> In this case we are dealing with a situation in which but for certain events chargeable to the state, Marion County would be either a consolidated school district . . . or IPS would have been expanded with the civil city of Indianapolis under Uni-Gov. In this context there is nothing talismanic about the word 'district,' for school district lines are not sacronsanct [sic].[77]

To support its views that segregatory purpose was unnecessary and that *Milliken* was distinguishable, the majority cited *Evans v. Buchanan*,[78] a Wilmington, Delaware case which the court considered factually analogous.

71. *Id.* at 183.
72. *See* notes 84-85 and accompanying text *infra*.
73. Brown v. Board of Educ., 349 U.S. 294 (1955).
74. 391 U.S. 430 (1968).
75. 541 F.2d at 1220.
76. *Id.* at 1220-21.
77. *Id.* at 1221.
78. 393 F. Supp. 428 (D. Del.) (3-judge court), *aff'd*, 423 U.S. 963 (1975). For subsequent history, *see* note 15 *supra*.

There a statute generally reorganizing Delaware school districts had explicitly excluded Wilmington. Although the statute was found not purposefully discriminatory, it had a "pronounced racial effect" and was invalidated for lack of a "compelling state interest."[79] The three-judge district court's decision had been summarily affirmed by the Supreme Court.[80]

The *Board of School Commissioners* majority then held that the limited interdistrict remedy ordered below was proper on the basis of Uni-Gov alone.[81] In addition, in proceeding next to affirm the lower court's injunction with respect to public housing segregation, the court implied that the housing site selections also supported the order transferring students to suburban schools. The court first quoted findings below that public housing segregation in Indianapolis had the *effect* of perpetuating school segregation. Then, although the district court had not made any express findings of discriminatory *purpose* in the housing site selection, the court itself found such a purpose within the record, which "clearly show[ed] a 'purposeful, racially discriminatory use of state housing.' "[82]

Thus the majority attempted to bring the case within Mr. Justice Stewart's concurring opinion in *Milliken*, quoting the language in which he had identified housing policy as one potential "interdistrict violation" which might support an interdistrict remedy.[83] Although the majority had made no finding of discriminatory purpose with respect to Uni-Gov as an interdistrict violation, clearly such a finding was necessary with respect to the housing site decisions because of Mr. Justice Stewart's use of the term "purposeful." The majority made no effort to resolve the arguable contradiction in requiring a discriminatory purpose for one sort of interdistrict violation but not for another.

Finally, the majority upheld the particular mandatory transfer orders issued by the district court.[84]

Judge Tone, in dissent, did not respond to the majority's suggestion that the case was not interdistrict in the *Milliken* sense, except to argue that the issue was foreclosed by the court's earlier opinion which remanded the case.[85]

79. 393 F. Supp. at 441, 445.
80. Evans v. Buchanan, 423 U.S. 963 (1975).
81. 541 F.2d at 1222.
82. *Id.* at 1223 (quoting Milliken v. Bradley, 418 U.S. 717, 755 (1974) (Stewart, J., concurring)).
83. 541 F.2d at 1223.
84. *Id.* at 1223-24. Judge Tone did not explicitly dissent from this aspect of the opinion, but under his reasoning he did not reach the issue. The federal plaintiffs, as opposed to the intervening black child plaintiffs, objected to the mandatory aspect of the transfers, while supporting the propriety of metropolitan-wide relief in some form.
85. *Id.* at 1225. "That *Milliken* controls here . . . was of course recognized in our decision on the second appeal, . . ." *Id.* Judge Tone's argument on this point is not persuasive. The earlier remand was couched as follows: "The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries

In his view the only question was whether Uni-Gov and the siting of public housing projects constituted "interdistrict violations" sufficient under *Milliken* to justify an interdistrict remedy.[86] They did not, he argued, because under *Davis*[87] they could not be constitutional violations unless purposefully discriminatory, and the record contained no findings or evidence of such a purpose.[88] *Green* concededly imposed an affirmative duty on the State of Indiana to desegregate, but only with respect to the school district within which the state had purposefully participated in racial segregation—Indianapolis.[89] *Evans* was distinguishable because Wilmington had a history of pre-*Brown* segregation practiced on an interdistrict basis. Moreover, the Supreme Court's summary affirmance did not necessarily imply approval of its reasoning, which "clearly cannot stand after *Washington v. Davis*."[90]

Who has the better argument? The question is of course not easy, but in this writer's view the majority reached the correct result.

The Facts: Segregatory Purpose in Indianapolis

One route to the majority's conclusion is short and swift, and focuses on facts without need for extended legal argument. Quite simply: both the omission of schools from Uni-Gov's functions, and the exclusive choice of central-city sites for public housing, were in significant part racially moti-

warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken*." 503 F.2d at 86 (footnotes omitted). True, this language seems to contemplate an inquiry into whether the decision to omit schools from Uni-Gov constituted an interdistrict violation with an interdistrict effect, which is essentially the inquiry pursued in Judge Tone's dissent. But the language does not on its face clearly foreclose consideration of the present majority's argument that the entire metropolitan area would have been a single district but for Uni-Gov's omission of schools. Particularly in context, the language is ambiguous, since in the same paragraph a clear distinction had been made between areas "beyond the Uni-Gov boundaries," as to which the original metropolitan order was *reversed*, and areas within Uni-Gov, as to which the order was *remanded*. A brief, ambiguous passage in an opinion devoted chiefly to other issues should not foreclose later de novo consideration of so important a question as whether *Milliken* is distinguishable, after further proceedings and briefing, fully exploring the effect of Uni-Gov on the "interdistrict" issue. *See* 503 F.2d at 79-80, 86 & nn.22, 23.

86. "The question now is: What other constitutional rights, violation of which calls for an interdistrict remedy, were shown on remand to have been violated by Uni-Gov and the siting of public housing projects?" 541 F.2d at 1225.

87. *See* text accompanying notes 17-25 *supra*.

88. 541 F.2d at 1225 (Uni-Gov and housing), 1225-26 (Uni-Gov), and 1228 (housing).

89. *Id.* at 1227.

90. *Id.* Moreover, Judge Tone might have pointed out, the *Evans* decision summarily affirmed by the Supreme Court was arguably not ripe for review, since it merely ordered the submission of "alternative Wilmington-only and interdistrict plans." 393 F. Supp. at 430. When *Milliken* itself was at a comparable stage the Court had declined review. 338 F. Supp. 582 (E.D. Mich.), *appeal dismissed*, 468 F.2d 902 (6th Cir.), *cert. denied*, 409 U.S. 844 (1972). Only after the general contours of a metropolitan remedial order had been spelled out and ordered implemented did the Court agree to review and thereupon reverse. 418 U.S. 717 (1974). Now, the later *Evans* decision, comparable in specificity to the *Milliken* decision given plenary review by the Court, has again been appealed, but the appeal has been dismissed for want of jurisdiction. *See* note 15 *supra*. Plenary review by the Court will not be likely this term, but may occur eventually.

vated. Even if Judge Tone is correct that *Milliken* rigidly controls the Indianapolis case, and that the government actions constituting the "interdistrict violations" must have been purposefully discriminatory, an interdistrict remedy is appropriate here.

On the second point—the housing sites—the majority could not restrain itself from following this route. Why else were all eleven housing sites selected within the central city school district boundaries, including six on or within a few blocks of the school district boundary? Why else were two of the projects located on the Indianapolis side of a street dividing central city from suburb? Why else was one project located "in a narrow peninsula of IPS that is surrounded on three sides by Perry MSD"?[91] The housing authority argued that adequate services were not available in the suburbs, but there was evidence that these services "could have been arranged," and one housing authority witness was unable to identify "any difference at all" in terms of the authority's non-racial criteria between a suburban and a central city location on opposite sides of the same street.[92] Why should public housing be any exception to the "customs and usages of both the officials and inhabitants" of the suburbs, which the district court found were "to discourage blacks from seeking to purchase or rent homes therein"?[93]

In the absence of a credible non-racial explanation, the majority found that the record "clearly shows a 'purposeful, racially discriminatory use of state housing.' "[94] Its finding was in accord both with other judicial findings on comparable facts[95] and with Mr. Justice Stevens' reminder in *Davis* that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor."[96]

But what of the district court's failure specifically to find as a fact that the choice of public housing sites stemmed from a purpose on the part of government officials to discriminate, or to acquiesce in discrimination?[97] One can only speculate as to why the trial judge did not so find. Certainly he did not make a contrary finding, and the thrust of his opinion is consistent with and even implies that he perceived a segregatory purpose in the siting.[98] Perhaps in light of such cases as *Green* he regarded a specific finding of

91. 541 F.2d at 1217 n.4.
92. *Id.* at 1216-17.
93. *Id.* at 1214.
94. *Id.* at 1223 (quoting Milliken v. Bradley, 418 U.S. 717, 755 (1974) (Stewart, J., concurring)).
95. *See, e.g.*, Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907, 913-14 (N.D. Ill. 1969).
96. 426 U.S. at 253.
97. *See* Cooper v. Aaron, 358 U.S. 1, 8 (1958); Gautreaux v. Romney, 448 F.2d 731, 737-40 (7th Cir. 1971).
98. 419 F. Supp. at 182-83.

discriminatory purpose as unnecessary, and accordingly refrained from unnessarily impugning local officials. In any event, the lack of an explicit finding by the district court on this sole issue need not preclude the reviewing court from inferring segregatory purpose on this otherwise adequate and ample record.[99] For a reviewing court either to close its eyes to the apparent, or to remand for yet another round of delay in an already protracted adjudication of civil rights deeply affecting the educational interests of the entire metropolitan Indianapolis population, would on this record be an unjustified adherence to technicality.

The case is not as strong for finding a segregatory purpose in the decision to exclude schools from Uni-Gov, but the record supports, indeed recommends, an inference of such a purpose. The effect of excluding schools from Uni-Gov, obvious beforehand to any Indiana legislator or public official, was to perpetuate racial segregation by keeping black students inside Indianapolis and leaving the nearly all-white suburban schools racially undisturbed.[100] Discriminatory purpose may be inferred from this fact in combination with others, under the "ordinary rule of tort law that a person intends the natural and foreseeable consequences of his actions," which is applicable in discerning the intent of public officials in school desegregation cases.[101] Keeping

99. "[F]actfinding is the basic responsibility of district courts, rather than appellate courts," and ordinarily a court of appeals should not resolve "in the first instance" a factual dispute not "considered by the District Court." DeMarco v. United States, 415 U.S. 449, note at 450 (1974) (criminal case). The normal response of an appellate court to a trial court's failure to make findings on a material issue is to vacate the judgment and remand for appropriate findings. *See generally* 5A MOORE'S FEDERAL PRACTICE ¶ 52.06[2] (1975) at 2718 and cases cited at n.1. However, findings are not a jurisdictional requirement for appeal. *Id.* at 2721-23 and cases cited 2723 at n.3. In unusual cases appellate courts may themselves determine the merits even though the findings below suffer from "lack of specificity" if a remand would not "add anything essential to the determination of the merits," Withrow v. Larkin, 421 U.S. 35, 45 (1975); or where "the error is not substantial in the particular case," Rossiter v. Vogel, 148 F.2d 292, 293 (2d Cir. 1945) (citing Hurwitz v. Hurwitz, 136 F.2d 796, 799 (D.C. Cir. 1943)); or where "a full understanding of the issues [can] be reached without the aid of findings." Davis v. Board of School Comm'rs, 422 F.2d 1139, 1142 (5th Cir. 1970) (dictum) (quoting Urban v. Knapp Bros. Mfg. Co., 217 F.2d 810, 816 (6th Cir. 1954), *cert. denied*, 349 U.S. 930 (1955)); *accord*, cases cited in *Davis*, 422 F.2d at 1142.

