Remedies for School Segregation: A Limit on The Equity Power of the Federal Courts?

By A. CHARLES DELL'ARIO*

On May 17, 1954, the United States Supreme Court delivered its opinion in *Brown v. Board of Education.*[1] The Court concluded, in what soon became famous language, that, "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[2] Twenty-one years later, legislatively mandated, overt segregation has ended. Yet throughout the country, especially in the larger cities, black and white children attend school primarily with members of their own race.[3] The racial imbalance that still persists is not always the result of prior state imposed segregation or invidious discrimination by school boards.[4] The growing number of one-race schools reflects the general demographic changes that are occurring throughout major urban areas of both North and South.

The Court which decided *Brown I* was cognizant that a bald declaration of a constitutional proscription against racially segregated schools was only the beginning. When the case was set for reargument after the 1954 Term, the Court propounded certain questions for consideration by the parties. Two of the five questions focused on the nature and scope of an appropriate remedy should a constitutional violation

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* B.A., 1969, Stanford University; J.D., 1974, University of California, Hastings College of the Law.

1. 347 U.S. 483 (1954) [Brown I].

2. *Id.* at 495.

3. "The percentage of Negro pupils which attended schools more than 80% black was 91.3 in Cleveland, Ohio; 97.8 in Compton, California; 78.1 in Dayton, Ohio; 78.6 in Detroit, Michigan; 95.7 in Gary, Indiana; 86.4 in Kansas City, Missouri; 86.6 in Los Angeles, California; 78.8 in Milwaukee, Wisconsin; 91.3 in Newark, New Jersey; 89.9 in St. Louis, Missouri [in 1971]." Keyes v. School Dist. No. 1, 413 U.S. 189, at 218-19 n.4 (1973) (Powell, J., concurring and dissenting).

4. Note, *Segregation in the Metropolitan Context: The "White Noose" Tightens,* 58 IOWA L. REV. 322, 323 (1972) [hereinafter cited as *White Noose*].

be found.[5] So intense was debate on the violation issue, the Court felt compelled to set the case for reargument just to consider the appropriate nature and scope of a remedy.[6] Over a year later, Chief Justice Warren concluded for a unanimous Court that desegregation should proceed with "all deliberate speed"[7] in a manner fashioned by the district courts employing the "traditional attributes of equity power."[8]

The Supreme Court has consistently articulated its commitment to eliminating state imposed racial segregation in public schools. The Court has uniformly rejected both overt and subtle attempts at circumvention of its *Brown I* mandate.[9] As the firm posture of the Court became clear, attempts to subvert desegregation have become increasingly better disguised. The time for "deliberate speed" has passed[10] and the Court has placed upon school and state officials the affirmative duty to end segregation and its effects.[11] The courts have also realized that the spectre of segregation can exist in school systems of the North where segregation has never been legislatively imposed.[12]

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5. "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?" Brown v. Board of Educ., 347 U.S. 483, 495 n.13 (1954) [Brown I].

6. *Id.*

7. Brown v. Board of Educ., 349 U.S. 294, 301 (1955) [Brown II].

8. *Id.* at 300.

9. *Compare* Cooper v. Aaron, 358 U.S. 1 (1958) *with* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972).

10. Griffin v. County School Bd., 377 U.S. 218, 234 (1964).

11. Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

12. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). The Court blurred the distinction between de facto and de jure segregation in finding that plaintiffs' showing of racially motivated acts in pupil assignment in one part of the city would be inferred as existing in all parts. *See generally* Goodman, *De Facto School Segregation: A Con-*

Over the twenty year period since *Brown II*, the Court has been aware of the need for further clarification and guidance on the extent of the remedy required to eliminate segregation of schools.[13] Simple repeal of the dual school system legislation has not been effective to eliminate the problem in the South and has no application to the racial imbalance in the unitary school systems of the North. In 1973, the Supreme Court had its first occasion to examine what now seems to be the outer limit of the equitable power of the federal courts to remedy racial imbalance in public schools. In *Bradley v. School Board [Richmond]*,[14] the Court ended twelve years of school desegregation in Richmond, Virginia. By dividing equally, the Court affirmed the Fourth Circuit Court of Appeals reversal of a district court order consolidating three counties into one school district to achieve racial balance. The failure of Justice Powell to participate produced the deadlock which lacks precedential effect outside the Fourth Circuit.[15] The full Court has again considered the issue in *Bradley v. Milliken* [Detroit], decided on the final day of the 1973 term.[16]

The Court has consistently relied on its equity powers to fashion relief once a constitutional violation has been shown. Although courts have often recognized that the equity power is not without limit,[17] *Detroit* represents the first time the Supreme Court has articulated the bounds of a definite limit to the equity power in school segregation cases. The purpose of this article is to explain this limit as announced in *Detroit*. Examination will first center on the remedies ordered in the desegregation cases previously adjudicated. Specific at-

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stitutional and Empirical Analysis, 60 CALIF. L. REV. 275 (1972) [hereinafter cited as *Goodman*]. Professor Goodman suggests that a showing of de facto segregation alone could mandate a less stringent remedy than that required after a showing of de jure segregation. *Id.* at 437. The Court's analysis in *Keyes* indicates that the situations where plaintiffs can only show de facto segregation are likely to be rare since school authorities must bear the burden of showing their apparently racially motivated actions were not so motivated. 413 U.S. at 203. Justice Powell seems prepared to make this step directly. *Id.* at 224 (Powell, J., concurring and dissenting). *But see* Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd*, 404 U.S. 1027 (1972).

13. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Griffin v. County School Bd., 377 U.S. 218 (1964).

14. 412 U.S. 92 (1973), *aff'g*, 462 F.2d 1058 (4th Cir. 1972).

15. United States v. Pink, 315 U.S. 203, 216 (1942); Hertz v. Woodman, 218 U.S. 205, 213-14 (1910).

16. 94 S. Ct. 3112 (1974).

17. *See* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 217 (1973) (Powell, J., concurring and dissenting); Davis v. School Dist. of Pontiac, 474 F.2d 46 (6th Cir. 1973).

tention will be focused on the consolidation order at issue in *Detroit*[18] and the reaction of the lower court jurists that considered it. The Supreme Court's opinion in *Detroit* will finally be examined with a counterpoint offered by theories and previous attitudes of the justices demonstrating that the outcome, while regrettable, was to a large degree predictable.

Remedies for Segregation: Brown II to Swann

The starting point for understanding the limits on the equitable power to remedy segregation must be the cases following *Brown I* in which the Court sought to provide guidance for the district courts upon which the task of determining the detailed decree devolved.[19]

Special consideration was given during the 1954 Term to the question of appropriate remedy for desegregation. In *Brown II* the Court followed its usual practice and remanded the cases to the lower courts. Chief Justice Warren gave only the most general guidance:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facilty for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.[20]

One may well wonder why the Court found necessary a year's delay in fashioning an order of such obvious and logical simplicity.[21] The point of debate seemed to center on the propriety of a gradual versus an immediate decree and the Court apparently took cognizance of the

18. 484 F.2d 215, 243-45 (6th Cir. 1973), *rev'd.* 94 S. Ct. 3112 (1974).

19. While the Supreme Court itself has the authority to fashion a decree of its own specific enough for any circumstance presented by a case, 28 U.S.C. § 2106 (1970), it favors the practice or remanding a case for a decree by the lower courts. Note, *Supreme Court Equity Discretion: The Decrees in the Segregation Cases*, 64 YALE L.J. 124, 135 (1954) [hereinafter cited as *The Decrees*].

20. *Brown II*, 349 U.S. 294, 300.

21. *See* Braucher, Foreword to *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 123 (1954) [hereinafter cited as Braucher].

profound sociological and psychological impact an immediate decree would have on the dual school systems of the South.[22] While some northern critics would have favored an immediate order,[23] others felt the Court's approach sound, though they recognized that a gradual decree invited dilatory tactics.[24]

Dilatory tactics and worse ensued as the legislatures and public officials of the dual system states openly sought to frustrate the Court's order.[25] By September, 1957, less than one third of the school districts segregated at the time of *Brown I* were even superficially desegregated, and the pace appeared to be slowing.[26] An early prediction of a generation of litigation was proving to be a realistic appraisal and the failure of the Civil Rights Act of 1957[27] to provide for desegregation left the federal judiciary to implement the *Brown II* mandate.[28]

The Court's initial guidance also proved insufficient. The district courts that were initially to order compliance decrees were uncertain not only as to pace but as to just what result was intended, since the *Brown II* Court had failed to define a "racially nondiscriminatory school system."[29] Seeking to give *Brown II* minimum impact, courts con-

22. *The Decrees, supra* note 19, at 133. One commentator has found curious and tragic the Court's adoption of the sociologists' arguments in finding a violation in *Brown I* but failing to follow their recommendation for an immediate order of integration in *Brown II*. Clark, *The Social Scientists: The Brown Decision and Contemporary Confusion* in ARGUMENT xxxi, xxxli (L. Friedman ed. 1969) [hereinafter cited as Clark].

23. *The Decrees, supra* note 19, at 133 n.36.

24. "The Court's 1955 decision was a distinct anticlimax after the 1954 opinion, but even as a matter of hindsight it is hard to suggest how the Court could have decided better except perhaps by deciding sooner. Its directions are likely to have the desired effect on state and local officials who are seeking conscientiously to desegregate and who have popular support for their efforts; lower courts are left free to prod—for example to overcome inertia when legislation is needed.

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"In the deep South, a final decree may well turn out to be merely the opening shot in a long delaying action." Braucher, *supra* note 21, at 123.

25. *See generally* McKay, *"With All Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U.L. REV. 991 (1956). Noting that two years after *Brown I*, eight Southern states still maintained segregated schools, Professor McKay discussed the use of interposition and legislative delay as techniques for avoiding the *Brown II* mandate. *Id.* at 1016-59.

26. McKay, *"With All Deliberate Speed": Legislative Reaction and Judicial Development 1956-57*, 43 VA. L. REV. 1205, 1206, 1245 (1957) [hereinafter cited as McKay II].

27. Act of Sept. 9, 1957, 85th Cong., 1st Sess., 71 Stat. 634.

28. McKay II, *supra* note 26, at 1206; Comment, *What Remedies Are Available to Enforce the Supreme Court's Mandate to Desegregate and Who May Use Them*, 9 HASTINGS L.J. 167 (1958).

