# Milliken v. Bradley: The Meaning of the Constitution in School Desegregation Cases

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## I. Overview

With *Milliken v. Bradley*[1] decided by the United States Supreme Court on July 25, 1974, the Court has apparently come full circle in its consideration and decision of public school desegregation cases begun twenty years ago with *Brown v. Board of Education*.[2] If *Brown* was, as it has properly been called, a watershed, *Milliken* may well mark the water's edge. At least a slim majority of the Court has signaled its unwillingness—with some limited exceptions—to test the water beyond the shores of political-geographical subdivisions of a state that mark the boundaries between the white suburbs and black cities of the nation.[3] In holding that as a general matter, approval of so-called "metropolitan" school desegregation plans that include suburban school districts adjacent to or near by inner-city school districts are beyond the remedial powers of federal district courts except in restricted circumstances, the Court may well have been acting on its perception *circa* 1974, of the tolerable limits of judicial intermeddling with life patterns evolved during the past few decades which serve for the most part to insulate white suburban communities from the

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1. 418 U.S. 717 (1974).

2. 347 U.S. 483 (1954).

3. Statements from the dissenting opinion of Justice Marshall are vivid in their description of the consequences of this phenomena for our public schools: "an expanding core of virtually all-Negro schools immediately surrounded by a receding band of all-white schools." 418 U.S. at 785; "a growing core of Negro schools surrounded by a receding ring of white schools", 418 U.S. at 799. Compare language in the brief filed on behalf of the black parents who initiated suit in the district court: "the walling-off of blacks in a state-imposed core of overwhelmingly black schools separated from a ring of overwhelmingly white schools. . . ." Brief for Respondents at 9, Milliken v. Bradley, 418 U.S. 717 (1974).

country's black population and its social demands. That the Court's position might be so read may have prompted Justice Stewart whose "swing vote" was crucial in forming the five-man majority, in separately explaining his views to reply to what he characterized as "some of the extravagant language of the dissenting opinions . . . ."[4]

On its face, the Court was acting on its view of what the Constitution requires (and what it does not). In past school desegregation cases, the Court has stated forthrightly that the governing constitutional principles announced in *Brown* cannot "yield simply because of disagreement with them."[5]

Though preservation of what many consider as the appropriate social configuration[6] of American society is certainly one result of *Milliken*, the Court was acting in its role as the final arbiter in constitutional decision making so the central question of the meaning of *Milliken* must be addressed in these terms. Since it purports to be a legally supportable exposition of constitutional doctrine, perspective on this latest (and perhaps last) pronouncement of major significance from the Supreme

4. 418 U.S. at 753. One can speculate that Justice Stewart probably had in mind this language from Justice Douglas' dissent: "When we rule against the metropolitan area remedy we take a step that will likely put the problems of the blacks and our society back to the period that antedated the 'separate but equal' regime of *Plessy v. Ferguson* . . . ." 418 U.S. at 759. Or perhaps from Justice White's dissent: "The Court's remedy, in the end is essentially arbitrary and will leave serious violations of the Constitution substantially unremedied." 418 U.S. at 780. Or from Justice Marshall's dissent: "[T]he Court's answer is to provide no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past." 418 U.S. at 782. However "extravagant" these comments in Justice Stewart's view, they surely reflect the quite understandable position that the whole of the Court's decision (as in the case of *Brown*) may well be greater than the sum of its parts in terms of both constitutional doctrine and the effect on the society.

5. Brown v. Board of Education, 349 U.S. 294, 300 (1955); *accord*, Cooper v. Aaron, 358 U.S. 1 (1958).

6. "The decade of the sixties was one of increasing suburbanization of whites in metropolitan areas and of increasing concentration of blacks within central cities—in short, of increasing racial separation. Between 1960 and 1970 the white central city population in metropolitan areas having a population of 500,000 or more declined by 1.9 million people, while the comparable black population increased by 2.8 million. The suburban rings of these same metropolitan areas had a white population increase of 12.5 million and a black population increase of only 0.8 million. In terms of percentage changes, the increase in the black share of the central city population was 2¼ times as great as the increase in the black share of total metropolitan population in these areas. Moreover, in 10 of the 34 metropolitan areas having a population of one million or more, the percentage of black suburban residents stayed the same or declined between 1960 and 1970." U.S. COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 6 (July, 1974) (footnotes omitted).

Court on this subject can only be achieved if assessed from that standpoint.

To appreciate the significance of *Milliken*, one must go back farther than *Brown v. Board of Education (Brown* I).[7] However, the opinion of Chief Justice Burger writing for the Court in the case, after reviewing preliminarily some of the facts and the procedural posture of the case, begins as does practically all exposition of doctrine in this area with *Brown* I (Part II of the opinion) and significantly, quotes *Brown*'s language to the effect that:

> [I]n the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[8]

He then states, "[t]his has been reaffirmed time and again as the meaning of the Constitution and the controlling rule of law."[9] Thus, purporting to reaffirm this language from *Brown* I as "the meaning of the Constitution and the controlling rule of law," he decides with the Court's majority that the Constitution does not mean that school desegregation measures can be made effective (absent some limited special circumstances) beyond a school district's boundaries as set by a state; "the controlling rule of law" permits separate educational facilities that may well be unequal to exist side by side in a city and its surrounding suburbs. Clearly then, the overriding legal question posed by *Milliken* is whether what the Court has done (or not done) can be squared with what it has said.