Here the objective facts concerning housing site decisions have been specifically found; the omitted finding relates only to an inference concerning subjective intent to be drawn from these underlying findings. Because of the urgency suggested in the text, the case should not be remanded for more specific findings if, as here, the inference is clear from findings already of record.

100. "Because, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were '[a] substantial cause of interdistrict segregation.' " 541 F.2d at 1220, (quoting *Milliken*, 418 U.S. at 745 (Stewart, J., concurring)). *See also id.* at 1214, 1221 (majority), and at 1227-28 (dissent) (majority's " 'racial impact' theory").

101. United States v. Texas Educ. Agency, 532 F.2d 380, 388-89 and cases cited 389 at n.6 (5th Cir. 1976), *vacated and remanded sub nom.* Austin Independent School Dist. v. United States, 97 S. Ct. 517 (1977), for further consideration in light of Washington v. Davis, 426 U.S. 229 (1976); *see* Monroe v. Pape, 365 U.S. 167, 187 (1961); *but see* Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579, 585 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974).

Indianapolis in a school district separate from the suburbs, like maintaining a neighborhood school policy in racially segregated neighborhoods, could lead to "no other result" but continued school segregation "and this is strong evidence of segregatory intent."[102]

This strong evidence is aggravated by several factors. First was the timing of the decision to exclude schools from Uni-Gov, shortly after the Indianapolis school desegregation suit was filed. Moreover, the opposition to including schools in Uni-Gov consisted mainly of the same suburban governments which the district court found had a custom and usage of discouraging blacks from moving into the suburbs and which participated in the purposefully segregatory public housing site selections. In addition, the exclusion of schools was due not to considerations unique to Uni-Gov's purpose or function, but rather was part of a "failsafe" legislative package designed to ensure that "by one means or another" the Indianapolis school district boundaries would not expand into the suburbs, despite a pre-existing, legislatively declared state policy that the boundaries of the city school district would expand with those of the city itself.[103] Looking only to these factors, it is difficult to avoid an inference of segrégatory intent.

On the other hand, as Judge Tone observed, there were a number of factors suggesting possible non-racial explanations for the failure to expand the Indianapolis school district's boundaries.[104] Chief among them were fears

Neither the per curiam order of remand in the *Austin* case, nor Mr. Justice Powell's concurring opinion, joined by the Chief Justice and Mr. Justice Rehnquist, rejected the "natural and foreseeable consequences" theory adopted by the court of appeals below and also by the Courts of Appeals for the First, Second and Sixth Circuits in the cases cited at 532 F.2d at 389 n.6. *Accord*, United States v. School Dist., 521 F.2d 530, 535-37 (8th Cir. 1975), *cert. denied*, 423 U.S. 946, *on remand*, 541 F.2d 708 (8th Cir. 1976) (en banc), *petition for cert. filed*, 45 U.S.L.W. 3477 (Nov. 19, 1976) (U.S. No. 76-705). Mr. Justice Powell did not dispute the court of appeals' finding of segregative intent, but suggested only that the court "may have imputed an intent far more pervasive than the evidence justified." 45 U.S.L.W. at 3413. He quoted a portion of its opinion which seemed to extend the "natural and foreseeable consequences" rule into a per se rule against any neighborhood assignment policy, rather than a basis for individualized consideration of whether a particular neighborhood assignment policy is purposefully segregative. *Id.* at 3413 n.1.

102. Morales v. Shannon, 516 F.2d 411, 413 (5th Cir.), *cert. denied*, 423 U.S. 1034 (1975).

103. 541 F.2d at 1220.

104. *Id.* at 1225-26. Apart from those factors discussed in the text, Judge Tone suggests five others, some of which overlap. He first refers to "historic" opposition to school consolidation "on non-racial grounds." *Id.* at 1226. But this refers to a 1959 decision not to expand the Indianapolis school district and subsequent adherence to it. As with the Uni-Gov decision ten years later, however, the tax and citizen participation concerns voiced on behalf of the 1959 decision do not negate an unstated racial basis. Expansion of the Indianapolis school district boundaries then, too, would have exposed suburbs to a potential influx of blacks. *Brown I* had been decided only five years earlier, and racial segregation in schools had still been official state policy only 10 years earlier. *See* 541 F.2d at 1212.

Second, Judğe Tone cites "the decision to leave other governmental units out of Uni-Gov." *Id.* at 1226. *But see* note 64 *supra*. Third, he points out that "all school boundaries elsewhere in the State were already frozen," *id.* at 1226, a fact that seems of little relevance except to distinguish *Evans*. Fourth, he cites the "haphazard" pattern of past municipal annexation, which

of higher taxes and loss of citizen interest and participation which could result from an expanded school district. As the majority noted, these two concerns had been "the most substantial reasons advanced" against an earlier attempt to consolidate Marion County school districts.[105]

While these tax and citizen participation explanations, like a "neighborhood school policy," may be partial explanations, they do not necessarily negate an additional explanation—race.[106] There is nothing inconsistent in suburban opposition to school consolidation on all three grounds: tax, citizen participation, and race. But only the first two are likely to be vocalized, especially when a desegregation suit is pending in the local federal courthouse. Where, as here, the objective evidence from which an inference of segregatory intent can be drawn is strong, little can be made of the fact that racial grounds for opposition have not been openly voiced but other grounds have.[107] In finding the "natural and foreseeable consequences" rule especial-

"depended in large part upon the position taken by the owners of the land affected" and their economic interests. *Id.* But this of course does not address the special racial threat posed by school district boundaries, nor does it conflict with additional racial explanations. Finally, he relies on the plaintiffs' failure to offer direct evidence of racial motive, to cross-examine defense witnesses claiming other motives, or to claim racial motivation in their briefs. *Id.* But plaintiffs' abstentions in this regard can be attributed to the inherent difficulty (suggested in the text) of producing direct evidence of bias or eliciting confessions of bias from the witness stand, combined with their legal position that no showing of discriminatory purpose was necessary.

105. 541 F.2d at 1221.

106. *See, e.g.*, United States v. Texas Educ. Agency, 532 F.2d 380, 391 (5th Cir. 1976), *see* note 101 *supra*; *see also* Judge Tone's opinion sustaining a finding of discriminatory purpose in the face of an asserted "neighborhood school policy" in Armstrong v. Brennan, 539 F.2d at 629 (although there was some testimony in *Armstrong* suggesting that the policy was at least racially conscious. *Id.* at 635).

107. Shortly before this article was to go to print, the United States Supreme Court commented on the situation where both racial and non-racial purposes underlie a governmental decision, in Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977). In a case involving an allegedly racially discriminatory refusal to rezone a parcel of land, the Court explained that *Davis*:

> does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.

Id. at 563. However, the Court later added in a footnote:

> [p]roof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required modification of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.

Id. at 566 n.21. This was dictum since plaintiffs in *Arlington Heights* had not, in the Court's view, proved that race was even one factor in the refusal to rezone. *Id.* at 566. In any event, the point is one of equitable remedies, not substantive constitutional law. The footnote concluded not that there would have been no constitutional violation if the Village could show adequate nonracial reasons for its decision, but only that no "judicial interference" would then be called for. *Id.* at 566 n.21. *See* Mr. Justice Powell's discussion of the remedial issues in his concurring opinion in Austin Independent School Dist. v. United States, 97 S. Ct. 517, 517 (1977), *see* note 101 *supra*; Mt. Healthy Bd. of Educ. v. Doyle, 97 S. Ct. 568, 575-76 (1977).

What *Arlington Heights* would mean if applied here is that, should racial motivation be inferred from the circumstances of the decision to omit schools from Uni-Gov, the burden shifts

ly apt in school desegregation cases, the Court of Appeals for the Fifth Circuit explained that

> it is difficult—and often futile—to obtain direct evidence of the official's intentions. Rather than announce his intention of violating antidiscrimination laws, it is far more likely that the state official "will pursue his discriminatory practices in ways that are devious, by methods subtle and illusive—for we deal with an area in which 'subtleties of conduct . . . play no small part.' " . . . Hence, courts usually rely on circumstantial evidence to ascertain the decisionmakers' motivations.[108]

Here the circumstantial evidence makes out a prima facie case of racial motivation, unrebutted by anything in the record. Although the majority chose not to make an inference of discriminatory intent from the circumstantial evidence concerning Uni-Gov, it regarded this inference as legally unnecessary and made no contrary inference.[109] But if one assumes *arguendo* with Judge Tone that Uni-Gov's exclusion of schools required a discriminatory purpose to qualify as an "interdistrict violation," then reviewing courts can and should infer discriminatory purpose from this record.[110]

Accordingly, on the facts, the majority's conclusion seems correct even if Judge Tone's view of the law holds the day.

The Law: Interdistrict "Violations"

Moreover, in this writer's view, the majority has the better of the admittedly difficult questions raised in interpreting *Milliken*. Two such questions are most pertinent here. First, what sorts of governmental actions qualify as "interdistrict violations" under *Milliken* sufficient to justify interdistrict relief? More specifically, must such actions be purposefully discriminatory?

Before asking what constitutes an "interdistrict violation," it helps to begin by asking what is a "violation"? In the school desegregation context, there are two distinct lines of cases defining two distinct kinds of "violations." The first line involves an initial violation of the Constitution itself and clearly demands proof of discriminatory purpose as an element of the "violation." *Keyes* exemplifies: Denver school officials' actions which had

to defendants to prove that tax and citizen participation concerns would in any event have excised schools from Uni-Gov's functions. The scant evidence of nonracial purpose in this record, relating mainly to the earlier effort to consolidate rather than to Uni-Gov itself, does not appear to carry defendants' burden. Accordingly, if on remand race is found to be one factor in the Uni-Gov decision, a student transfer remedy within Uni-Gov would not be precluded by the dictum at 97 S. Ct. 566 n.21 in *Arlington Heights*.