29. 349 U.S. at 301.

cluded that the case required only the opportunity to attend any school chosen regardless of race.[30] Consonant with this interpretation, most southern states enacted "pupil placement" laws.[31] The pupil placement laws required all children to be assigned initially to their old segregated schools but given the freedom to elect transfer to a school formerly reserved for members of the other race. This practice was condemned in the mid-sixties by the courts of appeals because the initial assignments were impermissibly made on the basis of race.[32]

Following the rejection of the "pupil placement" laws some schools adopted nonracially classified residential zoning plans, often supplemented with transfer options. The new vogue became "freedom of choice" plans which permitted pupils to select their own schools in the first instance. Should overcrowding occur, priority was granted to those residing nearest the school. Such plans were generally viewed as consistent with the Department of Health, Education and Welfare desegregation guidelines established in 1965 as conditions of eligibility for federal financial assistance.[33] Some debate ensued between the courts of appeals as to whether freedom of choice constituted in itself

30. On remand, the three-judge court in *Briggs v. Elliot*, a companion case in the Brown decisions, stated:

"[I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals." 132 F. Supp. 776, 777 (E.D.S.C. 1955). Not until 1967 was this language specifically disapproved. United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 389 n.2 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

31. McKay II, *supra* note 26, at 1214-21.

32. *See, e.g.*, Green v. School Bd., 304 F.2d 118 (4th Cir. 1962); Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962).

33. U.S. OFFICE OF EDUC. HEW, GENERAL STATEMENT OF POLICIES UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 RESPECTING DESEGREGATION OF ELEMENTARY AND SECONDARY SCHOOLS (1965). *See generally* Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 64 (1967) [hereinafter cited as Dunn].

full compliance or was merely a step in the proper direction of racially mixed schools.[34]

The Supreme Court resolved this conflict in its second major decision designed to guide the district courts in making their desegregation orders. In *Green v. County School Board*[35] the Court rejected "freedom of choice" as an end in itself for compliance with the *Brown I* mandate and viewed this new system as merely a means toward the abolition of segregated schools.[36] New Kent County, Virginia was a rural area with just two schools—the black and the white. Only fifteen percent of the black children had opted to attend the white school while none of the white children had switched to the black school since the board had adopted the plan in 1965. Freedom of choice was acceptable only if it worked. The school board could not transfer its duty to end segregation to the parents and pupils. Justice Brennan spoke for a unanimous Court:

> School Boards such as the respondent . . . operating state-compelled dual systems were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.[37]

If the adoption of methods such as residential zoning would achieve a greater degree of integration, the school board had a duty to implement these methods.[38] The district courts were reminded of their duty "to assess the effectiveness of a proposed plan [to achieve] desegregation,"[39] and "to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.[40]

The courts rejected the notion that compliance with the guidelines could be conclusive as to whether *Brown I* was satisfied, though entitled to great weight. Bowman v. County School Bd., 382 F.2d 326, 328 (4th Cir. 1967); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847-48 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

34. Dunn, *supra* note 33, at 72. *Compare* Bowman v. County School Bd., 382 F.2d 326 (4th Cir. 1967) *with* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966).

35. 391 U.S. 430 (1968). *See generally The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 111-18 (1968).

36. 391 U.S. at 440.

37. *Id.* at 437-39.

38. *Id.* at 441.

39. *Id.* at 439.

40. *Id.* at 438 n.4. The Court referred to its remedies in NLRB v. Newport News

Green still left questions unanswered. Most notably the Court continued to avoid defining the key operative concepts in its opinion such as "dual system," "unitary system," "segregated," "integrated," and "racially identifiable." Nor did the Court indicate how much weight was to be given other legitimate educational and administrative policies in assessing a school board's desegregation plan.[41]

Armed with this limited guidance, the district courts began assessing school integration plans anew.[42] After three years, the Supreme Court recognized the need for still further guidance in the area of permissible remedies and availed itself of the situation presented in *Swann v. Charlotte-Mecklenburg Board of Education.*[43] Prior to *Brown I* respondent had operated a racially segregated system as required by state law. In 1965 a "freedom of choice plan" was approved by the district court,[44] but plaintiffs moved for further relief after *Green* was decided. Finding that the school board had failed to achieve a unitary system, the court ordered new desegregation plans be submitted. A board plan that left elementary schools largely unchanged in their racial composition was rejected and the court adopted instead its expert's plan which grouped inner city black schools with suburban white schools to achieve a racial balance consistent with the overall demographic makeup of the community.[45] Chief Justice Burger, writing for a unanimous Court, rejected the Fourth Circuit's objections to the degree of busing ordered and affirmed the district court order in its entirety.

The school board must go further than the adoption of a facially neutral assignment plan, for such a plan "may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve

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Shipbuilding & Dry Dock Co., 308 U.S. 241 (1937); United States v. Crescent Amusement Co., 323 U.S. 173 (1944) (theater chain guilty of monopolization required to show lack of effect on competition in future acquisitions); Standard Oil Co. v. United States, 221 U.S. 1, 78 (1911) (antitrust violation permits court to "neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about").