Ever since *Brown v. Board of Education* (*Brown II*),[10] courts considering the problem of school desegregation have addressed it in terms of what remedial steps were necessary in a given situation to comply with the governing rule of law announced in *Brown* I. And in that mold the *Milliken* decision was cast, so on the face of it the disagreement between the majority and the dissenters goes only to the matter of remedy. Justice Stewart in his concurrence makes this explicit:

> 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.[11]

Ostensibly, the justices in the majority and the dissent seem to be talking about remedy (with the possible exception of Justice Marshall).[12]

7. 347 U.S. 483 (1954).
8. Milliken v. Bradley, 418 U.S. at 737.
9. *Id.*
10. 349 U.S. 294 (1955).
11. 418 U.S. at 753.
12. "The *rights* at issue in this case are too fundamental to be abridged on grounds

But I have said that to understand *Milliken* one needs to go much farther back than both *Brown* decisions. What clearly emerges from a close reading of the case is that the quarrel between the Court's majority and minority, despite Justice Stewart, despite the uniform assumption made since *Brown* II, is not over the question of remedy at all but really exposes a fundamental difference in the view taken of the nature of the constitutional right of the present day black descendants of slaves who attend the nation's public schools. How one views the necessary remedy depends—and it is graphically illustrated in this case—on how one views the nature of the right said by *Milliken* to be "the meaning of the Constitution and the controlling rule of law." It is appropriate, then, before undertaking detailed examination of several subquestions raised by the decision, chief among them the question of whether the Court has jettisoned or adhered to the "practical flexibility" standard of *Brown* II,[13] to address what I conceive as the main area of disagreement—a perception of the nature of the constitutional right involved.

## II. The Nature of the Right

Before the adoption of the reconstruction amendments[14] it was, of course, unthinkable to suggest that there were any rights that American blacks could insist upon under the Constitution. As is well known, blacks were slaves, a species of property, and as such, were not a part of "the people of the United States"[15] who had any hand in framing the Constitution or structuring government under it. As the Dred Scott decision[16] with its devastatingly accurate reading of history makes clear, blacks derived no benefit from the Constitution; since not considered as part of "the people of the United States," they were not citizens and therefore neither the national government, any of its citizens, nor any of the state governments owed any duty to accord them any of the rights and privileges normally associated with citizenship. Of immediate

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as superficial as those relied on by the majority today. We deal here with the *right* of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens." 418 U.S. at 783 (Marshall, J., dissenting) (emphasis added).

Compare similar language in his dissenting opinion in San Antonio School District v. Rodriguez, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting), and *see* text accompanying notes 76-78 *infra*.

13. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies." 349 U.S. at 300.

14. U.S. CONST. Amends. XIII (1865), XIV (1868), XV (1870).

15. *See* U.S. CONST. preamble.

16. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

importance to our consideration this meant that none of the states of the union prior to the Reconstruction amendments could have been required under the Constitution to afford black children access to what limited provisions had been made for public education at that time.

Of course, before blacks could become citizens they first had to cease being slaves. That was the principal work of the Thirteenth Amendment which for some, was alone sufficient to change the status of blacks and make them citizens in every regard with all attendant rights and privileges.[17] However, the matter became academic after adoption of the Fourteenth Amendment, whose first section was quite clearly designed, with its definition for the first time in the Constitution of what United States citizenship meant, to include all those who had been formerly slaves and their descendants. Without dispute, this has been the consistent reading of the meaning of the opening words of that amendment.[18] Pausing here then, without considering any of the additional language of the amendment, it is clear that to the extent that blacks were now recognized as "citizens" under the Constitution that recognition implied in an absolute sense, the right to be accorded the

17. The contemporary understanding of the effect of the Thirteenth Amendment was expressed in United States v. Rhodes, 27 F. Cas. 785 (No. 16,151) (Cir. Ct. D. Ky. 1866) decided within a year after the amendment's adoption. *Rhodes* involved the prosecution of whites for the burglary of the home of a black brought in a United States Court under the Civil Rights Act of 1866, Act of April 9, 1966, ch. 31, 14 Stat. 27, *as amended*, 42 U.S.C. § 1981 (1970), enacted pursuant to section 2 of the Thirteenth Amendment. The *Rhodes* court said:

"The act of congress confers citizenship.

. . . .

"We cannot deny the assent of our judgment to the soundness of the proposition that the emancipation of a native born slave by removing the disability of slavery made him a citizen. If these views be correct, the provision in the act of congress conferring citizenship was unnecessary, and is inoperative. Granting this to be so, it was well, if congress had the power, to insert it, in order to prevent doubts and differences of opinion which might otherwise have existed upon the subject." 27 F. Cas. 788-89. Of course the propriety of congressional adoption of the Civil Rights Act of 1866 was conclusively settled in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), which reinforced—more than 100 years after its ratification—the "promise of freedom," (392 U.S. 433) i.e., citizenship, made by the amendment. The position is surveyed in detail in Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

18. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1. Justice Goldberg, concurring in Bell v. Maryland, 378 U.S. 226 (1964), stated:

"The first sentence of § 1 of the Fourteenth Amendment, the spirit of which pervades all the Civil War Amendments, was obviously designed to overrule *Dred Scott v. Sandford* and to ensure that the constitutional concept of citizenship with all attendant rights and privileges would henceforth embrace Negroes." *Id.* at 300.

full range of treatment normally given to such persons. Since one of the inescapable facets of citizenship rights is the opportunity for access to public services provided by government on whatever terms they are provided, then black people, surely, at least as a matter of constitutional doctrine, were entitled to these advantages.[19]

But beyond the grant of United States citizenship, the Fourteenth Amendment also decreed that thereafter black people were to be considered citizens of the state in which they happened to reside.[20] Similarly then, to the extent that the states create and define for all its citizens certain rights and privileges (and concomitantly cast upon them certain necessary burdens) then surely blacks, now citizens of the states, had to be included.[21] Again, what this meant in practical terms, as it relates to the problem exposed in *Milliken*, is that state systems for educating children at public expense, to the extent that they existed or were formed, were to be made available to blacks not as a matter of gift but, because they were now citizens, as a matter of right.[22]

The Fourteenth Amendment went even further. The equal protection clause of the amendment forbids the states from denying "to

19. *See generally* Justice Goldberg's concurring opinion in Bell v. Maryland, 378 U.S. 226, 286 (1964), for much of the historical evidence. Adverting to that evidence, he states his agreement with the conclusion reached by the solicitor general that "it is an inescapable inference that Congress, in recommending the Fourteenth Amendment, expected to remove the disabilities barring Negroes from the public conveyances and places of public accommodation with which they were familiar, and thus to assure Negroes an equal right to enjoy these aspects of the public life of the community." *Id.* at 290.