108. United States v. Texas Educ. Agency, 532 F.2d at 388 (citations and footnote omitted).

109. 541 F.2d at 1221, 1222.

110. The absence of a specific finding of fact on intent by the district court need not preclude the reviewing courts from their own assessments of this question, for the same reasons stated in note 99 and accompanying text *supra*.

the effect of maintaining racial segregation initially violated the Constitution only if they were purposefully discriminatory.[111]

The second kind of "violation" is not of the Constitution itself but of a remedial obligation, derived from the Constitution and predicated on a prior constitutional violation. This kind of violation need not have a discriminatory *purpose*, so long as it has the *effect* of hindering public officials' fulfillment of their affirmative remedial obligation under *Green* to desegregate a school system once it has been purposefully, unconstitutionally segregated. Thus, in *Wright v. Emporia*,[112] when a city, assertedly for non-racial purposes, sought to withdraw its schools from a county school system under desegregation orders, the Supreme Court ruled that "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect."[113] In so doing it distinguished the two kinds of "violations": initial violation of the Constitution, and subsequent violation of the affirmative obligation to redress the original wrong. "[T]he power of the District Court to enjoin Emporia's withdrawal from that system need not rest upon an independent constitutional violation. The Court's remedial power was invoked on the basis of a [prior] finding that the dual school system violated the Constitution, . . ."[114]

This suggests a misplaced emphasis in Judge Tone's reasoning in *Board of School Commissioners*. In demanding that any nominee for "interdistrict violation" under *Milliken* first present credentials of discriminatory purpose, Judge Tone focuses on the first kind of violation, largely ignoring the second. Thus he phrases the question as what "constitutional rights" did Uni-Gov or the siting of public housing violate?[115] Yet even *Davis*, the case upon which his dissent heavily relies,[116] recognizes the second kind of violation, in which "the racial impact of a law, rather than its discriminatory purpose, is the critical factor."[117]

111. 413 U.S. 189 (1973).
112. 407 U.S. 451 (1972).
113. *Id.* at 462.
114. *Id.* at 459.
115. 541 F.2d at 1225. *See also* note 85 and accompanying text *supra*. Only in a brief passage, criticizing the majority's "attempts to avoid the necessity of finding discriminatory purpose by postulating an affirmative duty under *Green* . . .," does Judge Tone come close to recognizing the second kind of violation. Even then, he uses the term "violation" only in reference to the underlying constitutional violation and, once, in reference to an "affirmative duty to use interdistrict means to remedy intradistrict violations," which he says does not exist. 542 F.2d at 1227.
116. 541 F.2d at 1224, 1226-27.
117. 426 U.S. at 243. Citing Wright v. Emporia, 407 U.S. 451 (1972), for that proposition, *Davis* explains that because racial segregation until 1969 supplied the "constitutional predicate" in *Wright*, there was no need to find an "independent constitutional violation" to set aside the division of the district because it "had the effect of interfering with the federal decree." The reasoning of *Wright* did not turn on the existence of a federal decree, although it was an aggravating factor, and *Davis*, by referring to the segregation itself as the "constitutional predicate," does not purport to so limit *Wright*.

But when *Milliken* uses the phrase "interdistrict violation," does it contemplate both kinds of violations or only the first, as Judge Tone seems to believe? There certainly is language in the holding from which one might infer that only the first kind, violations of the Constitution itself, can justify interdistrict relief. For example, the holding speaks of a "constitutional violation" and a "constitutional wrong."[118] However, these terms are ambiguous and if used in the broad sense could also encompass violations of the remedial obligation under *Green*, which is derived from the Constitution and predicated upon a constitutional violation.

Indeed, this broad sense seems to be the one intended in *Milliken*. Just before its holding, the plurality opinion cites *Wright* for the proposition that "[s]chool district lines . . . , are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies."[119] Similarly, Mr. Justice Stewart's concurring opinion cites *Wright* in giving as an example of a possible interdistrict violation, the situation where "state officials . . . contributed to the separation of the races by drawing or redrawing school district lines."[120]

What this means for the Indianapolis case is that the exclusion of schools from Uni-Gov need not have been purposefully discriminatory to amount to an "interdistrict violation with interdistrict effects" under *Milliken*. If it violated the State of Indiana's affirmative obligation under *Green* to desegregate Indianapolis schools, an obligation no one denies, it qualifies as a "violation." The only remaining question[121] then would be whether this violation had "interdistrict effects," which is also denied by no one.

The decisive question then is, did Uni-Gov without schools violate the state's affirmative obligations? Clearly under *Milliken*, as Judge Tone argues, the state had no affirmative duty to expand the city school district boundaries in order to remedy inner city segregation.[122] In *Milliken* the Supreme Court assumed arguendo that the State of Michigan was culpable for segregation in Detroit, yet did not mandate the state to expand the Detroit school district boundaries.[123]

118. 418 U.S. at 745. *See also id.* at 752.
119. *Id.* at 744.
120. *Id.* at 755.
121. Although the literal phrasing, "interdistrict violation and interdistrict effects," might be construed to mean that the violation itself must take place in two or more districts, this is clearly not what the Court in *Milliken* intended. For example, the Court illustrates the phrase with the situation "where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district." *Id.* at 745. Thus the acts constituting an "interdistrict violation" may take place entirely within one district, provided that they have an effect on racial segregation in the schools of another district. The Court later argues, referring to school construction and site acquisition, that "there was no evidence suggesting that the State's activities within Detroit affected the racial composition of the school population outside Detroit or, conversely, that the State's . . . activities within the outlying districts affected the racial composition of the schools within Detroit." *Id.* at 751.
122. 541 F.2d at 1227.
123. 418 U.S. at 746, 748.

But Michigan had not also expanded the City of Detroit's boundaries to embrace the suburbs into which students might be transferred. Nor, in the process of doing so, had Michigan excluded schools from the expansion, while abandoning a prior state statutory policy that the school district expand coterminously with the city. Indiana, on the other hand, did all these things with respect to Indianapolis. Although under no obligation to initiate the process, once the state voluntarily undertook a comprehensive boundary realignment potentially affecting all major government services including schools, it could not fulfill its *Green* obligations without at least *considering* the effect of various boundary locations on desegregation of Indianapolis schools.[124] Apparently it did not do or purport to do even this.[125]

Moreover, it is arguable that Indiana's obligation to use the most effective means to desegregate central city schools meant that it could not exclude them from a general expansion of city boundaries without some greater justification than a mere rational, permissible state purpose. Even if no showing was needed of the "compelling state interest" required to justify deliberate racial discrimination,[126] still some significant, demonstrably threatened state interest should have been shown to justify rejection of so obviously effective a means to fulfill the state's remedial obligations under *Green*. The vague suggestions here of some tenuous threat to citizen participation and to fair allocation of tax burdens were not enough.

The enactment of Uni-Gov, without consideration of its effect on racial segregation, and without demonstrably adequate justification for its enactment despite those effects, violated Indiana's affirmative, constitutionally grounded obligation under *Green* to use the most effective means available to desegregate Indianapolis schools. This "violation" had interdistrict effects, since it tended to perpetuate racial segregation in both the central city and

124. *Cf.* Shannon v. HUD, 436 F.2d 809, 816-17, 819, 820-23 (3d Cir. 1971). The court, relying on statutory requirements that HUD "effectuate" and "affirmatively" promote nondiscrimination policies, held that HUD "must utilize some institutionalized method whereby, in considering site selection or type selection [of federally-aided-low rent housing], it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts." *Id.* at 821. "[C]olor blindness is impermissible." *Id.* at 820.

Indiana's obligation under *Green* affirmatively to remedy prior constitutional violations in Indianapolis is at least as broad and forceful as the statutory obligations relied upon in *Shannon*. *Compare* 42 U.S.C. §§ 2000(d), 2000(d)-1, 3601, and 3608(d)(5) (1970 & Supp. IV 1974) *with* the quotation from *Green* in note 129 *infra*.

125. *See* 541 F.2d at 1214, 1225-27.

126. *E.g.*, Evans v. Buchanan, 393 F. Supp. 428, 439-41 (D. Del.), *aff'd*, 423 U.S. 963 (1975). *Evans*, however, adopted the view, clearly erroneous after *Davis*, that segregative effect alone suffices to trigger the "compelling State interest" test. 426 U.S. at 242. Still, *Evans* may nonetheless be affirmed on the grounds that segregatory "effect" was enough in that case. At the time the statute with segregatory effect was enacted, "the State Board had not yet satisfied its obligation to eliminate the vestiges of *de jure* segregation in the Wilmington schools," 393 F. Supp. at 442, and *de jure* segregation had been practiced on an interdistrict basis. *Id.* at 437. (Judge Tone recognized this in distinguishing *Evans* from the Indianapolis case. 541 F.2d at 1227). Thus *Evans* appears to fall within the *Wright* category of cases, in which discriminatory effect is enough to show violation of a state's remedial obligations under *Green*. *See* notes 111-13 and accompanying text *supra*.

suburban school districts. It was, in short, an "interdistrict violation" under *Milliken*. Interdistrict relief was therefore appropriate in *Board of School Commissioners*.

A similar argument can be made concerning the siting of public housing. As the *Board of School Commissioners* majority noted, "It is obvious that there is a close relationship between the racial balance in housing and the racial balance in schools."[127] Because of that close relationship, Indiana's obligations under *Green* arguably included the obligation to utilize state housing programs to maximize school desegregation in Indianapolis.[128] The failure to do so, without even consideration of the effects of housing sites on school desegregation, and without demonstrably adequate justification for confining the public housing to the central city despite those effects, violated the state's remedial obligations under *Green*. The siting decisions amounted to an interdistrict violation with interdistrict effects and justified interdistrict pupil transfers.

The housing injunction in *Board of School Commissioners* was not only appropriate but could have gone even further.[129] The housing authority, an agency of the State of Indiana, was at all relevant times empowered to operate in an area transcending the central city boundaries.[130] Relief related to future housing sites anywhere within Uni-Gov's boundaries (where the housing authority can now operate) is therefore not really "interdistrict" in the *Milliken* sense. Just as in *Hills v. Gautreaux*[131] the "relevant geographic area" for the Chicago and federal housing agencies was the Chicago "housing market area,"[132] so the relevant geographic area for the authority's administration of housing programs in this case is Uni-Gov. And as in *Hills*, a decree directing the Indianapolis housing authority to take affirmative steps to site new public housing in suburbs within Uni-Gov need not "impermissibly interfere with local governments and suburban housing authorities."[133]

127. 541 F.2d at 1222.

128. *Green* speaks of an "affirmative duty to take whatever steps might be necessary to convert to a unitary system . . ." 391 U.S. at 437-38. *Green* embodies an "implicit command . . . . that all reasonable methods be available to formulate an effective remedy." North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971).

