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School Desegregation: Paring the Tail that Wagged the Dog

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SCHOOL DESEGREGATION: PARING THE TAIL THAT WAGGED THE DOG

Milliken v. Bradley, 94 S. Ct. 3112 (1974)

Plaintiffs[1] brought suit against Michigan state officers and Detroit district school officials[2] alleging racial segregation within the Detroit school system in violation of the equal protection clause of the fourteenth amendment.[3] The district court found de jure segregation within the Detroit public school system[4] and ordered the Detroit Board of Education to submit desegregation plans. Additionally, the district court ordered the state to submit desegregation plans for the city of Detroit and the surrounding three-county metropolitan area despite the fact that the suburban school districts were not parties to the action.[5] Finding that desegregation of Detroit public schools could not be accomplished within the corporate limits of the city,[6] the district court ordered the implementation of a metropolitan plan requiring interdistrict busing of students to achieve racial balance.[7] The Sixth Circuit, sitting en banc, af-

1. This action was brought by plaintiff black parents, the Detroit branch of the National Association for the Advancement of Colored People, and the representatives of a class defined as all school children of the city of Detroit and all Detroit resident parents having children of school age. Bradley v. Milliken, 338 F. Supp. 582, 584 (E.D. Mich. 1971).

2. *Id.* The named defendants included the Governor of Michigan, the attorney general of Michigan, the state board of education, the state superintendent of public instruction, the Board of Education of the City of Detroit, its members, and its former superintendent of schools. See text accompanying note 35 *infra*.

3. Plaintiffs alleged that Act 48 of the 1970 Michigan Legislature interfered with the execution and operation of a voluntary plan of partial high school desegregation within Detroit, known as the April 7, 1970, Plan. The district court refused to grant an injunction restraining the implementation of Act 48. *See* 338 F. Supp. at 584-85. On appeal, the Sixth Circuit held Act 48 unconstitutional because it inhibited desegregation, and remanded the case for trial. Bradley v. Milliken, 433 F.2d 897, 902 (6th Cir. 1970). The district court, without an evidentiary hearing, refused to accept the April 7, 1970, Plan. Instead, the court approved an alternative plan submitted by the Detroit District School Board. 338 F. Supp. at 584. On appeal, the Sixth Circuit ruled that the district court had not abused its discretion in refusing to adopt the April 7 Plan without an evidentiary hearing and remanded for immediate trial on the merits. 438 F.2d 945, 947 (6th Cir. 1971).

4. The district court found that "[g]overnmental action and inaction at all levels, federal, state and local," had combined to establish and maintain racial segregation within the Detroit School District, which is coterminous with the municipal limits of the City of Detroit. 338 F. Supp. at 587.

5. The 1970 census found the population of Michigan to be 8,875,083, almost half of which, 4,199,931, resided in the tri-county area of Wayne, Oakland, and Macomb. *See* 94 S. Ct. 3112, 3120 n.10 (1974). Detroit is located in Wayne County. *See* Bradley v. Milliken, 468 F.2d 902 (6th Cir.), *cert. denied*, 409 U.S. 844 (1972), dismissing an appeal by the defendants of the district order requiring submission of metropolitan desegregation plans.

6. The district court's ruling on the "Detroit-only" desegregation plan is set out in full by the court of appeals. Bradley v. Milliken, 484 F.2d 215, 244-45 (6th Cir. 1973). The Detroit Board of Education and counsel for white parents within the city of Detroit, defendants to the action, also argued that a metropolitan plan was the only method of effectively desegregating Detroit. Bradley v. Milliken, 345 F. Supp. 914, 922 n.3 (E.D. Mich. 1972).

7. 345 F. Supp. 914. The district court stated: "It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland, and Macomb, nor on the issue of whether, with

firmed[8] and remanded so that all affected suburban districts could be heard on the scope and implementation of an interdistrict remedy.[9] On certiorari, the United States Supreme Court reversed and HELD, without a substantial, interdistrict constitutional violation, remedies crossing traditional school district boundaries exceeded the equitable jurisdiction of the federal judiciary.[10]

Since the decision of *Brown v. Board of Education*[11] one of the most troublesome aspects of constitutional law has been the implementation of desegregation in the nation's public schools.[12] In *Green v. County School Board*[13] the Supreme Court held that each state had an "affirmative duty to take whatever steps might be necessary to convert to a unitary school system in which racial discrimination would be eliminated root and branch" and to develop a plan that "promises realistically to work *now*."[14] The courts, in effecting the *Green* mandate, eventually turned to mandatory busing of school children to dismantle de jure segregated school systems.[15] In *Swann v. Charlotte-Mecklenburg Board of Education*[16] the Supreme Court approved this expansion of the remedial equity powers set forth in the second *Brown* decision.[17]

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the exclusion of the City of Detroit school district, such school districts have committed acts of de jure segregation." *Id.* at 920. Additionally, the district court ordered the purchase of 295 buses in order to effect the plan. 484 F.2d at 221.