Of course, the Court has many times acted to assure the equal right of blacks to access to the community's public facilities. *See, e.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches). Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (restaurants); Evans v. Newton, 382 U.S. 296 (1966) (parks).

20. *See* note 18 *supra.*

21. "[I]t was assumed that under state law, when the Negro's disability as a citizen was removed, he would be assured the same public civil rights that the law had guaranteed white persons." Bell v. Maryland, 378 U.S. 226, 301 (Goldberg, J., concurring).

22. This is the reading given to the Fourteenth Amendment by the *Brown* Court. Though that Court recognized that largely because state public education systems were in a seminal stage at the time of the adoption of the Fourteenth Amendment, contemporary history regarding the application of the amendment to the specific subject of public education was at best "inconclusive," 347 U.S. at 489, it also recognized that "the first cases in this Court construing the Fourteenth Amendment . . . interpreted it as proscribing *all* state imposed discriminations against the Negro race." 347 U.S. at 490 (emphasis added). "[T]he opportunity of an education", the Court continued, "where the state has undertaken to provide it, is a *right* which must be made available to all on equal terms." 347 U.S. at 493 (emphasis added).

any person within its jurisdiction the equal protection of the laws."[23] As that clause was consistently interpreted by the Supreme Court in the period from the adoption of the amendment to *Plessy v. Ferguson*,[24] its purpose went beyond the grant of citizenship—which ought to have been enough—to a requirement that states must in all areas of their interaction *qua* states with their citizens, treat black citizens the same as white citizens.[25] Of significance to an understanding of the debate in *Milliken*, is the observation that the equal protection clause speaks to the states, not to their subdivisions, whether county, parish, city, town or village.[26]

If then the nature of the constitutional right of black citizens is not to be treated unequally with respect to whatever public benefits a given state bestows on all its citizens, application of this principle to public schools operated by the states is clear: black students should have the same opportunity as white students (and all others) to receive whatever benefits may be thought to flow from an educational system conducted at the state's expense and managed by persons employed by or operating under state authority.[27] Put another way, the nature of the constitutional right goes beyond—and this implicates the question of remedy—the mere permission of attendance at schools but requires state effort to assure "equal protection of the laws." Surely, whatever

23. U.S. CONST., amend. XIV, § 1.

24. 103 U.S. 537 (1896).

25. *See* The Slaughter House Cases, 83 U.S. (16 Wall) 36 (1873); Strauder v. West Virginia, 100 U.S. 303 (1880); Ex Parte Virginia, 100 U.S. 339 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Civil Rights Cases, 109 U.S. 3 (1883).

26. Continued emphasis of this point occurs in the dissent filed by Justice White in *Milliken*: "[T]he State of Michigan is the entity at which the Fourteenth Amendment is directed. . . . ." 418 U.S. at 763; "[I]t is the State that must respond to the command of the Fourteenth Amendment." *Id.* at 770; "No 'State' may deny any individual the equal protection of the laws . . . ." *Id.* at 771; "The obligation to rectify the unlawful condition nevertheless rests on the State." *Id.* at 773.

The repetition of course reflects the tenacious "state action" dogma given birth in the Civil Rights Cases, 109 U.S. 3 (1883). "[S]ome State action through its officers or agents . . . ." 109 U.S. at 13, is required for application of the equal protection clause, but the nationwide circumstance of public school systems operated under state authority by state officers clearly pretermits—whatever the continued vitality of the doctrine—any question whether the requirement is met in school desegregation cases.

27. The principle of course applies no matter the kind of public educational facility involved. *See, e.g.*, Singleton v. Board of Commissioners of State Institutions, 356 F.2d 771 (5th Cir. 1966) (reform school); Crum v. State Training School for Girls, 413 F.2d 1348 (5th Cir. 1969) (same); Montgomery v. Oakley Training School, 426 F.2d 296 (5th Cir. 1970) (same). And of course, prior to *Brown*, the equal protection clause had been applied to higher education. *E.g.*, Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Board of Regents, 339 U.S. 637 (1950).

benefits are derived from the state's system of laws as it relates to public education must be made available to all upon whom the state can exert its power and from whom it can require obedience. In this view, to use the phrase from *Swann*[28] that constantly recurs throughout the opinions, "the condition that offends the Constitution"[29] is any condition for which the state is responsible that prevents according black public school children throughout the state, who are its citizens, whatever positive educational advantages the state is in a position to bestow. The entire range of matters normally thought derivable from access to public education would seem to be included.[30]

Thus a basic difference between those in the majority and those in the dissent in *Milliken* is the perception of the constitutional right and from that naturally enough, a differing appreciation of when the right is violated and what is needed to remedy such violation. This is quite clear from the chief justice's statement in the majority opinion that, "[t]he constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district"[31] even though the Fourteenth Amendment refers simply to the state. The question quite naturally arises whether this judgment as to the nature of the right involved is consistent with what the chief justice earlier describes, quoting from *Brown* I ("Separate educational facilities are inherently unequal"), as "the meaning of the Constitution and the controlling rule of law."[32] It is difficult to know how the Court's majority can purport to adhere to this statement from *Brown* if the nature of the right is only as described by the chief justice. If the nature of the right is only to prevent racially biased school assignments in the city of Detroit then it would appear to be a refutation of the historical concerns, highlighted above, from which the constitutional amendment flowed. Naturally enough, however, if that is the nature of the right, then a more restricted view of the inquiry necessary to determine when

28. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

29. 402 U.S. at 16.

30. "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Brown v. Board of Education (Brown I), 347 U.S. at 493.

31. 418 U.S. at 746.

32. 418 U.S. at 737.

the right has been violated and to conclude what remedy is needed is justified. Given the history, the questions of what is the right and what is the remedy for its violation are inextricably interwoven.[33] Certainly, where one comes out on the question of an interdistrict remedy affords a complete statement of one's view of what black children are entitled to under the Constitution.