129. This bold statement must be subjected to at least one caveat. The district court enjoined further public housing not only in black areas of the central city, as did the court in the Chicago case, but in the entire central city, including its white areas. *Compare* 419 F. Supp. at 186 *with* Gautreaux v. Chicago Hous. Auth., 304 F. Supp. 736, 738-39 (N.D. Ill. 1969) *and* Crow v. Brown, 332 F. Supp. 382, 395-96 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972). In its petition for certiorari, the Housing Authority questioned whether this order, by barring public housing even in areas of the city populated by whites, contravenes "congressional policy as set out in HUD guidelines, adopted pursuant to the Civil Rights Acts of 1964 and 1968, under which racial concentration is only one of several items to be considered and balanced in determining location?" 45 U.S.L.W. at 3370; *see* note 8 *supra*. Even if the Housing Authority were sustained on this contention, any defect could be cured by modifying the district court's order along the lines set forth in *Gautreaux* and *Crow*.

130. *See* note 68 *supra*.

131. 425 U.S. 284 (1976).

132. *Id*. at 300.

133. *Id*. However, *Hills* adds little to the extent to which interdistrict student transfers can

Current Status of the Case

Shortly before the preceding text was to go to print, the United States Supreme Court vacated the judgment in the Indianapolis case and remanded[134] for further consideration in light of *Davis* and the Court's recent decision in *Arlington Heights v. Metropolitan Housing Development Corp.*[135] The most important thing to be said of this remand is that it by no means requires reversal.[136] It does demand a re-examination of the court of appeals' reasoning and, in particular, its initial treatment of *Davis*.

In light of *Davis* and *Arlington Heights*, two essential questions appear to face the court of appeals on remand. First, was there an interdistrict violation within Uni-Gov and, second, if there was, does it support a remedial decree transferring students across the inner city school district line to the extent this one does?

As to the first question, the court of appeals has at least four basic options:

(1) The court could find no purposeful interdistrict constitutional violation and no violation outside the central city of the state's remedial obligations and accordingly reverse the "interdistrict" portion of the decree below.

With respect to the housing violations, this option seems to have been ruled out by the court's earlier finding of purposeful discrimination.[137] With respect to the decision to enact Uni-Gov without schools among its functions, this option would be inconsistent with the evidence of purposeful discrimina-

be predicated upon housing violations here. Such relief would clearly interfere with the operation of local suburban school districts. It must therefore find justification not in a *Hills* theory, but only in *Milliken*'s authorization of interdistrict relief when there exists an interdistrict violation with interdistrict effects. *See id.* at 296-97, 300-06.

134. 45 U.S.L.W. 3508 (U.S. Jan. 25, 1977) (Nos. 76-212, 458, 468, 515, 522).

135. 97 S. Ct. 555 (1977), *discussed at* note 107 *supra*.

136. Compare *Arlington Heights*, where the Court reversed on the constitutional issue, remanding only on a statutory issue. 97 S. Ct. at 566. Here the Court, in whose decision of remand Mr. Justice White joined, may simply be doing what he urged in *Arlington Heights*. There he dissented from the reversal, arguing:

> The Court gives no reason for its failure to follow our usual practice in this situation of vacating the judgment below and remanding in order to permit the lower court to reconsider its ruling in light of our intervening decision. The Court's articulation of a legal standard nowhere mentioned in *Davis* indicates that it feels that the application of *Davis* to these facts calls for substantial analysis. If this is true, we would do better to allow the Court of Appeals to attempt that analysis in the first instance. Given that the Court deems it necessary to re-examine the evidence in the case in light of the legal standard it adopts, a remand is especially appropriate. *Id.* at 567.

137. That finding should not be disturbed because of the Supreme Court's explication in *Arlington Heights* of *Davis* and the factors to be considered in discerning purpose. The Supreme Court listed, "without purporting to be exhaustive," the following categories of "circumstantial and direct evidence": (1) the "impact," (2) the "historical background," (3) the "specific sequence of events leading up to the challenged decision," (4) "[d]epartures from the normal procedural sequence," and (5) substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." 97 S. Ct. at 564.

There are no surprises in this list; indeed it reflects the kinds of factors discussed in the court of appeals' opinion in the Indianapolis case, and which apparently underlay its finding of purposeful discrimination in the siting of public housing.

tion previously discussed,[138] and with the violation of the state's remedial obligation articulated earlier.[139]

(2) The court could reiterate its prior finding of racially discriminatory purpose in the housing decisions, and make such a finding with respect to the Uni-Gov decision for the reasons previously stated[140] and proceed to consider the extent of the remedy.

(3) Instead of, or in addition to, finding racial purpose, the court could conclude that the Uni-Gov decision violated the state's remedial obligations for the reasons already stated[141] and proceed to consider the extent of the remedy. The *Wright* theory outlined above[142] was not urged upon the Supreme Court by any of the parties and is not inconsistent with the remand for further consideration in light of *Davis* and *Arlington Heights*. However, the novelty of this theory in a *Milliken* context, coupled with its departure from the results if not the reasoning of the Supreme Court's recent school decisions,[143] might earn it a less hospitable reception by the Justices than simply finding that race was a factor in the Uni-Gov decision.

(4) The court of appeals could remand to the district court for further findings, and possibly evidentiary hearings, on the issue of whether race was a factor in the Uni-Gov decision.

In the interest of expedition and for reasons stated earlier[144] no remand for findings concerning racial purpose should be necessary if the court, on this record, discerns that race was a factor.

On the other hand, if the court interprets the order of remand to condition an interdistrict remedy on a finding of racially discriminatory purpose and is unable to so find on this record, it would be appropriate to remand for further findings and possibly evidentiary hearings. Neither the district court nor the parties had the benefit of the Supreme Court's subsequent rulings in *Davis* and *Arlington Heights*, and they ought not to be foreclosed from any opportunity to respond to the constitutional test as newly clarified. Constitutional rights are too important to be waived by lack of foresight, at least where many courts of appeals, including this one, were also unable to predict the Supreme Court's recent insistence upon proof and findings of racial purpose.[145]

If the court of appeals finds an interdistrict violation, it then faces the second question, the extent of the remedy. Are interdistrict transfers which

138. *See* text accompanying notes 99-109 *supra*.
139. *See* text accompanying notes 110-128 *supra*.
140. *See* text accompanying notes 99-109 *supra*.
141. *See* text accompanying notes 110-128 *supra*.
142. *Id*.
143. Austin Independent School Dist. v. United States, 97 S. Ct. 517 (1977); Dayton Bd. of Educ. v. Brinkman, 518 F.2d 853 (6th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3485 (U.S. Jan. 18, 1977) (No. 76-539).
144. *See* note 99 and text accompanying notes 98 & 99 *supra*.
145. *See* Mr. Justice White's dissent in *Arlington Heights*, *quoted at* note 137 *supra*.

aim for fifteen percent minority enrollment in most schools within Uni-Gov appropriate?[146]

Until recently, this would not have been a serious question. Once a constitutional violation was found, lower courts had a relatively free hand to use it as the basis for a wide-ranging remedial decree within a single district.[147] Presumably under *Milliken*, once an interdistrict violation were found, the trial court could reach anywhere within the affected districts.[148]

However, recent Supreme Court decisions suggest that even where interdistrict violations are shown, no interdistrict student transfers can be ordered if defendants can show that suburban schools would have been racially segregated even absent the violations.[149] Since it is unlikely that the parties have had a fair opportunity to present their cases on this newly defined issue, a remand for pertinent evidentiary presentations by both sides would seem warranted if this remedial approach is adopted.

Especially here, where the district court has relied upon a history and pattern of various kinds of racial segregation in Indiana,[150] unraveling strands of causation would be enormously difficult. Whether the student transfer remedy would ultimately be sustained might depend upon how heavy a burden of proof were in practice demanded of defendants.

Looking Forward

As the Indianapolis case already illustrates, the aftermath of *Milliken* has been confusion. Under the approach there adopted and still being elaborated by the Supreme Court, the propriety of metropolitan-wide relief seems to turn largely on the factual idiosyncracies of each city. The results in Detroit, Indianapolis, and Wilmington may all differ. Yet the underlying national pattern of wrong seems too basic and too common to justify such drastic variations in the permissible geographical scope of the remedy. Perhaps, as Mr. Justice Powell urged in *Keyes*, the Supreme Court's approach should make results depend more on common reality and less on elaborate conceptual refinements. In the metropolitan setting, that reality is one in which state and local government officials are neither fully responsible for, nor wholly innocent in, the racial gap between increasingly white

146. *See* text accompanying notes 61-71 *supra*.

147. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

148. *See* Milliken v. Bradley, 418 U.S. at 744-45.

149. *See* Austin Independent School Dist. v. United States, 97 S. Ct. 517, 517-19 (1977) (Powell, J., concurring); Mt. Healthy City Bd. of Educ. v. Doyle, 97 S. Ct. 568, 575 (1977); Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 566 n.21 (1977); Dayton Bd. of Educ. v. Brinkman, 518 F.2d 853 (6th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3485 (U.S. Jan. 17, 1977) (No. 76-539).

At least pending a decision in *Brinkman*, it is not yet clear that the burden-shifting remedial approach stated in *Mt. Healthy* and *Arlington Heights* necessarily applies in the school desegregation context. In *Austin*, Mr. Justice Powell argued that it does, but six Justices refrained from joining in his concurring opinion.

150. *See* 419 F. Supp. at 182-83.

suburban schools and increasingly black central city schools. A fairer, more uniform response to this reality is needed.

If the Supreme Court eventually reverses the decrees granting interdistrict remedies in the Indianapolis case and in the Wilmington case which the Court may yet give plenary review,[151] uniformity of result among cities will indeed be achieved. *Milliken*'s meaning will then be clear: subject to rare, hypothetical exceptions, the present Court will not require the relatively affluent, white suburbs to participate in ameliorating the educational residue of historic discrimination in the relatively poor, black central cities. If, on the other hand, the Supreme Court ultimately affirms interdistrict decrees in the pending cases, the door could be open for a gradual evolution toward a remedial presumption like the one already used for awarding attorneys fees in civil rights cases generally,[152] or the one used for awarding back pay[153] and retroactive seniority[154] in employment discrimination cases. Metropolitan-wide relief would "ordinarily" be appropriate, "unless special circumstances would render [the remedy] unjust."[155]

EMPLOYMENT DISCRIMINATION ON THE BASIS OF RACE, SEX OR AGE

The court of appeals this term promoted effective judicial redress of employment discrimination against blacks and women by a consistently liberal interpretation of Title VII of the Civil Rights Act of 1964.[156] Two non-Title VII cases, however, deserve initial comment because of their potentially broad implications for equal protection cases generally and sex discrimination cases in particular.

In *White v. Fleming*,[157] the court meticulously reviewed the recent controversy over the proper standard of review in equal protection cases, but at least for the moment declined to pass judgment on it. *White* involved a prosecution under a Milwaukee ordinance prohibiting female employees of taverns from sitting with male patrons.[158] In holding that the sex discrimination in the ordinance violated the equal protection clause, the court identified

151. *See* note 15 *supra*.