41. *The Supreme Court, 1967 Term,* 82 HARV. L. REV. 63, 114 (1968). The Court also failed to indicate the application *Green* was to have, if any, on Northern schools. *Id.*

42. The Fifth Circuit alone heard 166 appeals in school cases from Dec. 2, 1969 to Sept. 24, 1970. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14 n.5 (1971).

43. 402 U.S. 1 (1971). *See generally The Supreme Court 1970 Term,* 85 HARV. L. REV. 3, 74-86 (1971).

44. 243 F. Supp. 667 (W.D.N.C. 1965), *aff'd,* 369 F.2d 29 (4th Cir. 1966).

45. 311 F. Supp. 265 (W.D.N.C. 1970).

or maintain an artificial racial separation."[46] Toward this end the opinion held that district courts may use racial quotas as a starting point for the degree of desegregation to be achieved, rezone school attendance districts, provide for majority to minority option transfers and order the bus transportation of students.[47]

While this decision was criticized as leaving many questions yet unresolved,[48] it was another major step in defining the power of the federal judiciary to remedy segregation. Indirectly, by affirming the district court, the Supreme Court established the Charlotte-Mecklenburg district as an example of what a desegregated school system might look like. Little deviation from uniform racial balance would be permitted in the secondary schools. At the lower levels an occasional one-race school would be permitted as long as the general percentage of blacks in the system was reflected in the other schools. Again by indirection the Court suggested that financial considerations might limit the scope of an order. In *Swann* additional expenditures of 1.5 percent of the total district budget for busing students was approved. A practical limitation on the length of a busing trip was also suggested—thirty-five minutes one-way was accepted as feasible and not detrimental to the health of the children.[49] The local policies of school construction were seen as forming a basis for a finding of continued maintenance of a dual system.[50] Finally, the Court acknowledged the existence of a limit to the broad equity powers of the district courts:

> The task is to correct, *by a balancing* of the individual and *collective interests*, the condition that offends the Constitution. . . . No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits.[51]

Thus the court continued to add substance to the parameters of the "practical flexibility" of the judicial power to remedy segregation. The major question left by *Swann* could only be answered in the course of history: Would further guidance be necessary?

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46. 402 U.S. at 28.

47. *Id.* at 22-31.

48. Goodman, *supra* note 12, at 292; *The Supreme Court 1970 Term*, *supra* note 43, at 75-82. Among the questions left open is "the allocation of discretion among school authorities, district courts, and appellate courts." Goodman at 292.

49. 402 U.S. at 30.

50. *Id.* at 20-21. These policies would evince a dual system even where not accompanied by previous statutory segregation. Keyes v. School Dist. No. 1, 413 U.S. 189, 201-02 (1973).

51. 402 U.S. at 16, 28 (emphasis added). The chief justice seized upon this language again in rejecting the metropolitan remedy in *Detroit*, 94 S. Ct. at 3124. See text accompanying notes 164-179, *infra*.

The Metropolitan Consolidation Cases: The "Inevitable Sequel"[52]

Even as the Court was making its decision in *Swann*, the district courts in Richmond, Virginia and Detroit, Michigan had before them the cases which would present the next and, possibly, final round of Supreme Court litigation concerning the scope of the equity power to deal with school segregation. The Richmond court ordered implementation of a plan developed by the school board which would consolidate three separate county school systems[53] while the Detroit court concluded that a plan consolidating all or part of three metropolitan Michigan counties must be developed as the only effective method of achieving the desegregation ordered by *Brown I*.[54] Both courts arrived at this result after finding that integration of the core city school district alone would still leave schools that were largely racially identifiable and not consistent with the demographic structure of the larger metropolitan community.[55] The Supreme Court ended the Richmond litigation by dividing equally but the full panel has delivered its opinion in *Detroit*. The case will have great impact on the future of school desegregation for southern schools formerly statutorily segregated as well as for northern schools where segregation of a more devious sort is coming under increasing attack.[56]

Bradley v. School Board [Richmond]

In May of 1970, some 52,000 pupils attended Richmond city schools. Of the 52,000 some 60 percent were black and 40 percent were white.[57] At all levels, the schools operated by the board were identifiably one-race schools,[58] even though the board had operated a

52. The phrase was used by Solicitor General Erwin N. Griswold in the oral argument of *Bradley v. School Bd.* [Richmond] before the Court. 41 U.S.L.W. 3577, 3579 (U.S. Apr. 23, 1973).

53. Bradley v. School Bd. [Richmond], 338 F. Supp. 67 (E.D. Va. 1972), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973).

54. Bradley v. Milliken [Detroit], 345 F. Supp. 914 (E.D. Mich. 1972), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 94 S. Ct. 3112 (1974).

55. 338 F. Supp. at 103, 345 F. Supp. at 916, *citing* earlier findings at 338 F. Supp. 582 (E.D. Mich. 1971).

56. *See* Note, *Consolidation for Desegregation: The Unresolved Issue of the Inevitable Sequel*, 82 YALE L.J. 1681, 1681-82 n.8 (1973) [hereinafter cited as *Inevitable Sequel*].

57. 338 F. Supp. at 71.