## III. The Course of Remedy

Indeed, what the Court has done in the cases since *Brown* I and prior to *Milliken* has been constantly to define and redefine the nature of the constitutional right of black children to public education during the course of the now imposing number of presumptively remedial decisions in which varying factual patterns called forth a definition. This exercise was undertaken, to be sure, to decide concrete cases and to resolve the conflicting claims of parties—black children and their parents on the one hand as to their rights, and school authorities on the other as to their immunities—under *Brown*, but it also was undertaken against the backdrop of increasing national concern over what if any—limits the Court would eventually impose on the *Brown* doctrine.

*Brown* I, of course, was a precise application of the Fourteenth Amendment, clearly mandated in the context of the cases under consideration.[34] The Court's description in *Milliken* of the meaning of *Brown* is consistent with what has been described as the nature of the constitutional right. But *Brown* was limited by its facts: it needed to go no further to reach its result, dealing as it was with school systems that historically had maintained schools unmistakenly violative of the Fourteenth Amendment; "the condition that offends the Constitution" was clear in those cases.

33. Justice Marshall's dissent reveals the essential relatedness of the right-remedy question: "[T]he Court, confuses the inquiry required to determine whether there has been a substantive constitutional violation with that necessary to formulate an appropriate remedy once a constitutional violation has been shown. While a finding of state action is of course a prerequisite to finding a violation, we have never held that after unconstitutional state action has been shown, the District Court at the remedial stage must engage in a second inquiry to determine whether additional state action exists to justify a particular remedy." 418 U.S. at 799 n.19. Of course, the comment also throws in bold relief the nature of the disagreement between the Court and the dissenters.

34. *See* Amaker, *Public School Desegregation: Legal Perspectives*, 7 GA. S.B.J. 102 (1970); 33 NEGRO HISTORY BULL. 174 (1970): "What the Court did in 1954 is what courts and lawyers have traditionally done in fashioning legal rules out of the materials of language, history, social conditions, logic and precedent for application to existing social phenomena."

It was then a relatively simple step beginning with *Brown II*[35] to launch the case-by-case development seen in the past two decades: federal district court consideration to determine initially whether a case was "like" the *Brown* I cases, whether there was so-called *de jure* segregation;[36] if so, a factfinding process at that level to determine how to remedy the situation; where significant questions were raised in the litigation, appeal to the courts of appeals and finally to the Supreme Court. The Court, in passing on the question of remedy raised in the case, revealed increasingly more about the nature of the constitutional right involved. For example, the Court declared that black children initially assigned to school on a racial basis could not be required to transfer from a school where their race was in a minority to a school where their race constituted the majority;[37] that black children had a right to attend nonracially segregated schools without having to resort to state administrative remedies;[38] that there was a right to have the public schools kept open in a given county so that desegregation could go forward if a state kept public schools open elsewhere;[39] that there was a constitutional right to a racially desegregated public school faculty;[40] that there was a right to have that plan of desegregation adopted that would affirmatively undo the effects of prior discrimination;[41] that desegregation pursuant to such a plan must occur as soon as possible;[42] and that such a plan might include the use of school buses within reasonable limits of time and distance.[43] Prior to *Milliken*, the Court had told us that these are all within the intent of *Brown* I and constitute the "meaning of the Constitution."

The issues that brought *Milliken v. Bradley*, a case "like" the *Brown* I cases,[44] to the Court from this process of case-by-case defini-

35. 349 U.S. 294 (1955).

36. Cases found not to be "like" *Brown, i.e.*, so-called *de facto* cases, have not prompted plenary consideration by the Supreme Court, *see, e.g.*, Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. den.*, 377 U.S. 924 (1964); Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), *cert. den.* 380 U.S. 914 (1965); Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), *cert. den.*, 389 U.S. 847 (1967). Of course, whether a case is *de jure* or *de facto* is itself a matter of characterization, ultimately a matter of defining the scope of the equal protection clause as it bears on the right of Negro school children to public education. Keyes v. School District No. 1,413 U.S. 189 (1973).

37. Goss v. Board of Education, 373 U.S. 683 (1963).

38. McNeese v. Board of Education, 373 U.S. 668 (1963).

39. Griffin v. County School Board, 377 U.S. 218 (1964).

40. Rogers v. Paul, 382 U.S. 198 (1965).

41. Green v. County School Board, 391 U.S. 430 (1968).

42. Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

43. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

44. *See* note 36 *supra.*

tion of the nature of the constitutional right were fairly predictable. Eventually, the social movement of the nation in the post-*Brown* decades ( much of it no doubt caused by *Brown*) would pose for the Court yet another choice of competing interests. Theoretically, the choice of a so-called metropolitan plan of school desegregation was a logical next step based on the historical analysis outlined above.

The argument, ably made by the dissenters in *Milliken*,[45] is straightforward enough: since the Fourteenth Amendment speaks to the states, not to its subdivisions; since the Constitution recognizes the equal protection right of blacks but does not similarly recognize a state's right to maintain political-geographical subdivisions; since these subdivisions are at most no more than a convenient administrative apparatus; and since in other contexts, specifically the reapportionment cases, the Court has required restructuring of a state's political subdivisions for equal protection purposes;[46] it follows that school district boundaries may give way also if that is required to prevent state denial of equal educational opportunity to black children.

Notwithstanding the strength of the argument, a majority of the Court declined to accept it. Thus, we are left with the majority's view of the limits of *Brown* as "the meaning of the Constitution."

## IV. The Court's Opinion

The majority's restrictive view of the constitutional question at issue is reflected throughout the Court's opinion. Note for instance how the chief justice poses the question presented at the opening of the opinion:

> We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-district, areawide remedy to a single-district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multi-district remedy or on the question of constitutional violations by those neighboring districts.[47]

45. *See* 418 U.S. at 762 (White, J., dissenting).

46. 418 U.S. at 777-78 (White, J., dissenting) 418 U.S. at 807-08 (Marshall, J., dissenting).