152. Northcross v. Board of Educ., 412 U.S. 427, 428 (1973) (school desegregation); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (public accommodations).

153. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). "[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421. Analogously, the Court could rule in school cases that metropolitan relief should be denied only for reasons which, if applied generally, would not effectively bar the remedy throughout the nation.

154. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). *Franks* applied the backpay test of *Albemarle*, *see* note 153 *supra*, verbatim to seniority relief. 424 U.S. at 770-71.

155. Northcross v. Board of Educ., 412 U.S. 427, 428 (1973).

156. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. IV 1974) [hereinafter refered to as Title VII].

157. 522 F.2d 730 (7th Cir. 1975). *White* was decided late last term.

158. *Id.* at 730-31. The ordinance also prohibited female employees from sitting or standing at or behind the bar. Its several "interwoven" provisions were struck down in their entirety. *Id.*

three general standards of review, but did not clearly indicate which standard it was applying in the case at bar.

The first standard was the "rational basis" test, which demands that a legislative classification bear a rational relationship to the objective of the law in which it appears. The second was the "strict scrutiny" test, under which discrimination can be justified only if essential to promote a "compelling state interest," and which has been used in cases involving "fundamental interests" or "suspect classifications." Four Justices of the United States Supreme Court—but only four—have opined that sex is such a suspect classification.[159] The third, "intermediary" standard has been invoked by some courts dissatisfied with the unhappily rigid choice between the first test, which almost any discriminatory law can meet, and the second test, which almost none can meet. For lack of a better shorthand, this intermediary test might be described as the "fair and substantial" relation test; it requires the discrimination to bear a fair and substantial relation to the statutory objective.[160]

After carefully reviewing cases applying the three tests, the court in *White* summarized ambiguously: "[W]hatever formulation the [Supreme] Court may ultimately adopt, it can at least be divined . . . that we may not accept a classification based solely on sex without further inquiry as to whether the differences between men and women rationally justify the classification."[161]

If this language seemed to suggest adherence to the traditional rational basis test, the court's subsequent analysis suggested some sort of intermediary test. Under the rational basis test, "a classification must be sustained 'if any state of facts reasonably may be conceived to justify it.' "[162] However, in evaluating the Milwaukee bar ordinance, the court refrained from the kind of imaginative speculation too often stimulated by this doctrine. Assumptions that prostitutes tend to be women and to frequent bars, asserted the court, "do not in logic or experience support broader assumptions about all or most women who work in bars or the relative proclivities of men and women, . . ."[163] The equal protection clause does not tolerate "stereotyped assumptions concerning propensities thought to exist in some members of a given sex."[164] The court concluded, "This is not necessarily to say that sex is

159. Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (Brennan, Douglas, White, Marshall, J.J.) (plurality opinion).

160. The tests are discussed *id.* at 733-36, and the "fair and substantial" relation test at 734-35 & 735 n.6. *See also* Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2566-68 (majority), 2568-73 (Marshall, J., dissenting).

161. 522 F.2d at 736.

162. *Id.* at 734. While acknowledging some cases in which the United States Supreme Court was less willing than it formerly had been to ascribe legitimate purposes to the legislative body, the court viewed the "reasonably conceivable" language as "reaffirmed" by Weinberger v. Salfi, 422 U.S. 749 (1975).

163. 522 F.2d at 737.

164. *Id.*

an inherently suspect classification, a point which the Supreme Court has yet to decide."[165]

Only two months later, however, in another opinion written by Judge Tone, the court seemed to be taken in by the very kind of "stereotyped assumptions" it rejected in *White*. In *Mims v. Board of Education*,[166] five female and six male employees in the job category "Film Serviceman I" were laid off. The six men, but not the women, were kept on temporarily for doing "heavy work of moving equipment."[167] The women filed suit charging sex discrimination. The district court found that these facts did not demonstrate sex discrimination and the court of appeals upheld the finding as not clearly erroneous. The defendant, explained the court, "determined to retain the six males because he considered the temporary males able to do the heavy lifting and moving that the female civil servants would be unable to do. It is reasonable to take into account the individual's physical capabilities in determining who can perform a certain kind of work."[168]

Yet that is precisely the point. The women were entitled to be judged on their *individual* physical capabilities relative to those of the men and not to be excluded on the basis of a stereotyped assumption about the frailty of their sex. Indeed, in also holding that the women had been denied due process for lack of a hearing before their layoffs, the court tacitly admitted that the frailty might lie in the stereotype, not in the women. "Plaintiffs at least were entitled to an opportunity to attempt to demonstrate that they were capable of performing the work assigned to the six temporary employees."[169]

If the ruling on the merits in *Mims* is less enlightened than in *White*, the ruling on the remedy in *Mims* is even more difficult to understand. Having determined that plaintiffs were denied due process, the court held defendants immune from damages on the ground that they had acted in good faith and not unreasonably.[170] But it then proceeded to deny plaintiffs any remedy whatsoever. It explained only that "[f]ive years after the action complained of is too late to order injunctive relief," to reinstate plaintiffs or to offer them another position.[171] Yet the five years had passed almost entirely because the district court had twice ruled incorrectly on the merits, and had twice been overruled by the court of appeals. On this second appeal, however, the district

165. *Id.* at 737. *But see* Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2569 (1976) (Marshall, J., dissenting).

166. 523 F.2d 711 (7th Cir. 1975).

167. *Id.* at 713, 714.

168. *Id.* at 715.

169. *Id.*

170. The court also held that the Board was not subject to the court's jurisdiction because it was not a "person" under 42 U.S.C. § 1983 and plaintiffs had not pleaded alternative jurisdiction under 28 U.S.C. § 1331. 523 F.2d at 716.

171. 523 F.2d at 715.

court's erroneous ruling was technically affirmed, "[s]ince plaintiffs are not entitled to relief."[172] Plaintiffs, after five years of apparently diligent prosecution of their lawsuit, had a right without a remedy.

The apparent injustice in *Mims* contrasts with a more favorable result obtained to date by plaintiff in *Evans v. United Air Lines, Inc.*,[173] one of the more important Title VII cases decided this term and presently pending before the United State Supreme Court. Two issues were presented in *Evans*, albeit obscurely. One was substantive, having to do with whether a seniority system which perpetuates the effects of past discrimination is itself an independent violation of Title VII. The other was jurisdictional, having to do with when the statutory 180-day limitations period under Title VII begins to run in a case challenging such a seniority system.[174]

Plaintiff Evans had "involuntarily resigned" as a United stewardess in February 1968, because of a company policy which disqualified women who married from continuing as stewardesses.[175] In November 1968, United discontinued this policy, which was ruled unlawfully discriminatory in 1971.[176] In February of 1972 Evans was rehired without the seniority she had accrued through 1968. A year later she filed a complaint with the Equal Employment Opportunity Commission[177] charging that this denial of seniority constituted sex discrimination.

The district court rejected plaintiff Evans' argument that the 1972 denial of seniority, by perpetuating the effects of past discrimination, was a "current and continuing" violation of Title VII.[178] The court of appeals initially agreed, but on rehearing reversed and remanded.[179] The substantive issue was prima facie simple. The Supreme Court had previously ruled that under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[180] United's policy of denying accrued seniority to persons rehired after a prior termination, when applied to persons like Evans whose termination had been caused by a discriminatory employment practice, unlawfully operated to "freeze in" the effects of the prior discrimination.[181] Consequently the 180-day limitations period was no

172. *Id.* at 713, 716.
173. 534 F.2d 1247 (7th Cir.), *cert. granted*, 96 S. Ct. 308 (1976) (*Evans* is also discussed at pages 520-40 *infra*). *See also* Nance v. Union Carbide Corp., 540 F.2d 718 (4th Cir.), *petition for cert. filed*, 45 U.S.L.W. 3475 (U.S. Dec. 20, 1976) (No. 76-838).
174. *See* 534 F.2d at 1248, 1250.
175. *Id.* at 1247-48.
176. Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).
177. Hereinafter referred to as EEOC.
178. 534 F.2d at 1248.
179. *Id.*
180. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971), *quoted in* 534 F.2d at 1250 n.15.
181. 534 F.2d at 1250.

bar to suit, because plaintiff Evans clearly filed her EEOC charge within 180 days of the "current and continuing" discriminatory denial of her accrued seniority.[182]

United's defense on the merits lay in an exception to Title VII which allows an employer to treat employees differently "pursuant to a bona fide seniority . . . system."[183] However, *Franks v. Bowman Transportation Co.*,[184] decided by the United States Supreme Court while the petition for rehearing in *Evans* was pending, seems to answer this defense. The Supreme Court held that this exception to Title VII protects the operation of a seniority system only when challenged as perpetuating effects of discrimination occurring "prior to the effective date of the Act."[185] Since Title VII was effective in 1965 and the original discrimination against plaintiff Evans did not occur until 1968, *Franks* clearly indicates that the "bona fide seniority system" exception could not be invoked against Evans. The court of appeals properly so held, after rehearing the case in light of *Franks*.[186]

Apart from the bona fide seniority system defense, defendant United argued with superficial plausibility that "if a discriminatory act is considered to continue for so long as there is some lingering effect, every alleged discriminatory act could be litigated at any time. A discrimination, . . . would never be final, despite the limitation period . . . , since there might always be some lingering effects—monetary or otherwise."[187] The court's opinion does not make clear whether United urged this as a defense on the merits against an expansive interpretation of "unlawful employment practices" under Title VII, or as an argument on the proper interpretation of the statutory limitations period, or in some other way. Certainly the argument cannot prevail as a defense on the merits. Cases striking down practices which "freeze in" effects of past discrimination have long since passed it by.[188] Nor

182. *See id.* at 1251.
183. 42 U.S.C. § 2000e-2(h) (1970 & Supp. IV 1974); *see* 534 F.2d at 1249.
184. 424 U.S. 747 (1976).
185. *Id.* at 761.
186. 534 F.2d at 1250-51. In so holding, the court of appeals labored valiantly to distinguish the facts of Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1316-20 (7th Cir. 1974), *cert. denied*, 96 S. Ct. 2214 (1976). The facts may indeed be technically distinguishable, but clearly much of the thrust of *Waters'* reasoning on the seniority issue has been dissipated by *Evans*.
187. These are the words of the court, not of United. 534 F.2d at 1249.
188. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) and cases cited in *Evans*, 534 F.2d at 1250 n.15. These cases demonstrate that International Machinists v. NLRB, 362 U.S. 411 (1960), is not dispositive of *Evans*. In *Machinists*, the Court rejected under the National Labor Relations Act a limitations argument parallel to that made under Title VII by plaintiff Evans. However, the limitations provision there was construed strictly because of the purposes of the statute in which it appeared, which were "overall" to promote industrial peace, including "stability of bargaining relationships." *Id.* at 428, 425. The complainant's interest, "employee freedom of choice," was important but secondary, *see id.* at 428, and Congress manifested a specific intention not to disturb collective bargaining agreements more than six months after their inception, however unlawful. *Id.* at 426-27. The dual purposes of Title VII, in contrast, are to eradicate discrimination and to make victims whole so far as possible. Franks v. Bowman

can it prevail in interpreting the statutory limitations period. If the offense is indeed current and continuing, United's argument would have the limitations period end before the offense is committed.