58. Of 61 schools operated, 52 were 85 percent one-race. *Id.* at 72-73. A similar situation existed with respect to faculty and staff.

freedom of choice plan since 1966. In an earlier opinion,[59] the district court rejected a new neighborhood assignment plan because it found the pattern of severe residential segregation, resulting in part from board action in construction of schools, would perpetuate the racial identifiability of the system. It ordered the joinder of state education officials as well as the school boards of adjoining counties to consider[60] their participation in the maintenance of a dual system in Richmond and to consider their duties to remedy that segregation. The principal alleged participation of these parties was their cooperative efforts to create and maintain school boundaries that had the effect of locking blacks in the core city.

State Action

As is necessary in any desegregation case, any consideration of remedy must be preceded by a finding of a constitutional violation—a state imposed denial of equal protection of the laws. After the Supreme Court's decision in *Green*, racially identifiable schools were equated with segregated schools. If such segregation was state imposed, there was a constitutional violation.[61] The district court in *Richmond* had little trouble finding racial identity in the schools and made detailed findings to establish its conclusion that the local and state officials had acted to maintain the dual system that was statutorily abolished following *Brown II*.[62] The court found that school construction policy and transportation of pupils were widely used to maintain the segregated system.[63] Local officials, with state concurrence, selected school sites to coincide with the pattern of residential segregation,[64] then reinforced the pattern by drawing attendance lines to conform. Pupil assignment plans, such as freedom of choice, also accentuated the problem.[65] The court did not confine its findings to acts by the Richmond board but found active participation by the boards of the suburban counties[66] also.

The court also found significant participation on the part of state

59. Bradley v. School Bd., 317 F. Supp. 555 (E.D. Va. 1970).

60. Bradley v. School Bd., 51 F.R.D. 139 (E.D. Va. 1970).

61. U.S. CONST. amend. XIV, § 1.

62. The court's general findings encompassed 36 pages, 338 F. Supp. 79-116, while its detailed findings covered another 113 pages. *Id.* at 116-229.

63. The court relied on language in *Swann* for support of its consideration of school construction. *Id.* at 89, *citing*, 402 U.S. at 20-21.

64. *Id.* at 86-87, 127, 133.

65. *Id.* at 84.

66. *Id.* at 168.

school officials. The starting point of this inquiry was the state's overall responsibility for education.[67] Judge Merhige noted state concurrence in local discriminatory acts[68] and concluded by examining the effect of state legislative attempts to frustrate desegregation, such as Virginia's "massive resistance" plan.[69] Although the court made occasional reference to Virginia's past history of dual school systems, the finding of state action was premised on post-*Brown I* conduct by the defendants.

The Remedy

Having established by overwhelming evidence the constitutional violation, Judge Merhige had little difficulty in perceiving the duty and power to order consolidation of the tri-county school system with attendant busing.

> [T]he duty to take whatever steps are necessary to achieve the greatest possible degree of desegration in formerly dual systems by the elimination of racially identifiable schools is not circumscribed by school division boundaries created and maintained by the cooperative efforts of local and central State officials.[70]

The mandate of *Swann* was broad enough to justify this action.[71] The court made much of its finding that the tri-county area was the relevant community. Richmond was seen as the center of the metropolitan area, providing jobs and cultural leadership for the entire area. The city boundary lines posed no physical barrier to the movement of pupils. The court considered cases in which natural barriers such as superhighways[72] or railroad tracks[73] had been ignored in desegregation orders. "If physical demarcations do not limit the duty of the court to use 'all available techniques' . . . so much the less should political boundaries, when they coincide with no tangible obstacles and are unrelated to any administrative or educational needs."[74] The court examined situations in which school pupils had been transported across political boundaries in Virginia and noted examples of tri-county co-

67. *Id.* at 93.
68. *Id.* at 83, 124-27.
69. *Id.* at 94-96.
70. *Id.* at 79-80.
71. "[I]t is the duty of a district court to intervene to 'eliminate . . . all vestiges of state-imposed segregation.' " *Id.* at 81-82, *citing*, *Swann*, 402 U.S. 1, 15.
72. Davis v. Board of School Comm'rs., 402 U.S. 33 (1971).
73. Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682 (5th Cir. 1969).
74. 338 F. Supp. at 83.

operation in educational and other areas.[75] Virginia state officials had substantial power to draw school district lines and could not avoid responsibility for correcting the dual system by delegating its boundary line power to local officials.[76]

The voting rights cases[77] were viewed as providing ample authority for the proposition that state political subdivisions were not inviolate when their strict observance would perpetuate a constitutional infringement. "*Reynolds* and its companion cases establish that denials of equal protection may not be justified by reference to the needs of a system of subordinate political entities, themselves the products of state action."[78] The Supreme Court had long held that cities, towns, and counties are mere political subdivisions of the state, which may grant or withhold from them powers as it sees fit.[79]

Judge Merhige found further support for his order in what he called the "splinter" cases—where local political units were restrained from seceding from larger school districts where the effect of such action was to maintain or increase segregation.[80] Though not given the force of a Supreme Court mandate at the time of his opinion, the judge found the reasoning persuasive. If a separation and alteration of a boundary line could be enjoined, this was action affecting political subdivisions of the state. Ignoring or changing boundary lines seemed equally permissible.[81]

Armed with these conclusions, the court proceeded to adopt a plan.