47. 418 U.S. at 721-22. One can't help but be impressed with the chief justice's advocacy skills. As every lawyer knows, how one frames the question(s) to be decided

This statement of the question for decision nowhere mentions the state of Michigan,[48] but rather emphasizes a concern with the integrity of school district lines when called into question in federal courts. (The alternative wording of the question, framed by the counsel for the black parents, emphasizes the issue of the state's action.) The initial inquiry for Chief Justice Burger then is not with Michigan's responsibility as a state for alleged denial of equal protection to the plaintiffs and their class, but rather with the culpability (or lack of it) of the outlying school districts. The problem is described not in terms of state responsibility but rather as "a single district *de jure* segregation problem," thus confining the inquiry to whether the other districts have done anything to account for the problem in Detroit; if the state is to be held accountable in any way, it can only be if the boundary lines of *any affected school district* were established with the purpose of fostering racial segregation irrespective of whatever else the state has done or failed to do. Such a contained view of where the inquiry ought to begin and end is understandable only in terms of a similarly telescoped view of what the Constitution permits the plaintiffs to litigate, whether racially discriminatory conduct affects their attendance in the Detroit school system instead of whether the state of Michigan is affording them as citizens, the same kind of educational opportunity it makes available to white citizen—school children.[49]

Similarly expressive of the Court's restricted view of the nature of the constitutional right is the emphasis in the majority opinion on the district court's apparent failure to respect what is seen as the due

is critical to the ultimate decision. The alternative question framed by counsel for the black plaintiff-respondents before the Supreme Court is: "May the State of Michigan continue the intentional confinement of black children to an expanding core of state-imposed black schools within a line, in a way no less effective than intentionally drawing a line around them, merely because petitioners seek to interpose an existing school district boundary as the latest line of containment?" Brief for Respondents, at 1-2 Milliken v. Bradley, 418 U.S. 717 (1974).

It is of course, a tremendous aid to advocacy when the advocate is a justice (let alone chief justice) of the nation's highest court.

48. *See* note 47 *supra.*

49. A similar divergence of views occurred during the previous term with respect to a state's—as opposed to an individual district's—responsibility for financing public education. *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). Justice Douglas, who also dissented in *Rodriguez,* makes essentially the same point in his dissent here as in that case, *i.e.,* that the cases taken together mean that the Court, by not requiring the states as a part of their constitutional duty under the equal protection clause to do whatever they can to assure that public educational benefits are in fact made available to all children throughout the state on terms as nearly equal as human ingenuity can make them, has itself defaulted in its duty under the Constitution. *See* text accompanying notes 76-78 *infra.*

process rights of the suburban school districts—notice and an opportunity to be heard on the question of the feasibility of a metropolitan plan. The opinion mentions, for example, the fact that the district court deferred a ruling on a motion by parents of Detroit school children who had intervened as defendants, to join as additional defendants school districts in the surrounding counties until after it had ordered the defendant state officials (including in addition to the governor and attorney general, the State Board of Education and its superintendent):

> [T]o submit desegregation plans encompassing the three-county metropolitan area despite the fact that the 85 outlying school districts of these three counties were not parties . . . and despite the fact that there had been no claim that these outlying districts had committed constitutional violations.[50]

Described as "significant factors" were: that the district court eventually permitted intervention by the suburban districts on the second day of the hearings scheduled on the desegregation plans submitted by the Detroit school officials and the state officials (notice of the hearing having been given only a week before), but the intervenors' roles were limited to that of filing a brief within one week thereafter on the legal propriety of the metroplan, and counsel for the intervenors was limited in oral argument to how the plan would operate rather than whether it was appropriate.[51] Perhaps weightiest of all in this aspect of the Court's consideration, was the district court's admission that it had not taken proof "with respect to the establishment of the boundaries of the 86 public school districts . . . nor on the issue of whether . . . such school districts have committed acts of *de jure* segregation."[52]

No one, of course, contends that the districts surrounding Detroit whose educational facilities and personnel and whose parents and children were ultimately to be involved in a metropolitan plan should not have had some opportunity to become involved in the details of how such a plan would be implemented. But the question of *whether* such plan should be implemented was ultimately for the Court to decide with the overarching consideration being the constitutional commands. The

50. 418 U.S. at 729-30. The Court however, also notes, that the plaintiff parents opposed intervention by other school districts because they felt "the presence of the state defendants was sufficient . . . ." 418 U.S. at 729 n.9. The plaintiffs' view of the nature of the right, of its violation and of where responsibility lay for correcting such violation obviously differed from that of Court's majority.

51. *Id.* at 731.

52. 418 U.S. at 730 n.11. The Court at a later point mentions that the panel appointed by the district court to prepare a plan for the metropolitan area included only one member representing the intervening suburban districts. 418 U.S. at 733 n.14. This too, apparently, was not viewed favorably by the Court's majority.

legal process would be divorced from reality if the Supreme Court did not consider how the district court performed its function in arriving at its decision; but in the delicate process of drawing the line between apparent due process deprivations of the rights of school districts and the obvious deprivations of the rights of the plaintiffs under the equal protection clause, the line was apparently drawn by the Court in this case to embrace concerns which in the context of the litigation were of relatively less moment.

Similarly, the Court in disagreeing with the court of appeals' affirmance of the district court's requirement of a metropolitan plan, commented on the court of appeals' failure to discuss in its opinion claims that the outlying suburban districts had not themselves committed any constitutional violation and "that no evidence on that point had been allowed . . . ."[53] The Court seemed particularly troubled that the court of appeals, in remanding the case to the district court, did not require that court to receive evidence "on the question of whether the affected districts had committed any violation of the constitutional rights of Detroit pupils or others."[54] Here again, such concerns are significant only because of the view taken by the court of the nature of the basic constitutional right.