The argument deserves a hearing, if at all, on the remedy.[189] If a Title VII plaintiff inexcusably waits too long, either she should be denied relief altogether or her relief should be curtailed, such as by denying all credit for accrued seniority.

But plaintiff Evans did not wait too long. The offense here—refusal to grant her accrued seniority—did not and could not commence until she was rehired in February of 1972. She is not seeking damages for her involuntary termination in 1968. True, after being rehired she waited a year before filing charges with the EEOC. But given the novelty of her claim and the fact that she, like most Title VII claimants, is not a lawyer, one year is hardly an unconscionable period, particularly on a claim of continuing wrong.[190] Just as Title VII plaintiffs are not held to professional pleading standards,[191] so they ought not be held to the standards of expedition demanded of corporate employers advised by specialized counsel on permanent retainers.

United thus presented a good argument in theory but not on these facts. The result reached by the court of appeals deserves to be affirmed by the Supreme Court.

The non-technical reception which Title VII plaintiffs deserve was underscored by the court of appeals sitting en banc in *Jenkins v. Blue Cross Mutual Hospital Insurance*.[192] On her EEOC complaint form, plaintiff had indicated the nature of her claim by checking the box for race discrimination,

Transp. Co., 424 U.S. 747, 763-64 (1976). These purposes counsel a more flexible reading of the limitations period under Title VII. Moreover, the "freeze-in" cases have regularly brought seniority relations originating more than six months prior to the filing of a discrimination charge within reach of judicial redress under Title VII.

189. Both retroactive seniority and backpay can be denied, and presumably limited, in particular cases "for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Franks v. Bowman Transp. Co., 424 U.S. 747, 771 (1976) (retroactive seniority); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (backpay). It seems fair to extend this principle to the "accrued seniority" remedy sought by plaintiff Evans, as well as to the backpay she seeks. 534 F.2d at 1247.

The equitable defense of laches is apparently not available to defendant United, even though plaintiff Evans seeks equitable relief, because of the congressional specification of a statutory limitations period. *See* Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946). Nonetheless, laches principles might be considered by analogy on the remedy issue. *See also* Pasadena Bd. of Educ. v. Spangler, 96 S. Ct. 2697, 2704-05 (1976).

190. *Cf.* Contract Buyers League v. F. & F. Inv., 300 F. Supp. 210, 220-21 (N.D. Ill. 1969) (action not barred by statute of limitations with respect to sales contracts which had not terminated before the running of the statute; purpose served by such statutes is to ensure that stale claims are not decided), *aff'd sub nom.* Baker v. F. & F. Inv., 420 F.2d 1191, 1200 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970).

191. This is reflected in the case discussed next, Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164 (7th Cir. 1976) (en banc), *cert. denied*, 97 S. Ct. 506 (1977).

192. 538 F.2d 164 (7th Cir. 1976) (en banc), *cert. denied*, 97 S. Ct. 506 (1977).

but not the box for sex discrimination. Her narrative complaint explained that she had experienced no problem until she began wearing an Afro hair style. She was then accused of being "the leader of the girls." The complaint asserted that she was forced either to transfer to another job or to terminate her employment, and that a white friend "might have been denied her promotion because of her association with me."[193]

The court held these claims before the EEOC sufficient to qualify plaintiff to file a subsequent class action on behalf of "all black and female persons who are employed, or might be employed, by Blue Cross-Blue Shield, Inc.,"[194] and, the court implied, to " 'launch a full scale inquiry' " into employment discrimination on the basis of race and sex at Blue Cross-Blue Shield.[195] The controlling standard, all members of the court agreed, was that a Title VII suit could " 'properly encompass any . . . discrimination like or reasonably related to the allegations of the charge [before the EEOC] and growing out of such allegations.' "[196] Three judges, however, including the two who had formed the majority on the earlier, contrary panel decision, dissented on the application of the standard to the facts.

In the course of its opinion the court reaffirmed that "Title VII is to 'be construed and applied broadly,' "[197] and expressly adopted a policy already recognized elsewhere "of being 'solicitous of the Title VII plaintiff.' "[198] In any event, the full court agreed that wholly apart from Title VII, plaintiff's EEOC complaint could not limit her eligibility to represent a class on her race discrimination complaint under 42 U.S.C. § 1981.[199]

In addition to *Evans* and *Jenkins*, the court ruled for plaintiffs in a number of other cases raising procedural issues under Title VII. In *Adams v. Brinegar*,[200] the court ruled that the 1972 amendment subjecting federal government employers to Title VII applied retroactively to cases pending administratively on its effective date.[201] In *McGuire v. ALCOA*,[202] the court

193. *Id.* at 167.
194. *Id.* at 169.
195. *Id.* at 168.
196. *Id.* at 167 (quoting Danner v. Phillips Petroleum Co., 447 F.2d 159, 162 (5th Cir. 1971)).
197. *Id.* at 167 (quoting Motorola, Inc. v. McLain, 484 F.2d 1339, 1344 (7th Cir. 1973)).
198. 538 F.2d at 168 (citing, inter alia, Gamble v. Birmingham R.R., 514 F.2d 678, 687-89 (5th Cir. 1975)).
199. 538 F.2d at 166. However, the court remanded for consideration of the plaintiff's eligibility to serve as class representative in light of a factual question as to whether her employment terminated voluntarily, and also a question of possible mootness. *Id.* at 169. Earlier the court had also noted a question concerning the appealability of the district court's denial of class certification, which apparently did not matter since plaintiff had also appealed a denial of a preliminary injunction. *Id.* at 166 n.2.
200. 521 F.2d 129 (7th Cir. 1975).
201. 42 U.S.C. § 2000e-16 (1970 & Supp. IV 1974).
202. 542 F.2d 43 (7th Cir. 1976).

held that the ninety-day period for filing suit under Title VII begins to run on the date the plaintiff receives a "right-to-sue" letter from the EEOC, not on the earlier date when notice is received from the EEOC that the letter may be requested.[203] In *Romasanta v. United Air Lines, Inc.*,[204] the court permitted a member of a class which the district court had declined to certify to intervene in the named plaintiffs' Title VII action, four years after it was filed but only three weeks after the final order and four days after the would-be class member learned for certain that the denial of class certification was not being appealed. In *Caro v. Schultz*,[205] the court correctly anticipated the Supreme Court's subsequent ruling in *Chandler v. Roudebush*[206] that federal employees are entitled to a trial de novo in Title VII suits, even if the record of the administrative hearing clearly fails to establish a finding of discrimination. Finally, in *Denofre v. Transportation Insurance Rating Bureau*,[207] after a district court ruled against a Title VII plaintiff without making all the specific findings of fact and conclusions of law required by rule 52(a) of the Federal Rules of Civil Procedure, the court of appeals remanded for the necessary findings and conclusions to be made.[208] Judge Swygert, however, dissented on the ground that nothing less than a new trial would do.[209] The portion of the record below quoted in his dissent reveals that the court of appeals' liberal attitude toward Title VII actions is not necessarily reflected in the trial courts. The trial judge had voiced the following opinion just before granting defendant's motion to dismiss without argument.

> These days, everytime a woman or a black or a Latino or an elderly person or a young person loses his job, it is a violation these days that their civil rights have been violated, and they flood the federal court not only here but throughout the country and this is a new way of trying to retain your job, regardless of why they are released.[210]

Transient frustration, perhaps, produced these remarks. Nonetheless, it is difficult to understand why any plaintiff should be remanded to a trial judge who has expressed such blatant bias.

Two contrasting decisions, one granting and one denying a preliminary injunction, offer useful lessons for Title VII practitioners in challenges to system-wide employment discrimination in government agencies.[211] In

203. *Id.* at 45; 42 U.S.C. § 2000e-5(f)(1) (1970 & Supp. IV 1974).

204. 537 F.2d 915 (7th Cir. 1976), *cert. granted sub nom.* United Air Lines, Inc. v. McDonald, 45 U.S.L.W. 3408 (U.S. Dec. 6, 1976) (No. 76-545).

205. 521 F.2d 1084 (7th Cir. 1975), *cert. denied sub nom.* Caro v. Simon, 426 U.S. 919 (1976).

206. 425 U.S. 840 (1976).

207. 532 F.2d 43 (7th Cir. 1976).

208. *Id.* at 45.

209. *Id.* at 45-46.

210. *Id.* at 46.

211. In a third Title VII public employment case, the court declined to rule on an appeal from a preliminary injunction, pending a possible appeal from the permanent injunction which had already been issued by the district court. United States v. City of Chicago, 534 F.2d 708 (7th Cir.

Crockett v. Green,[212] the district court granted a preliminary injunction against racial discrimination in employment of skilled craft workers by members of the Milwaukee Board of City Service Commissioners. The order enjoined defendants from demanding apprenticeship and experience as prerequisites for some positions. Defendants were ordered to hire one black person for every two openings in each skilled craft job classification until the percentage of blacks in that classification equalled the percentage of blacks in Milwaukee.[213]

The court of appeals held that the ratio hiring, "for a limited period as part of a broad equitable remedy," was within the district court's discretion.[214] Without explanation, the court also held that the district court's choice of the percentage of blacks in Milwaukee (seventeen percent) as a target ratio, rather than the "considerably lower" percentage of blacks in the metropolitan area, was within its discretion.[215] Finally, the court rejected defendants' contention that the ratios should not immediately apply to upper-level positions which required extensive training and to which whites already in entry-level jobs legitimately expected to be promoted. The court noted that the order did not require employment of "nonqualified employees".[216]

Finally, the court cautioned that it was not reviewing a permanent injunction. One could not confidently predict how the ratio hiring system would work, and the district court might in the future modify its order as needed.[217]

Instead of seeking affirmative relief specifying the racial composition of new recruits, as in *Crockett*, plaintiffs in *Washington v. Walker*[218] sought temporarily to bar the Illinois State Police from hiring any new troopers.[219] The district court refused to grant such a preliminary injunction, and the court of appeals affirmed, mainly because "the harm to the public from unfilled state police positions out-weighed the injury to the plaintiffs."[220] In addition,

1976). The court later ruled on the permanent injunction, but the ruling was too recent for inclusion in this review. United States v. City of Chicago, Nos. 76-1113, 1152, 1205 and 1344 (7th Cir. Jan. 11, 1977), *aff'g in part, rev'g in part and remanding for further proceedings* 411 F. Supp. 218 (N.D. Ill. 1976).