> The court's order provided for the merger of the city and suburban school systems and then divided the newly consolidated system into six subdivisions. All but one of the subdivisions were irregular pie-shaped configurations which began in central Richmond and extended out to the suburbs. The sixth subdivision encompassed a large portion of rural Chesterfield County and did not extend into the city of Richmond. Except for subdivision six, all subdivisions

75. "[P]ast events in the metropolitan area and in Virginia betoken a willingness —indeed an enthusiasm—to disregard political boundaries when needful to serve state educational policies, among them racial segregation." *Id.* at 103.

76. *Id.* at 102.

77. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

78. 338 F. Supp. at 103.

79. Trenton v. New Jersey, 262 U.S. 182 (1923); Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

80. *E.g.*, 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). *See generally, White Noose, supra* note 4, at 350-51.

81. 338 F. Supp. at 105-13.

> contained a racial mix approximating the racial mix for the entire consolidated system, 67 percent white and 33 percent black. In order to effectuate an acceptable racial balance in each particular school, a lottery system based on each child's birthday was to have been utilized to determine which individuals would be transported out of their zone.[82]

Substantial busing was involved, representing an increase of about 12 percent over existing levels,[83] but in no case would the one-way trip exceed 45 minutes to an hour,[84] compatible with existing levels and with the guidelines established in *Swann*.[85]

> Judge Merhige's remedy of consolidation reflected his belief that segregated "unitary" systems existing contiguously in an interrelated metropolitan area were incompatible with the fourteenth amendment and the political subdivision lines must not interfere with the remedy if a constitutional violation has been determined.[86]

Unfortunately, his considered opinion failed to pass muster at the court of appeals or at the Supreme Court.

The Fourth Circuit

In reversing Judge Merhige,[87] the Fourth Circuit Court of Appeals took issue with both the finding of state action and the scope of the equitable power to deal with segregation.[88] Judge Craven, writing for a five to one majority, accepted that there may have been some minimal state action in maintaining housing segregation.[89] The court rejected the district court's conclusion, however, that there had been any "joint interaction" between the school districts themselves and state officials for the purpose of promoting segregation.[90] There was a complete absence of any evidence of overt racial gerrymandering in the drawing

82. *White Noose, supra* note 4, at 338-39.

83. 338 F. Supp. at 188. The number of pupils bused would increase 10,000 to 78,000.

84. *Id.*

85. 402 U.S. at 30.

86. *White Noose, supra* note 4, at 341.

87. 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973).

88. "May a United States District Judge compel one of the States of the Union to restructure its internal government for the purpose of achieving racial balance in the assignment of pupils to the public schools? We think not, absent invidious discrimination in the establishment or maintenance of local governmental units. . . ." *Id.* at 1060. Judge Winter, dissenting, finds this an oversimplification. *Id.* at 1075.

89. *Id.* at 1066.

90. *Id.* at 1065.

91. *Id.* at 1064.

of the school district boundaries.[91] The court failed to perceive any difference in the demographic patterns at work in Richmond from those at work in the other major metropolitan areas.[92]

Although the court found that the case failed to present requisite state action, the opinion also considered the question of an appropriate remedy. Concluding that each of the school districts was now unitary within the meaning of *Swann* and *Green*,[93] the court registered its extreme distaste for the consolidation remedy. Judge Craven emphasized the importance of Virginia history, traditional emphasis on local school control, problems of financing and the inherent educational disadvantage in such a large system.[94] The court felt that Judge Merhige had failed to perceive in *Swann*'s broad mandate the qualifying language concerning a limit on his power to fashion remedies in school cases.[95]

> [W]e think the adoption of the Richmond Metropolitan Plan in toto . . . is the equivalent, despite disclaimer, of the imposition of a fixed racial quota. The Constitution imposes no such requirement, and imposition as a matter of substantive constitutional right of any particular degree of racial balance is beyond the power of a district court.[96]

The court apparently felt that Judge Merhige had gone beyond the use of racial quotas "as a starting point" in fashioning a desegregation plan.

The Fourth Circuit also felt that the district court had not taken proper consideration of the Tenth Amendment as a limit on the equity power. The circuit judges saw the states' power over their school districts and other political subdivisions as near-plenary.[97] They recognized that *Gomillion v. Lightfoot*[98] proscribed the use of this plenary power as an instrument for circumventing the equal protection clause but failed to find in the facts before them such a circumvention.[99] Richmond, Henrico, and Chesterfield Counties had removed all vestiges of state imposed segregation—"further intervention by the district court was neither necessary nor justifiable."[100] Readjustment of the racial

92. "Indeed this record warrants no other conclusion than that the forces influencing demographic patterns in New York, Chicago, Detroit, Los Angeles, Atlanta and other metropolitan areas have operated in the same way in the Richmond metropolitan area to produce the same result." *Id.* at 1066.

93. *Id.* at 1070.

94. *Id.* at 1066-68.

95. 402 U.S. at 24.

96. 462 F.2d at 1064.

97. *Id.* at 1068-69.

98. 364 U.S. 339 (1960).