After having taken the lower courts to task, the Court opened Part II of its opinion with the quote from *Brown* I that "separate educational facilities are inherently unequal." Then considering *Swann*'s admonition that courts are to correct "the condition that offends the Constitution," the Court relates both standards to the same frame of reference that was adumbrated by its opening statement of the question presented. The frame of reference is the city of Detroit: emphasis in the quote from *Brown* is laid on "separate" and thus "the condition that offends the Constitution" is the separateness of black children *within* Detroit rather than their lack of equality vis-a-vis other school children in Michigan. From this stance, the Court moved to criticism of the district court for having "abruptly rejected" the Detroit only school desegregation plan,[55] and its further comments underline what clearly emerged as a major stumbling block for the Court's majority, the catchphrase "racial balance." The lower courts are accused of endorsing a metroplan because a Detroit only plan "would not produce the racial balance which they perceived as desirable."[56] Of course, the Court

53. 418 U.S. at 736.
54. *Id.*
55. *Id.* at 738.
56. *Id.* at 740.

at this point has moved as far away from the central point respecting the constitutional rights of black children as it accused the lower courts of doing in requiring a metroplan.[57]

Finally, the Court shifts the focus entirely away from the constitutional right of black school children and a remedy for its violation to a concern with local autonomy in the management of school systems within a state. This focus on school autonomy leads the Court to speculate on the possible consequences of implementation of any metropolitan school remedy.[58] The Court seems horrified at the notion that the tradition of local control of schools in its present form might be altered thus choosing this value rather than the constitutionally mandated requirement of actual equality of educational opportunity. This emphasis on local autonomy irresistibly leads to its clearest statement that, "[t]he constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district."[59] Thus, the constitutional right is the right of attendance in a given district no matter what deficiencies of educational opportunity may exist; anything else is a "drastic expansion of the constitutional right itself . . . ."[60]

Justice Stewart in his concurrence shows a similar refractory approach to the problem. One might agree in the abstract that "the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation of the Equal Protection Clause . . . ."[61] But the problem is hardly abstract. His conclusion that the Court is not dealing with substantive constitutional law questions is as I have previously indicated, simply not right. In seeking to confine the scope of the majority opinion to the matter of remedy, he of course joined the view that prevailed as to the nature of the constitutional right. Nevertheless, he focuses on what factual showing is needed in a given case to validate the remedy thought appropriate by the district court. In sum, there must be some kind of factual showing involving

57. Desdemona thought Othello's accounts of his travels and battles "strange, wondrous strange." I have a similar reaction to the Court's use of "racial balance" as a means of avoiding the fundamental issue. The Fourteenth Amendment does not cast the issue in terms of "racial balance," "race mixing" or any of the other flaccid substitutes for analysis of the real problem so rife in our contemporary jargon. The "racial balance" phrase at best (or worst) is a piece of political patchwork introduced into the vocabulary of school cases to blunt the effectiveness of efforts to resolve the basic question of how educational benefits are to be made real for millions of black children to whom they've been denied because of the legacy of slavery.

58. 418 U.S. at 743.

59. *Id.* at 746.

60. *Id.* at 747.

61. *Id.* at 756.

a relationship between where children go to school and the use of state power to that end. Hence, it is dispositive for him that evidence of the drawing or redrawing of school district lines, or the transfer of school units by districts, or the discriminatory use of housing and zoning laws by the state, is absent. Because of this absence he finds the interdistrict remedy "simply not responsive to the factual record. . . ."[62]

But what leads him to this conclusion, though he takes care to frame his opinion in remedial guise and specifically disallows its impact on "questions of substantive constitutional law," is precisely a reading of the Constitution and a rendering of *Brown* I that obviates for him the necessity of looking at the impact of what the State has failed to do to assure maximum access to educational benefits it bestows rather than whether the state may be said to be "innocent" of the kind of conduct that for him might prompt a different conclusion. Clearly, a more searching light thrown on the seeming historical purpose of the equal protection clause might alter his notion of the remedial excesses of the district court.

## V. The Impact of the Decision

With *Milliken,* we have now been afforded what many have sought from the Supreme Court in the years since *Brown* I: a definitive answer to the questions of what that decision means and what it requires of state authorities, local school officials, the lower federal courts and finally the lawyers who by taking school desegregation cases to court on behalf of Negro parents and their children have sought to give living reality to the break with the past that *Brown* represented. *Milliken* in quoting *Brown* I's exhortation that "separate educational facilities are inherently unequal"[63] and equating it with "the meaning of the Constitution"[64] has determined the scope of constitutional doctrine and described for us the practical limits of *Brown* I, thus stilling, at least for the moment, the debate that has occurred during the last two decades of what the quoted language means.

As to the scope of constitutional doctrine: the "meaning of the Constitution" despite its grant of citizenship to blacks and proscription of state denial of equal protection of the laws, is that state authorities have no affirmative duty to expend any effort toward guaranteeing that the yield from its educational harvest is actually shared with its black citizens as well as with its white. Their duty at most is to remain in-

62. *Id.*
63. *Id.* at 737.
64. *Id.*

nocent of any conduct that may be seen as causing racial separation *within a district.* As to the practical limits of *Brown* I: there is no literal quality to the quoted text; separate educational facilities no matter how "inherently unequal" may coexist within a state if the mode of their coexistence is a set of lines labeled a "school system" or "school district" even though one or more of the lines touches immediately a similarly labeled school system or district in which the fruits of education are richer and more nourishing. Thus the doctrine of "separate but equal" continues to have a place in the field of public education so long as the separateness is the result of boundaries around school districts drawn with no purpose of racial containment irrespective of whether actual equality of educational opportunity results. Local school authorities to be sure must continue to do what they can to prevent public schools in their charge from being racially identifiable with respect to students, teachers, administrators and staff. They must still justify obvious inequalities regarding sharing of facilities and expenditure of monies at their disposal. They must be careful about where schools are built and how their school transportation systems operate. They will not, however, be held responsible if in the end, racial identifiability does result and the children attending their schools are not being educated as well as the children who go to school in the neighboring district; their "local autonomy" will assure that they will not be called to account. Given the Court's definitive interpretation in *Milliken* of *Brown* I, the fears of school authorities at state and local levels that *Brown* may indeed have meant they would be required to pay strict attention to how effectively their educational system was educating black children are quieted and the *de jure-de facto* distinction has been re-emphasized.[65]

In terms of what *Milliken* means for the lower courts, there is clearly a jettisoning of the "practical flexibility" standard of *Brown* II. This standard, as reinterpreted in *Swann*[66] does not permit district courts to require or approve plans for school desegregation that involve school districts other than the one in suit except in what will be relatively rare instances in which parties successfully undertake a major burden of proof not heretofore thought necessary. The instances mentioned in a general way in the opinion-in-chief are "where the racially discriminatory acts of one or more school districts cause[d] racial segregation in an adjacent district, or where district lines have been deliber-

65. "The record before us . . . contains evidence of *de jure* segregated conditions only in the Detroit schools . . . ." *Id.* at 745.