212. 534 F.2d 715 (7th Cir. 1976). In addition to the rulings discussed in the text, the court upheld the certification of a class of all blacks capable of working in or being trained for skilled craft jobs and who have been or will be denied such jobs because of their race, and the designation of the sole named plaintiff, a trained bricklayer, to represent it. The court declared, "Class action status is particularly appropriate in a case involving class discrimination." *Id.* at 718.

213. *Id.* at 717.

214. *Id.* at 718.

215. *Id.*

216. *Id.* at 719.

217. *Id.*

218. 529 F.2d 1062 (7th Cir. 1976).

219. *Id.* at 1064.

220. *Id.* at 1065.

defendants had already begun a program of ratio hiring as a result of negotiations with the EEOC, and had more than fulfilled their first year's goals.[221]

Two other cases decided this term illustrate the difficulties faced by victims of employment discrimination in the absence of a clearcut statutory remedy. Plaintiff in *Cohen v. Illinois Institute of Technology*[222] had the misfortune to suffer alleged sex discrimination before the effective date either of the Illinois Fair Employment Practices Act[223] or of Title VII's coverage of educational institutions,[224] "although the victim of comparable discrimination occurring today would clearly have a remedy under either of those statutes."[225] She was therefore forced to rely on the alternative theories that the officials of the private university had acted under color of state law so as to bring the discrimination within 42 U.S.C. § 1983, or that they had conspired to deprive her of federally protected rights under 42 U.S.C. § 1985(3).[226]

Neither theory succeeded. Although Illinois Institute of Technology received some financial support from the state, the court of appeals held that it was "not so heavily dependent on the State as to be considered the equivalent of a public university for all purposes and in all its activities."[227] Elsewhere, action by private universities receiving "substantial financial support" has been regarded as tantamount to state action, but I.I.T. received "only a small fraction" of its revenue from the state. Even so, that would have been enough "to require a finding of state action if that support ha[d] furthered the specific policies or conduct under attack."[228] But here it had not.

For the same reason, plaintiff's section 1985(3) claim failed. Unlike victims of racial discrimination, she had no federally protected rights to equal treatment in the purely private sector under the thirteenth amendment, and the fourteenth amendment forbids arbitrary sex discrimination only by states.[229] Thus, even assuming that defendants conspired to discriminate against her, they did not conspire to deprive her of any federal rights under either

221. *Id.* at 1064, 1065.

222. 524 F.2d 818 (7th Cir. 1975) (Stevens, J.), *cert. denied*, 425 U.S. 943 (1976).

223. ILL. REV. STAT. ch. 48, § 853(a) (1975) (effective Aug. 27, 1971).

224. *See* 42 U.S.C. § 2000e-1 (1970 & Supp. IV 1974) (effective Mar. 24, 1972).

225. 524 F.2d at 822.

226. *Id.* at 821. Plaintiff asserted five "state action" theories: (1) I.I.T.'s name gave an appearance of state action; (2) state financial and other aid; (3) pervasive state regulation; (4) the state's failure to take affirmative action to prevent sex discrimination by I.I.T.; and (5) I.I.T.'s "public function." *Id.* at 823-24 & 826 n.24. Only the second and third theories were seriously considered by the court, which rejected both for the reasons stated in text accompanying notes 227-30 *infra*.

227. *Id.* at 825.

228. *Id.* at 825-26, 825 n.18.

229. *Id.* at 828-29; *see* Griffin v. Breckenridge, 403 U.S. 88 (1971); Dombrowski v. Dowling, 459 F.2d 190, 194 (7th Cir. 1972).

amendment. Therefore, no cause of action was stated under section 1985(3).[230]

Cohen must be read with care. It does not mean that discrimination by a private university is not state action. Nor does it hold that section 1985(3) does not cover a private conspiracy to discriminate on the basis of sex. Resolution of both issues in *Cohen* depended on examination of the facts; in another case the result may differ.

Another victim of both alleged employment discrimination and the absence of an applicable remedial statute was the plaintiff in *Gault v. Garrison*.[231] Forced to retire as a public school teacher at the age of sixty-five, she claimed that the admitted age discrimination denied her due process and equal protection of the laws.[232] In the face of two summary affirmances by the Supreme Court of decisions rejecting similar claims,[233] the court of appeals opted to stay plaintiff's appeal pending the Supreme Court's ruling in *Massachusetts Board of Retirement v. Murgia*.[234] In June of 1976, the Supreme Court in *Murgia* held that a Massachusetts statute forcing state police officers to retire at the age of fifty was justified on a rational basis and accordingly did not violate the equal protection clause.[235] While still possible, successful challenges to mandatory retirement statutes on federal constitutional grounds will be difficult for the foreseeable future.[236]

230. 524 F.2d at 829. Plaintiff Cohen did not allege a private conspiracy to violate her right of interstate travel, as had plaintiffs in *Griffin*, 403 U.S. at 88, nor did she allege a private conspiracy to violate her first amendment rights. The court left open the possibility that section 1985(3) might cover such a conspiracy, noting authority on both sides of the issue. 524 F.2d at 829 n.33.

231. 523 F.2d 205 (7th Cir. 1975).

232. *Id.* at 205.

233. *Id.* at 205-06; Weisbrod v. Lynn, 420 U.S. 940 (1975); McIlvaine v. Pennsylvania, 415 U.S. 986 (1974). The court's opinion carefully reviewed the question of the precedential force of United States Supreme Court summary affirmances, concluding that in this case they were "at least extremely persuasive precedents if not binding ones." 523 F.2d at 209.

234. 96 S. Ct. 2562 (1976).

235. *Id.* at 2568.

236. In *Murgia*, the Court concluded: "We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the law." 96 S. Ct. at 2568. In context, the Court meant by this merely to disclaim passing on the wisdom of the statute, not to signal clearly that it might invalidate different mandatory retirement statutes. Nonetheless, the discrimination in *Murgia* may be distinguishable from other, less defensible age discrimination. The decision stressed the " 'general relationship between advancing age and decreasing physical ability to respond to the demands of the [state police officer's] job.' " *Id.* at 2565 (citation omitted). Other jobs, such as judicial positions, might not show such rational correlation between age and qualification. *See id.* at 2573 n.8 (Marshall, J., dissenting).

In addition, the due process question of an irrebuttable presumption raised in *Gault* was not explicitly decided in *Murgia*. *See id.* at 2564, 2565. However, it was raised in the briefs. The Court apparently chose simply to ignore the issue. The result in *Murgia*, therefore, necessarily rejects the irrebuttable presumption argument, which was already floundering in the wake of Weinberger v. Salfi, 422 U.S. 749 (1975). *See also* the Federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976), which protects employees who are at least forty but less than sixty-five from discharge on grounds of age, except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. §§ 623(f)(1), 631 (1976).

FIRST AMENDMENT FREEDOMS

In three cases this term, the court of appeals seemed keenly appreciative of the nature and importance of first amendment freedoms. However, it resolved free speech issues only after careful consideration of facts relevant to what it regarded as countervailing interests, of the means used to promote those interests, and of their impact on first amendment interests.

The court's decision in *Hanneman v. Breier*[237] may foreshadow its eventual response to post-Watergate government security litigation now wending through trial courts.[237.1] In *Hanneman*, the court held that an administrative rule making all "official business" of the Milwaukee police department "confidential" was unconstitutional as applied.[238] Relying on the United States Supreme Court's decision in *Pickering v. Board of Education*[239] and on one of its own prior decisions,[240] the court of appeals emphatically adopted a case-by-case, interest-balancing approach, at least in cases involving first amendment rights of public employees.

Several police union members had written relevant city and state officials confirming the existence of an internal departmental investigation. While invalidating administrative sanctions imposed on these officers for breach of the confidentiality rule, the court provisionally declined to enjoin further application of the rule. In *dicta*, it characterized the confidentiality rule as "clearly valid on its face."[241] "To justify application of the confidentiality rule in this case," the court held that the defendant police chief "must show a state interest in confidentiality applicable on these facts which outweighs the public and individual interests in the particular statements made."[242]

Analyzing the state's interest, the court conceded that a public employer, in a general sense, "has a legitimate interest in preserving confidentiality in the conduct of its internal affairs," particularly "in the sensitive area of law enforcement."[243] In this case, however, before the officers wrote their letters,

237. 528 F.2d 750 (7th Cir. 1976).

237.1 Broadly viewed, *Hanneman* involved the clash of first amendment interests with governmental security interests. In this sense, the court's ruling addressed the same broad issues currently at stake in litigation over alleged infiltration and surveillance of community groups by the Chicago police department, the Army, the FBI and others. *See, e.g.*, Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Chicago, No. 76 C 1982 (N.D. Ill., filed May 28, 1976); ACLU v. Chicago, No. 75 C 3295 (N.D. Ill., filed Oct. 3, 1975); Alliance To End Repression v. Rochford, 407 F. Supp. 115 (N.D. Ill. 1975).

The specific first amendment issues, of course, are quite different in the surveillance cases, which also raise major fourth and fifth amendment issues not involved in *Hanneman*.

238. 528 F.2d at 756.

239. 391 U.S. 563 (1968); 528 F.2d at 753. *See also* Madison School Dist. v. Wisconsin Employment Relations Comm'n, 45 U.S.L.W. 4043 (U.S. Dec. 8, 1976) (No. 75-946).

240. Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973).

241. 528 F.2d at 754, 756.

242. *Id.* at 754.

243. *Id.*

the privacy of the investigation had been "destroyed" in a front-page newspaper article quoting an acknowledgment of the investigation by the police chief himself. Moreover, noted the court, the officers involved were not "in such a close personal relationship" with the police chief "that sharp public criticism could not be tolerated."[244] In addition, the chief was free in this instance to defend himself publicly.

The court then considered the officers' first amendment interests. Police officers, unlike members of the military services, " 'are not relegated to a watered-down version of constitutional rights.' "[245] Although their freedom to speak concerning their employment "may be more or less limited,"[246] the officers' letter here was worthy of protection. It accused the department's highest official, the police chief, of "improper," anti-union motives in ordering an investigation of union-related political activities by the officers.[247] The officers had no practical alternative but to go outside the department with an appeal to responsible officials for protection. Even though the district court found that the investigation was not improperly motivated, the officers' letter still merited protection because it was written in good faith. The state's interest in preventing publication of false criticism, ruled the court of appeals, could override its employees' interests in free speech only if their statements were knowingly or recklessly false.[248]

Without indicating whether the officers' interests in free speech alone would also outweigh the state's separate and additional interest in *confidentiality*, the court went on to consider the "public's interest in being informed."[249] At the core of the first amendment, it said, "is a preference for debate rather than suppression."[250] The officers' letter "touched on matters of public concern"—public employment and collective bargaining by public employees—for which its recipients were officially responsible.[251] In sum, considering "all the factors," the court concluded that the "need to enforce the confidentiality rule against the statements here in issue" was outweighed by "the individual and public interests in their expression."[252] It then remanded for consideration of the appropriate remedy.