99. 462 F.2d at 1069.

100. *Id.*

composition of student bodies was not required by *Swann* once "the affirmative duty to desegregate has been accomplished. . . ."[101] Arguing back toward their initial rejection of the state action finding, the court concluded that Judge Merhige had overstepped his powers.[102]

Judge Winter, in dissent, offered a persuasive counterargument.[103] In his view the majority had erroneously decided both the state action and the remedy issues. He failed to perceive the basis for the court's conclusion that the affirmative duty to desegregate had been accomplished. The district court should not be required to show that there had been a conspiracy among defendants to perpetuate segregation. The actions of the individual boards and state officials had the unchallenged effect of "locking" blacks in Richmond. "[W]hether acting singly or in concert, action and inaction, . . . in the several regards described are all *state* action and it is to overall state action that the fourteenth amendment is addressed."[104]

Once the hurdle of state action had been passed, the court's duty upon default of the state was clear—to end racial segregation in the relevant community. Consolidation was not an abuse of discretion.[105] "This record reflects no reason to respect existing political boundaries except that some of them have always existed."[106] Judge Winter found support in the voting rights cases and in the language of *Brown II* and *Swann* for revision of district lines as a permissible remedy.[107] He was not unaware of the equity power's limits, but felt their bounds lay on the practical side of the order and not on federalism principles in the Tenth Amendment. While his position was not vindicated at the Supreme Court, Judge Winter would find comfort in the Sixth Circuit approach to consolidation.

Bradley v. Milliken [Detroit]

Much of the frustration produced by the Supreme Court's division in *Richmond* has been resolved.[108] A detailed look at the lower courts'

101. *Id., citing,* 402 U.S. at 31-32.

102. The court felt controlled by Spencer v. Kugler, 326 F. Supp. 1235 (D. N.J. 1971), *aff'd,* 404 U.S. 1027 (1972). There, plaintiffs had urged a state-wide redistricting of schools, but the court failed to find a constitutional violation in their bare assertion that the schools in New Jersey were racially identifiable.

103. 462 F.2d at 1071-80 (Winter, J., dissenting).

104. *Id.* at 1076.

105. *Id.*

106. *Id.* at 1077.

107. *Id.* at 1078, *citing, Brown II,* 349 U.S. at 300-01 and *Swann,* 402 U.S. at 27.

108. The *Detroit* case will not be the only one affected by this opinion. Consolida-

action in *Detroit* provides the background for understanding the resolution of the case at the Supreme Court.

The District Court: State Action and Remedy

Although schools in Michigan have never been maintained in a dual system by law, the factual pattern of segregation before Judge Roth was not unlike that found by Judge Merhige in Richmond. The action commenced in 1970 when plaintiffs and the NAACP attacked a Michigan statute which had the effect of nullifying a Detroit school board plan of partial high school desegregation. Plaintiffs also alleged that the Detroit school system was and is segregated on the basis of race. After legal maneuvering, the Sixth Circuit first held that the Michigan statute had the effect alleged[109] and then ordered a trial on the merits of the segregation claim.[110] At that trial, the district court found that the following test had been met:

> 1. The State, through its officers and agencies, and usually, the school administration, must have taken some action or actions with a purpose of segregation.
>
> 2. This action . . . must have created or aggravated segregation in the schools in question.
>
> 3. A current condition of segregation exists.[111]

The court felt a finding of de jure segregation should be unnecessary,[112] but found ample evidence upon which to base such a finding. The board had shaped school attendance zones to conform with segregated residential patterns, adopted optional attendance zones for "transition" areas,[113] and transported black pupils from overcrowded black schools past white schools—all acts of segregation.[114] The state defendants were also culpable. They held ultimate responsibility for education in

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tion remedies are under consideration elsewhere. Indianapolis has progressed furthest where the court has found de jure segregation in the entire metropolitan area. United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

109. Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970).

110. Bradley v. Milliken, 438 F.2d 945 (6th Cir. 1971).

111. Bradley v. Milliken, 338 F. Supp. 582, 592 (E.D. Mich. 1971). Though he did not have the Supreme Court decision to guide him, Judge Roth seemed to make the same sort of findings approved in Keyes v. School Dist. No. 1, 413 U.S. 189, 199-200 (1973).

112. 338 F. Supp. at 592.

113. A "transition" area is one in which the demographic pattern is changing from one race to another.

114. 338 F. Supp. at 593. The court also noted that the board failed in its affirmative duty to use school attendance lines to counteract residential segregation. *Id.*

Michigan.[115] The state department of education was found to exercise supervision and, in many cases, to provide financial support over all aspects of school administration.[116] Theirs was the responsibility to provide pupils with an education without discrimination as to race.[117]

Having found a constitutional violation, the court turned to the consideration of a remedy. Judge Roth directed defendants, city and state, to submit plans for desegregation encompassing both "Detroit-only" and "metropolitan" areas. After holding hearings to consider the plans submitted, the court concluded that segregation relief could not be accomplished within the corporate geographical limits of the city of Detroit.[118] From the plans presented, Judge Roth adopted one which involved consolidating fifty-four separate school districts, encompassing the bulk of a tri-county area. Transfer of pupils would be two-way. Each school would have at least 10 percent black faculty and staff. The financial arrangements would be examined to insure proper distribution of costs.[119] The court did not purport to find segregative acts on the part of the school officials in the suburban counties.[120] The district judge concluded his duty was to effect "prompt and maximum actual desegregation of the public schools by all reasonable, feasible, and practicable means available."[121]