8. 484 F.2d 215. The court en banc reached the same conclusion as the vacated opinion of a Sixth Circuit panel filed Dec. 8, 1972. *Id.* at 218-19. The Sixth Circuit affirmed the district court's finding of de jure segregation within the Detroit school system, agreed with the district court that the "Detroit-only" plan would not rectify these violations, and concluded that because the only feasible desegregation plans involved the crossing of school district boundaries, an interdistrict remedy was within the equitable power of the court. *Id.* at 249-50.

9. The terms of the remand did not require the district court to accept evidence on the substantive merits of the propriety of a "Detroit-only" plan or whether suburban districts had committed constitutional violations. The court of appeals also vacated the district court's order to purchase buses until an "appropriate time." *Id.* at 252.

10. 94 S. Ct. 3112 (1974) (Stewart, J., concurring separately; White, J., with whom Douglas, Brennan, and Marshall, JJ., joined, dissenting; Marshall, J., with whom Douglas, Brennan, and White, JJ., joined, dissenting; Douglas, J., dissenting separately).

11. 347 U.S. 483 (1954).

12. In *Brown* (II), *Brown* (I)'s implementation decision, the Court discussed the equitable remedies available to federal courts in implementing desegregation. 349 U.S. 294, 300 (1955). The central issue following *Brown* (I) was whether the Constitution required affirmative desegregation. Dicta in Briggs v. Elliot, 132 F. Supp. 776 (E.D.S.C. 1955), stated: "Nothing in the Constitution or in the decision of the Supreme Court (*Brown* I) takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration." *Id.* at 777. This notion was rejected in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966) and in Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965).

13. 391 U.S. 430 (1968).

14. *Id.* at 437 (emphasis in original). *Accord,* Carter v. West Feleceana School Bd., 396 U.S. 290 (1970); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969); Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968).

15. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 44-46 (1971).

16. 402 U.S. 1 (1971). *Accord,* Davis v. Board of School Comm'rs, 402 U.S. 33 (1971).

17. Brown v. Board of Educ., 349 U.S. 294, 300 (1955). See note 12 *supra. Swann* offered three principal remedies for segregation: (1) racial quotas, (2) remedial altering of attendance zones, and (3) transportation of students. 402 U.S. at 22-32. In *Swann* the Court

The dichotomy of de jure and de facto segretation, however, complicated the application of this remedy.[18] In *Spencer v. Kugler*[19] the court relied heavily on *Swann* in concluding that the federal judiciary was without equitable jurisdiction to remedy racial imbalance in schools that resulted from purely de facto segregation.[20] Yet the Supreme Court, when faced with both de jure and de facto segregation occuring within the city of Denver School District,[21] affirmed a city-wide desegregation plan that included extensive busing.[22] The Court held that substantial de jure segregation within school district boundaries created a presumption that de jure intent permeated the entire district and shifted the burden of proving the constitutionality of any "de facto" racially identifiable schools onto the school district authorities.[23]

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stated: "[A]s with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." *Id.* at 16. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* at 15. "The remedy for such [de jure] segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided . . . when remedial adjustments are being made to eliminate the dual school systems." *Id.* at 28. In Davis v. Board of School Comm'rs, 402 U.S. 33 (1971), the Court said: "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation. The measure of any desegregation plan is its effectiveness." *Id.* at 37.

18. The court in Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) defined "de jure segregation" as "segregation specifically mandated by law or by public policy pursued under color of law," and "de facto segregation" as segregation that "results from the action of pupil assignment policies not based on race but upon social or other conditions for which government cannot be held responsible." *Id.* at 493. The Supreme Court has recently defined "de jure segregation" as the purpose or intent to segregate. Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973). *See generally* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis,* 60 CALIF. L. REV. 275 (1972).

19. 326 F. Supp. 1235 (D.N.J. 1971), *aff'd,* 404 U.S. 1027 (1972).