66. 402 U.S. 1 (1971).

ately drawn on the basis of race."[67] The former presumably might include cases where it could be shown that school officials in one district had located a school or a number of them in such a way—either by construction or change of attendance areas—to encourage white flight from a district to a neighboring district.[68] The latter might involve a showing of territorial annexations or detachments and/or the shifting of boundary lines such as occurred in one case.[69] Not only will the occasions be rare when such a showing can be made, but in order to make such a showing even on these rare occasions, it seems clear that one would have to prove purposeful conduct which given the sophistication of the deceptive art in race cases, is increasingly harder to do. Beyond this, the rarity of the instances makes this particular game not worth the candle; the vast majority of intrastate school district arrangements will be seen under the *Milliken* standard as innocently arrived at.[70] Once school officials show—as they can in practically all cases—that the boundaries of their district were not drawn (at least not so recently as to be noticed) deliberately with racial segregation in mind, that will be the end of the matter and the hand of the courts will be stayed.

Much has been made of Justice Stewart's rendering of the majority holding with his emphasis on what factual showing would be necessary to sustain a cross-district decree as a possibility for lessening the impact of the majority decision. However, upon analysis his statement of what the Court's opinion means is substantially the same as that of the opinion of the Court. With one exception, a district court case involving a legislative effort in North Carolina to carve out of an existing county two racially separate school districts,[71] he cites the same cases

67. 418 U.S. at 745.

68. But note that Justice Marshall's criticism of the state of Michigan's ultimate responsibility for the "white flight" phenomenon went unheeded. Apparently, the majority believes that the individual district must be shown responsible.

69. United States v. Texas, 321 F. Supp. 1043 (E.D. Texas 1970), *aff'd*, 447 F.2d 441 (5th Cir. 1971), *cert. denied sub nom.* Edgar v. United States, 404 U.S. 1016 (1972). Both the chief justice and Justice Stewart cite this case as an example of a situation in which an interdistrict remedy might be appropriate. 418 U.S. at 744, 418 U.S. at 755 (Stewart, J., concurring).

70. Note for instance, that according to Chief Justice Burger, the constitutional violation within one district, whether that of the local district or of the state, must produce "a significant segregative effect in another district." 418 U.S. at 745. But he failed to construe as did the dissenters, what the record showed the state had done here as sufficiently "significant" to warrant an inter-district remedy. So much for the problem of proof.

71. Turner v. Warren County Board of Education, 313 F. Supp. 380 (E.D.N.C. 1970).

as Chief Justice Burger cited earlier.[72] None of these cases is particularly helpful in blunting the essential thrust of the *Milliken* holding. All involved some demonstrable effort by local school authorities or state officials to arrange or rearrange school district boundaries to maintain segregation and in all the purposefulness of what was attempted could be readily seen. Thus the compelling nature of the proof burden as I have described it (totally dispositive for Justice Stewart) seems the same whether one reads the main opinion or the concurrence. This is so even if one seizes upon Justice Stewart's advertence to the use of state housing or zoning laws by state authorities to maintain segregation as one means of demonstrating the need for a metropolitan remedy.[73] There is no question at least since *Buchanan v. Warley*[74] that use of such laws by state or local school authorities to maintain racial segregation (as for example, by placing schools to serve black and white residential communities pursuant to such laws) is proscribed but there is still, under Justice Stewart's formulation, the twin necessity for showing that their use by a district is "purposeful," not adventitious, and moreover that the communities created across the school district boundaries are a direct result of such use.

In sum, notwithstanding Justice Stewart's interpolation, litigants who argue the necessity of a metropolitan plan in school cases must be prepared to carry the burden of proving purposeful discrimination with respect to the creation of school district boundaries; they will no longer be permitted—in the absence of a suit against the state as a whole in which all of a state's districts are named as defendants or more modestly, suits against several but fewer than all districts within a state[75]—to rest solely on a showing of racial isolation within a district and inequality with respect to a neighboring district. That avenue is closed.

Perhaps the greatest impact of the decision beyond these nice, lawyers' questions relating to proof burdens, is what it augurs for the

72. 418 U.S. at 744.

73. 418 U.S. at 755. *But see* the recent decision of the Seventh Circuit Court of Appeals on rehearing in Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974), rendered after the decision in *Milliken*, endorsing the principle of metropolitan relief to remedy housing discrimination in Chicago on the ground that discrimination in Chicago may have affected housing patterns throughout the Chicago metropolitan region. How the Supreme Court might respond if the metropolitan remedy problem were presented in a housing rather than a school context is a matter of speculation, but given the decision in *Milliken*, this avenue will inevitably be examined in the future.

74. 245 U.S. 60 (1917).