In three other first amendment cases this term, the court's decisions were more circumscribed by precedent. In *Aikens v. Jenkins*[253] the court, in

244. *Id.* at 755.
245. *Id.* at 754 (quoting Garrity v. New Jersey, 385 U.S. 493, 500 (1967)).
246. 528 F.2d at 754.
247. *Id.* at 755.
248. *Id.* For the standard of knowing or reckless falsehood, the court analogized from New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).
249. 528 F.2d at 755, 756.
250. *Id.* at 755.
251. *Id.* at 755-56.
252. *Id.* at 756.
253. 534 F.2d 751 (7th Cir. 1976).

striking down prison censorship regulations for overbreadth, tracked the reasoning of the Supreme Court's 1974 decision in *Procunier v. Martinez*.[254] *Procunier* held that prisoners' first amendment rights "must be 'applied in light of the special characteristics of the . . . environment.' "[255] Prison censorship regulations can be justified only if they further "one or more of the substantial governmental interests of security, order, and rehabilitation," if their restrictive impact on first amendment freedoms is "no greater than is necessary or essential" to protect those interests, and if prison officials carry their burden of proving both of these conditions.[256]

In addition to *Procunier*, the court of appeals premised its analysis on *Erznoznik v. Jacksonville*,[257] in which the Supreme Court had held that a statute "should not be deemed facially invalid unless [1] it is not readily subject to a narrowing construction by the state courts, . . . and [2] its deterrent effect on legitimate expression is both real and substantial."[258] In theory, said Judge Tone for the court, the same test would "normally" apply to administrative regulations, but here the court could not ignore that local prison officials had banned "*inter alia*, Dostoevski's *The Gambler*, Gibran's *The Prophet*, and all publications of Bantam Books."[259]

Following *Procunier* and *Erznoznik*, the court invalidated three regulations. One appeared to prohibit photos or paintings of nudes unless "supportive or incidental to a theme not designed primarily to arouse sexual desires."[260] This, reasoned the court, might exclude "a collection of works of art" conveying no theme, innocent or otherwise.[261] Another regulation prohibited literature that encouraged "aggressive hostility toward prison authorities" or toward minority groups, "or having a substantially inflammatory effect on inmates," including material "in any way subversive of institutional discipline."[262] This one bore more than a passing resemblance to a regulation invalidated in *Procunier* and, as in that case, invited prison officials " 'to apply their own personal prejudices and opinions as standards.' "[263] The last regulation prohibited literature "glorifying criminals, discussing the modus operandi of a felon, or treating in a bizarre fashion the details or circumstances of a crime."[264] The court struck it down in part

254. 416 U.S. 396 (1974).
255. *Id.* at 409-10.
256. *Id.* at 413.
257. 422 U.S. 205, 216 (1975).
258. *Id.*
259. 534 F.2d at 754.
260. *Id.* at 756.
261. *Id.*
262. *Id.*
263. *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 412 (1974)).
264. *Id.* at 757.

because, "[a]pplied literally, it would exclude many of the world's great books."[265]

Freedom from censorship need not mean unbridled license. In *Carson v. Allied News Co.*,[266] the court reversed a summary judgment for a defendant tabloid in a libel suit brought by Joanna Holland and her husband, television personality Johnny Carson, because of an article defaming their sex life. Applying the familiar if imprecise *New York Times* rule,[267] the court predictably found Mr. Carson to be "an all-purpose public figure."[268] Unfortunately, in also characterizing Ms. Holland as a public figure, the court ventured that "one can assume that the wife of a public figure such as Carson more or less automatically becomes at least a part-time public figure herself."[269]

The court then examined whether the facts could support the finding of "actual malice" required to sustain libel actions brought by public figures. Relying on two factors—"completely fabricated" accusations, and "wholly imagined but supposedly precisely quoted conversations"—the court found enough to entitle the plaintiff couple to a jury trial.[270] Defendants' professed absence of malice toward plaintiffs was immaterial, since what counted was their "attitude toward the truth or falsity" of their statements, and defendants had "a high degree of awareness of their probable falsity."[271]

In the third case, *Grandco Corp. v. Rochford*,[272] the court had no trouble invalidating a Chicago ordinance requiring an operating license for a public place of amusement, as it applied to movie theaters.[273] The ordinance provided that the mayor "may" issue a license upon a "satisfactory" showing that the applicant is a "fit and proper" person. Such terms patently failed to provide the "narrow, objective and definite standards" required to license exercise of first amendment freedoms by such Supreme Court decisions as *Shuttlesworth v. Birmingham*.[274]

The difficulty was in reaching the merits. Two of three plaintiffs did not. They had no licenses and were apparently being repeatedly prosecuted for

265. *Id.* at 756-57.
266. 529 F.2d 206 (7th Cir. 1976).
267. The rule originated in New York Times Co. v. Sullivan, 376 U.S. 254 (1974).
268. 529 F.2d at 210.
269. *Id.* Whether similar status is accorded husbands of public figures, or spouses of judges, were questions not presented.
270. *Id.* at 213. The court also considered a third factor, the reporter's failure to verify a crucial factual assertion in his article, which he simply lifted from another newspaper's article. But the court ruled that it need not decide whether this showed actual malice because of the presence of the other two factors. *Id.* at 211.
271. *Id.* at 213, 214.
272. 536 F.2d 197 (7th Cir. 1976).
273. *Id.* at 207-08.
274. *Id.* at 207; 394 U.S. 147, 151 (1969).

failure to have one. Under *Younger v. Harris*,[275] the federal court could not enjoin good faith, pending prosecutions under the city ordinance.[276] Mere multiple prosecutions did not demonstrate bad faith, ruled the Court. Even the "existence of adverse state appellate court authority" on their federal constitutional claims did not entitle plaintiffs to avoid relegation to state remedies, since the state courts might "change their minds."[277]

The one plaintiff who survived *Younger* faced no pending criminal prosecution. That plaintiff did face pending city administrative proceedings to revoke theater operating licenses. However, said the court, comity under *Younger* mandated federal restraint "only upon an express finding that the state's interest in its own [administrative] proceedings is substantial and that those proceedings provide a proper forum for vindication of the federal plaintiffs' constitutional claim."[278] Chicago's administrative proceedings were not such a forum for this plaintiff.

Declaratory relief "at a minimum" was therefore permissible and the court affirmed the declaratory judgment entered below on behalf of this plaintiff. However, since such relief was "sufficient in itself" in this case, and a permanent injunction might involve additional "considerations of comity and federalism" upon which the Supreme Court had yet to pass, the court of appeals remanded with directions to vacate the permanent injunction which had been awarded.[279]

The practical effect of *Younger* and its aftermath, as cautiously construed in *Grandco*, is to tone down the free speech guarantee of the fourteenth amendment to no more than an uncertain echo of the first amendment. In federal court, the fourteenth, while retaining the full substantive content of the first amendment, lacks its remedial force. State or local restriction of free speech by criminal laws is all too often shielded by comity from federal suit. Restriction by administrative regulation is sometimes equally beyond federal redress,[280] and in other situations subject only to minimal redress.

The court in *Grandco* might at least have affirmed the permanent injunction against future enforcement of the ordinance with respect to enforcement against movie theaters.[281] Perhaps the court presumed that the

275. 401 U.S. 37 (1971).

276. 536 F.2d 201-07. It was not clear whether there were in fact prosecutions pending against one of these two plaintiffs when the federal suit was filed, but the court concluded that the pendency of such proceedings could "fairly be inferred" from the complaint. *Id.* at 205.

277. *Id.* at 206-07.

278. *Id.* at 208.

279. *Id.*

280. This is in the situation where the regulations afford a "proper forum" for presentation of federal constitutional claims and the state has a "substantial" interest in the administrative procedures thus established. *Id.* at 206, 208.

281. The district court had enjoined "all further and future enforcement" of the ordinance; the court of appeals enjoined none. *Id.* at 208.

declaratory judgment would automatically stimulate a proper revision of the ordinance and, if not, that the next applicant improperly denied a permit could readily obtain an injunction, since the city's failure to heed the declaratory judgment would then sufficiently demonstrate bad faith. But what of permit applicants unaware of the court's ruling or not advised by counsel? Until an injunction finally issues, a mere declaratory judgment gives no assurance that their constitutional rights will not be violated by an ordinance already ruled facially unconstitutional. A declaratory judgment may protect the next litigant, but it does not necessarily protect the next persons to bear the brunt of the unconstitutional ordinance, unless they also have the awareness, determination, and financial wherewithal to take their grievances to court. First amendment freedoms, as embodied in the fourteenth amendment, deserve more protection than this.[282]

In state courts, the fourteenth amendment is theoretically preserved intact, both substantively and remedially. But as demonstrated by the history of federal court redemption of free speech from abridgements tolerated by state courts,[283] these tribunals are often inadequate guardians of federal rights. In some times and places, their inadequacy is notorious. The 1871 Civil Rights Act (under which plaintiffs in *Grandco* sued) was enacted largely because Congress recognized as much.[284] Federal courts ought not, as *Grandco* does, shortchange the first amendment in the name of respect for federalism and states' rights. Rights of citizens are usually more easily infringed—and less easily protected—than rights of governments.

282. It might be suggested that the city would necessarily modify its ordinance to conform with the United States Constitution. But there is no guarantee that the city would modify it at all, much less that it would do so promptly and in full accord with proper constitutional standards.

It might also be urged that movie theater owners all have counsel who are quite familiar with decisions, like *Grandco*, which specially affect the industry. There may be much truth to that, but the court should not assume it in the absence of some evidentiary showing. Moreover, the wait-and-see remedial approach of *Grandco* would be especially harsh in cases where the litigants are not likely to have counsel or counsel with specialized knowledge.

283. Recent decisions in those areas of federal judicial oversight of free expression not curtailed by *Younger* are only the latest in an endless line of decisions in which federal courts have had to strike down laws or actions earlier upheld by state courts. *E.g.*, Nebraska Press Ass'n. v. Stuart, 96 S. Ct. 2791, 2796-97 (1976); Hynes v. Mayor of Oradell, 425 U.S. 610, 620-23 (1976); *cf.* Madison School Dist. v. Wisconsin Employment Relations Comm'n, 45 U.S.L.W. 4043 (U.S. Dec. 8, 1976) (No. 75-946) (order which prohibited non-union teachers from speaking at public meeting about pending labor negotiations struck down as improper prior restraint on teachers' expressions to board of education on school matters). More egregious examples are not hard to find. *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

284. *See generally* Monroe v. Pape, 365 U.S. 167 (1961).