20. 326 F. Supp. at 1242. *See also* Bell v. School City of Gary, 324 F.2d 209 (1963); Hobson v. Hansen, 269 F. Supp. 401 (1967). In *Spencer,* plaintiffs alleged that racial segregation was due to school district lines drawn in 1953. Plaintiffs presented no evidence of de jure action and apparently relied on the existence of racially imbalanced schools as a prima facie case of constitutional violation. The court noted: "A continuing trend towards racial imbalance caused by housing patterns within the various school districts is not susceptible to federal judicial intervention. The New Jersey Legislature has by intent maintained a unitary system of public education, albeit that system has degenerated to extreme racial imbalance in some school districts. . . ." 326 F. Supp. at 1243. Further, *Swann* contained substantial dicta concerning de facto segregation and interpreted the Civil Rights Act of 1964, 42 U.S.C. §§2000c-6(a) (Supp. II, 1972) not to include de facto segregation under federal remedial authority. 402 U.S. at 17-18.

21. The Tenth Circuit found de jure acts within the Park Hill section of Denver. Racial separation in other portions of the city, however, seemed due to de facto causes. Keyes v. School Dist. No. 1, 445 F.2d 990, 1002, 1006-07 (10th Cir. 1971).

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

23. *Keyes* can be reconciled with *Swann* and *Spencer* by noting that the *Keyes* Court presumed district-wide de jure segregation. 413 U.S. at 208. Because school authorities did not rebut the presumption, *Keyes* became another de jure case justifying the use of broad equitable powers available to the federal judiciary. *See generally* Note, *De Facto School*

Thus, prior to the instant decision the Court used broad language to define the equity powers available to federal courts in equal protection cases and specifically approved busing as a remedy for de jure segregation. In the de facto segregation context, however, the Court refused to permit these broad remedies. Yet when segregation was due to de jure and de facto causes, the Court would presume the racial imbalance totally de jure and amenable to remedy, if the de jure segregation was substantial and within a *single* school district.

Like Denver, many modern metropolitan areas without a history of overt de jure segregation nevertheless exhibit geographic separation along racial lines due to income differences. The principal example of such income polarization is urban-suburban segregation.[24] Previously, federal courts had found two types of constitutional violations justifying multidistrict remedies: drawing or redrawing of school district lines,[25] and the transfer of school units between school districts.[26] Nevertheless, the question remained whether an equitable desegregation remedy, in the absence of de jure violations, could reach into suburban school districts in order to rectify the racial imbalance in metropolitan schools.

The Supreme Court faced just such an interdistrict remedy problem in *Bradley v. School Board.*[27] The Fourth Circuit had rejected a multidistrict busing plan in Richmond, Virginia because the defendants had satisfactorily complied with federal desegregation guidelines,[28] on the apparent reasoning that without a wrong there could be no remedy.[29] The Supreme Court divided evenly on the merits, thus permitting the Fourth Circuit's decision to stand, but leaving the issue of multidistrict desegregation remedies unresolved.[30]

The instant case, which involved a metropolitan, multidistrict remedy,

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Segregation and the "State Action" Requirement: A Suggested New Approach, 48 IND. L.J. 304 (1973); Comment, Keyes v. School District No. 1: *Unlocking the Schoolhouse Door,* 9 HARV. CIV. RIGHTS-CIV. L. REV. 124 (1974).

24. In 1960, 100 of Detroit's 251 schools were 90% or more white and 71 were 90% or more Negro. In 1970, of Detroit's 282 schools, 69 were 90% or more white and 133 were 90% or more Negro. 94 S. Ct. at 3154. The district court noted in its analysis of Detroit's racial polarization that "[i]f the population trends evidenced in the federal decennial census for the years 1940 through 1970 continue . . . . [t]he percentage of black students in the Detroit Public Schools in 1975-76 will be 72.0%, in 1980-81 will be 80.7% and in 1992 it will be virtually 100% . . . ." 338 F. Supp. at 585.

25. Haney v. County Bd. of Educ., 429 F.2d 364 (8th Cir. 1969); *cf.* United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

26. United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *aff'd,* 447 F.2d 441 (5th Cir. 1971); Turner v. Warren County Bd. of Educ., 313 F. Supp. 380 (E.D.N.C. 1970).

27. 412 U.S. 67 (1973).

28. 462 F.2d 1058, 1065 (4th Cir. 1972).