75. The enormity of the proof burden under these circumstances is evident.

future with respect to efforts to fulfill the historic purpose of the Fourteenth Amendment. In that light, Justice Douglas' reference to the Court's recent 5-4 decision on state government responsibility for school financing[76] takes on added significance:

> Today's decision given *Rodriguez* means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the Black schools are not only "separate" but inferior.[77]

Focusing on the equal protection aspect of the Fourteenth Amendment as it applies to public education, Justice Douglas concludes, considering the observable social facts described in his dissent,[78] that given both *Rodriguez* and *Milliken* the Court has ignored state responsibility for doing all it can to guarantee all its citizens (including those who are black and poor—and in Detroit, as elsewhere, they amount to the same people) that educational opportunity will be the same throughout the state. In his view, a view supported by the historic framework in which the Fourteenth Amendment was adopted, the decisions taken together signal an abandonment of the amendment's central purpose and focus inadequately on the question, on the one hand, of whether schools in a given district of the state are racially segregated, and on the other, whether the amount of expenditures for education made by the state are minimally nondiscriminatory from district to district; but the continued racial separateness of schools which are also poorer is condoned! His comment accurately takes into account the prevalence of the same approximate set of social conditions that it was the work of the Fourteenth Amendment to change; he has essentially said to the Court's majority and to us that it simply will not do to say to the states to whom the Fourteenth Amendment speaks directly, that you may continue to do nothing about the underlying social facts of racially separate and inferior public education. The issues for him then, are not as they apparently were for the majority of the Court—whether the Fourteenth Amendment's equal protection clause requires racial balance or whether local autonomy is sacrificed—but rather whether given the existing social conditions, the state as a whole must do everything in its power to change them since only in this way will equal protection of the laws not be denied.

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76. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

77. 418 U.S. at 761.

78. 418 U.S. at 76 n.10 (The Detroit inner city is almost solidly black; blacks attending school there "are likely to be poorer"; the black schools in Detroit are inferior to those in neighboring districts.)

## VI. Conclusion

A final set of observations. Of course, it understates the truth by a great deal to say that questions relating to public school desegregation are "often strongly entangled in popular feeling."[79] One need only reflect on the history of these past years from Clinton, Tennessee to Boston to confirm this. Thus quite aside from the importance and relevancy of constitutional analysis attempted here, ultimately the Court's decision in *Milliken* will be judged—despite any protestations to the contrary—on the basis of the majority's considered choice of what in these times appeared to it the greater evil: a judgment upholding with some restrictions, the power of communities to deal with their educational systems locally, or a judgment that more nearly reflects what the Fourteenth Amendment would seem to be all about. In successive terms now, the Court has opted for the former in the face of historically supportable competing claims as to what the Fourteenth Amendment requires for the states *qua* states. Its judgment no doubt has inescapably been formed with knowledge of the pressures generated not only from those who would deny black rights altogether, but also from those of whom it can be fairly said that their primary interest is in having as much to do as possible with where and how their children are educated. Thus the question of busing for example is important not because of the Fourteenth Amendment but because existing social arrangements including the fact of residential segregation and city-suburban separation[80] makes it so. And it would be naive to think that the Court does not recognize this.[81] Hence *Milliken* can be seen as a response to the play of forces that underlies the continuing debate surrounding complex questions of race, poverty, and education.

Having said this much and given the need to know the nature of things in which our feelings are involved, one ought candidly to recognize that the goal—important to some—of mixing the races in the public schools for its own sake or because as Justice Marshall says, in dissent, this may the only way "that our people will ever learn to live together"[82] is not central to the meaning of the Fourteenth Amendment.[83] There is no hard evidence that this is or ever was a condition

79. Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

80. *See* note 6 *supra.*

81. Indeed, Justice Marshall in dissent states his belief that the decision is "a reflection of a perceived public mood." 418 U.S. at 814.

82. 418 U.S. at 783.

83. We would do well to have a clearer perception of our premises regarding constitutional analysis than has often been evidenced. One commentator, for example, has

precedent for learning to live together. But what there is hard evidence of —and that evidence still exists—is that "separate but equal" has not achieved in American society the goals that the Fourteenth Amendment was intended to accomplish, full accordance to blacks of the rights of *citizenship* on equal terms. Given our history and our experience as a nation, we know that those who ultimately control benefits at the state level are members of the white majority who to date have not shown, without compulsion, any desire to bestow these benefits on children of the black minority to the same degree as they do on their own children. Thus, *Brown v. Board of Education* was a necessary way to begin the achievement of true educational equality for the simple reason that those who control educational policy and educational finance presumably would be compelled thereby to provide the same education to blacks as to whites. This remains true today and so the point of *Brown* is still valid and will be for generations to come given the extent of the pre-existing historical conditions.

But if *Brown* is limited—as apparently it is by *Milliken*—to a constitutional right only of attendance on more or less nondiscriminatory terms within a school district, then what remains of the rest of the Fourteenth Amendment given the compelling nature of the fact of largely affluent white suburban communities surrounding largely poor black cities? Surely, the controllers of state policy and finance who have historically paid little or no attention to the educational needs of their black citizen-school children will continue to do so. So it is not a question at all of whether schools are "majority black" or "racially balanced"—that colloquy misses the point of equal protection of the laws. The prime reason for desegregation of public schools is to assure, in light of our history and experience, that conduct by officials not be racially discriminatory insofar as the permissible exertions of state power or the valid objectives of state conduct are concerned. Thus, where education is the function involved, the equal protection

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read *Brown* as a decision which enforces a right of association between blacks and whites: "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its *constitutional* dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (emphasis added). Emphasis as a constitutional matter on the question of "association," equally a cornerstone of liberal faith and the *bête noir* of racist fears, is responsible for the skewered perception of *Brown* and its progeny that has infused debate over "integration" vs. "segregation" rather than education which "assuming equal facilities"—("Aye, there's the rub")—can of course occur in schools which are totally black or in which blacks are a substantial majority.

clause says that the states must assure as an affirmative matter, that benefits and burdens are equally shared and imposed to the extent that human ingenuity can assure that result.

This is the failure of *Milliken.* Of course, practical limits must always be observed with respect to the realization of any constitutional right.[84] It would, for example, be extreme to suggest that any parent, black or white, whose children live in New York City send them to school in Buffalo, or that children living in St. Louis must attend school in Kansas City, or those living in Tallahassee must attend school in Miami. But such extreme results were neither sought nor intended in Detroit. Rather, plaintiffs there were asking only that the court require the state of Michigan to do what it could in fact do with relatively little expenditure of human capacity. It would seem that given the nature of the constitutional right this was not asking too much and the real tragedy of *Milliken* consists in the Court's view that these parents under our Constitution, had no right to ask at least this much.

84. Everyone knows one can't falsely shout "fire!" in a crowded theater. Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.).