29. *See* text accompanying note 20 *supra.*

30. The Richmond case involved school districts previously guilty of de jure violation and currently utilizing those methods outlined in *Swann* to achieve unitary school systems. Because they complied with federal guidelines, the issue then became de facto urban-suburban racial polarization not subject to federal intervention. The court of appeals noted the independent, local nature of Virginia's school districts and found that no concerted state intervention existed. 462 F.2d at 1067.

proposed in response to combined de facto-de jure segregation,[31] again presented this issue to the Court. The majority believed the pivotal question to be the extent of a federal court's equitable jurisdiction once a constitutional violation had occurred. As Mr. Justice Stewart stated in his concurring opinion: "In the present posture of the case, therefore, the Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction."[32] Noting that redistricting and interdistrict transfer of school units are de jure actions sufficient to trigger a cross-district remedy,[33] the majority stated "it must be shown that racially discriminatory acts of state or local school districts, or of a single school district have been a substantial cause of the inter-district segregation."[34]

By joining state officials, plaintiffs sought to distinguish *Richmond* on the ground that Michigan participates more directly than Virginia in school district affairs. The district court utilized this "state action"[35] as partial justification for its use of a metropolitan perspective in shaping its remedy.[36] The court also felt compelled to reject a "Detroit-only" remedy because it would not fulfill the mandates of *Green*[37] and *Davis*[38] to eliminate racial segregation "root and branch" and to measure desegregation plans by their "effectiveness."[39] Additionally, the district court found that a multidistrict busing

31. See note 8 *supra.*

32. 94 S. Ct. 3112, 3131 (1974) (Stewart, J., concurring).

33. *Id.* at 3127, 3132.

34. *Id.* at 3127. The majority limited interdistrict remedies to interdistrict violations by school authorities. *Id.* Chief Justice Burger, in *Swann,* remarked: "One vehicle can carry only a limited amount of baggage. It would not serve the important objectives of *Brown* (I) to seek to use school desegregation cases for purposes beyond their scope . . . ." 402 U.S. 1, 22 (1971). *But see* Mr. Justice Stewart's concurring opinion in the instant case, which appears to sanction cross-district remedies for "purposeful, racially discriminatory use of state housing or zoning laws." 94 S. Ct. at 3132.

35. 484 F.2d at 238. *See also* 94 S. Ct. at 3149-53 (Marshall, J. dissenting); Note, *Segregative Intent and the Single Governmental Entity in School Desegregation,* 1973 DUKE L.J. 1111; Note, *Consolidation for Desegregation: The Unresolved Issue of the Inevitable Sequel,* 82 YALE L.J. 1681 (1973). See note 2 *supra.*

36. The district court, in expanding the scope of its equitable jurisdiction to include suburban districts, seemed to be wrestling with several of the same problems faced by the Supreme Court in *Keyes. See* 345 F. Supp. 914, 921 (1972). Extrapolation of the Court's reasoning in *Keyes* to a metropolitan area would be consistent with past Court holdings. *Cf.* notes 20, 23 *supra.* By using a metropolitan perspective, de jure segregation within the city of Detroit would compare with the de jure segregation found by the Court in the Park Hill section of Denver. Keyes v. School Bd., No. 1, 413 U.S. 189, 198 (1973). The substantial de jure segregation within Detroit would then shift the burden of proof onto the state to demonstrate that racially identifiable schools within the Detroit metropolitan area were due to de facto causes. If the state successfully rebuts this presumption of de jure segregation, federal courts would have no authority to act. See text accompanying note 20 *supra.* Should the state fail to overcome this burden, however, any racially identifiable schools would be presumed de jure and recognized remedies for de jure segregation would become appropriate. *See* Comment,*supra* note 23, at 135-42; *cf.* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

37. 391 U.S. 430 (1968).

38. 402 U.S. 33 (1971).

39. *See* 484 F.2d at 242-45, wherein the district court opinion on the "Detroit-only" plan is set out in full. *See also* text accompanying note 14 *supra.* This argument is premised upon

remedy would involve comparable travel times and would require the purchase of fewer buses than a "Detroit-only" desegregation plan.[40] Speaking for the majority, Chief Justice Burger noted that "desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.' "[41] "[T]he scope of the remedy is determined by the nature and extent of the Constitutional violation."[42] It seems the Court interpreted *Swann* to adopt a "sliding scale" analysis of federal remedial authority in public school desegregation, which, as demonstrated by the instant case, can contract as well as expand.

The instant Court's dilemma in evaluating the validity of extensive busing remedies was foreshadowed by Mr. Justice Black's question during the oral argument of *Swann*: "How can you rearrange the whole country?"[43] The instant Court indicated that with extensive multidistrict busing as the remedy for de jure intradistrict segregation, the remedial tail had begun to wag the substantive dog. Apparently, the tail was bobbed at traditional school district lines.

Of course, state and local school district authorities are not precluded from voluntarily correcting de facto racial imbalance by fashioning interdistrict desegregation plans.[44] Congress, however, has repeatedly demonstrated an aversion to busing as a means of achieving racial balance,[45] and the executive

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the view that the purpose of integration is to equalize opportunities for all races. Under this reasoning there is no de facto-de jure dichotomy inhibiting the dismantlement of racially segregated schools. *See generally* Goodman, *supra* note 18. Mr. Justice Powell wrote an exhaustive partial concurrence in *Keyes* propounding the demise of a de jure-de facto distinction. He would not define "de jure" as state *intent* to segregate; rather, if the *effect* is segregation the burden is placed upon the state to show a pure de facto causation. Mr. Justice Powell believed this would give a national interpretation to the fourteenth amendment. Keyes v. School Dist. No. 1, 413 U.S. 189, 217-53 (1973). *See also* Comment, *supra* note 23, at 143-48. Several commentators have discussed this "effect vs. intent" test. *Id.* at 145 n.89.

40. The "Detroit-only" plan would have required an estimated 900 buses in order to dismantle the existing dual school system because Detroit relies largely on public transportation at student expense for those students living beyond walking distance from school. The suburban tri-county area had an inventory of 1,800 buses. Considering more efficient utilization, the district court found only 350 additional buses necessary to effectuate a metropolitan plan. *See* the Supreme Court's discussion of this district court finding, 94 S. Ct. at 3160-61.

41. 94 S. Ct. at 3125.

42. *Id.* at 3127, *quoting* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

43. "From the first case, I have been interested in plain discrimination on account of race. We should correct that. But it disturbs me to hear we should try to change the whole lives of people around the country. You're challenging the place people live. You want to haul people miles and miles and miles in order to get an equal ratio in schools. It's a pretty big job to assign to us, isn't it? How can you rearrange the whole country?" 39 U.S.L.W. 3159 (1970).

44. McDaniel v. Barresi, 401 U.S. 39, 42 (1971); Hobson v. Hansen, 269 F. Supp. 401, 509-10 (D.D.C.), *appeal dismissed*, 393 U.S. 801 (1967); *cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16-19 (1971); Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd*, 404 U.S. 1027 (1972).

45. *See* Civil Rights Act of 1964, 42 U.S.C. §§2000c-6(a) (Supp. II, 1972); 20 U.S.C. §1656 (1970); Pub. L. No. 93-38 (Aug. 21, 1974), *amending* the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§236 *et seq.* (1970).

branch is currently taking an anti-busing position.[46] Thus, it is unlikely that significant voluntary action will be forthcoming.

Given the improbability of voluntary desegregation, the existence of an effective remedy for a minority victimized by de facto segregation is doubtful. The Supreme Court has held that federal courts are precluded from effecting remedies triggered by purely de facto segregation.[47] Further, the instant case appears to signal a reversal in the expansion of federal equitable remedies in response to de jure segregation. Consequently, the principal case will have an immediate effect on those lower courts currently wrestling with the segregation dilemmas created by urban-suburban racial polarization.[48] Where this polarization conforms to school district boundaries, interdistrict de jure segregation will have to be alleged and proved to justify an interdistrict remedy.[49]

In response to this apparent absence of remedy for de facto segregated minorities, Mr. Justice Marshall, in dissent, stated:

> Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities — one white, the other black — but it is a course, I predict, our people will ultimately regret.[50]

Although the accuracy of this prediction may be questioned, Justice Marshall's analysis reaches the underlying, volatile issues currently facing school desegregation.

By precluding the use of multidistrict remedies unless the involved school districts participated in interdistrict de jure segregation, the present court has redefined its mandate requiring the greatest degree of actual desegregation.[51] While desegregation plans are still to be measured by their effectiveness, the

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46. *See* 32 CONG. Q. 2049 (1974). President Ford told the Senate Rules Committee on Nov. 5, 1973, during his Vice Presidential confirmation hearings, that if the federal courts continued to use forced busing to achieve racial balance, he would favor a constitutional amendment prohibiting busing. *Id.* at 2031.

47. Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd*, 404 U.S. 1027 (1972). *See also* Bell v. School City of Gary, 324 F.2d 209 (6th Cir. 1963); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

48. Pending suits seek interdistrict relief in the following cities: Hartford, Conn.; Louisville, Ky.; Wilmington, Del.; Indianapolis, Ind.; Durham, N.C.; Atlanta, Ga.; Grand Rapids, Mich.; Cincinnati, Cleveland, and Dayton, Ohio. 43 U.S.L.W. 3029 (1974). *See* Higgins v. Board of Educ. of the City of Grand Rapids, 508 F.2d 779 (6th Cir. 1974), wherein the court noted: "In the recent decision of *Milliken v. Bradley* . . . the Supreme Court considered the grounds for imposition of an inter-district remedy, and it concluded that there must be a causal connection among the districts involved before inter-district relief could be employed. . . . We conclude that there has been no showing of a constitutional violation of any kind in the outlying districts and that a metropolitan remedy would therefore be completely inappropriate under the standards of *Milliken*." *Id.* at 796-97.

49. *Id. See* note 53 *infra*.

50. 94 S. Ct. at 3161.

51. See note 17 *supra*.

holding of the principal case constitutes an important limitation on the power of the federal judiciary in drawing such plans.[52] In order to effect multidistrict remedies in urban-suburban racially polarized metropolitan areas, the separation will have to be demonstrably de jure and, perhaps more importantly, the burden of proving such violations rests with the minority.[53] Even when faced with overt, de jure segregation and state responsibility,[54] the federal judiciary must now recognize that *the nature of the violation will determine the scope of the remedy* is a term of art, a sliding scale contracted, requiring interdistrict de jure segregation before remedies may cross traditional school district lines.[55]

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52. Mr. Justice Marshall noted: "After 20 years of small, often difficult steps toward that great end [making a 'living truth' of our Constitutional ideal of equal justice under law], the Court today takes a giant step backwards." 94 S. Ct. at 3145 (Marshall, J., dissenting).

53. *See* 94 S. Ct. at 3112, 3127, 3130, 3132. The Sixth Circuit's opinion in *Higgins*, rendered after the instant case, held that "plaintiffs have not introduced convincing evidence to support a finding that the State of Michigan contributed to and is responsible for any act of de jure segregation in Grand Rapids." 508 F.2d 779, 796 (6th Cir. 1974). *But cf.* Keyes v. School Bd. No. 1, 413 U.S. 189, 208-09 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971). *See also* Note, *supra* note 23.

54. In the instant case the majority accepted *arguendo* that the State of Michigan did participate in establishment of the de jure segregated Detroit school system and acknowledged that several instances of cross-district de jure segregation had occurred. 94 S. Ct. at 3129-30. The Court, nevertheless, refused to sanction massive interdistrict busing to relieve all of Detroit's intradistrict de jure segregation. 94 S. Ct. at 3112.

55. *See* Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974), a per curiam decision in which the Sixth Circuit reaffirmed its previous decision allowing an interdistrict remedy. In Newburg Area Council v. Board of Educ., 489 F.2d 925 (6th Cir. 1973), the district court's dismissal of the action as to outlying school districts was reversed. On certiorari, the Supreme Court vacated the reversal and remanded the case for further consideration in light of the instant case. 94 S. Ct. at 3208-09. In its reconsideration of the action, the Sixth Circuit noted six "material and controlling distinctions" between *Newburg* and the present case: (1) A "vital distinction" emphasized that in the present case there was no evidence that outlying districts had committed acts of de jure segregation; exactly the opposite was true in *Newburg*. (2) In the present case a metropolitan remedy would have involved 53 school districts in three counties; in *Newburg* only two or possibly three districts within a single county are involved. (3) In Kentucky the state legislature has referred to school district boundaries as "artificially drawn school district lines." KY. REV. STAT. ANN. §160.048(1) (Baldwin 1969); the Michigan Legislature has made no such reference. (4) In the present case the Court noted concern over the administration of a large, metropolitan school district. In Kentucky the reconsolidation of school districts within a single county is currently authorized by KY. REV. STAT. ANN. §160.041 (Baldwin 1969). (5) The City of Louisville School District is not coterminous with the City of Louisville; therefore, many students living within the City of Louisville must attend Jefferson County schools, aggravating the disestablishment of the dual city school system. (6) The "crucial difference" noted was that school district lines in Kentucky have previously been ignored for the purpose of aiding and implementing continued segregation in the two largest of the three affected school districts; whereas in the present case, crossing of district lines occurred in only two of fifty-three affected districts. 510 F.2d at 1359-61. The Sixth Circuit concluded from these facts that they were "not confronted . . . with the problem in *Milliken* in which the remedy approved . . . was broader than the constitutional violation." 510 F.2d at 1361.