Since the state defendants were burdened with the primary responsibility, their plan was the one to be given deference and consideration. Judge Roth found their six plans all lacking.[122] Upon such default, he felt bound to order a remedy. His premise that the tri-county area was the relevant community was reached in a method similar to that employed by Judge Merhige[123] and Judge Winter[124] in *Richmond.* He noted the lack of relationship between the school districts and other governmental services, noted that some school services were already provided for on a metropolitan basis, and he took notice of other tri-county cooperation and the general pattern of life in the area as reflecting a single metropolitan community.[125] His objective was

115. *Id.*
116. *Id.* at 593-94.
117. MICH. CONST. art. VIII, § 2.
118. Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972).
119. *Id.* at 917-19.
120. *Id.* at 920.
121. *Id.* at 921.
122. *Id.* at 922-23.
123. 338 F. Supp. at 86-87.
124. 462 F.2d at 1072 (Winter, J., dissenting).
125. 345 F. Supp. at 935.

> to establish the minimum constitutional framework within which the system of public schools may operate now and hereafter in a racially unified, non-discriminatory fashion.[126]

Since the court's decision was directed primarily at the state defendants, the court did not see fit even to consider any federalism arguments concerning the inviolability of the political boundaries. Financing was no problem. "Funds must either be raised or reallocated, where necessary, to remedy the deprivation of plaintiffs' constitutional rights and to insure that no such unconstitutional neglect recurs again."[127] The plan did not envisage a trip of more than forty-five minutes to an hour, nor did it contemplate the busing of an inordinate number of children.[128] Judge Roth was convinced that desegregation of schools throughout the Detroit area was required to overcome the constitutional violation.

The Court of Appeals

Sitting *en banc*, the nine judges of the Sixth Circuit Court of Appeals sustained Judge Roth.[129] Writing for five of his brethren, Chief Judge Phillips held that substantial evidence supported the findings of constitutional violations resulting in systemwide racial segregation of the Detroit public schools, that a constitutionally adequate system of desegregated schools could not be established within the Detroit school district's geographic limits, and that the order requiring preparation of a metropolitan plan represented a proper exercise of the district court's equity power.

The court was aware that the case was breaking new ground and, accordingly, it stayed the implementation of the district court's plan pending appeal. In considering first the issue of the violations, the court examined in detail the findings made by Judge Roth and the conclusions drawn therefrom. Judge Phillips' opinion set out at some length testimony of various witnesses concerning the method, purpose, and effect of school and state official action in drawing attendance zones, school construction, and busing to preserve racial identity of schools.[130] He concluded:

126. *Id.* at 936.

127. *Id.* at 938, *citing, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970); Griffin v. Prince Edward County, 377 U.S. 218 (1964).

128. *Id.* at 929-31. The number of students bused would increase from 300,000 to 310,000 or 40% of the school population, a figure comparing favorably with the statewide average.

129. 484 F.2d 215 (6th Cir. 1973).

130. *Id.* at 221-41.

> The discriminatory practices on the part of the Detroit Scrool Board and the State of Michigan revealed by this record are significant, pervasive and causally related to the substantial amount of segregation found in the Detroit school system by the District Judge.[131]

Michigan's declared public policy of integrated schools was of no comfort to these defendants in the face of constitutional violations in the record. "Even if the segregation practices were a bit more subtle than the compulsory segregation statutes of Southern States, they were nonetheless effective."[132]

Judge Phillips proceeded to the next level of inquiry—the district court's ruling that no Detroit-only desegregation plan was possible. As with the finding of segregation, the majority adopted the careful reasoning of the district judge, setting out much of his opinion.[133] The court concluded that a Detroit-only plan would leave the school system still racially identifiable. "[W]e see no validity to an argument which asserts that the constitutional right to equality before the law is hemmed in by the boundaries of a school district."[134] The district court's findings on the status of local control of schools in Michigan were also examined. Central responsibility lay with the state. On several occasions it had directly intervened in local affairs. The need for a metropolitan desegregation plan was even greater when the state had actively participated in the discrimination. Furthermore, the court perceived that a remedy limited to Detroit alone would have the unconscionable effect of making the *Brown I* mandate a nullity.[135]

Though aware that the court's dissatisfaction with a Detroit-only plan had been articulated, Judge Phillips examined the equity power of the federal judiciary for possible limitations that would preclude a metropolitan plan and found none. *Brown II*'s language referring to "revision of school districts and attendance areas" was influential.[136] The court found support from Chief Justice Marshall in *Marbury v.*

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131. *Id.* at 241.

132. *Id.* at 242. The court followed the lead of the Seventh Circuit which had sustained a similar finding as to Indianapolis. United States v. Board of School Comm'rs., 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

133. 484 F.2d at 243-45.

134. *Id.* at 245.

135. "The instant case calls up haunting memories of the now long overruled and discredited 'separate but equal doctrine' of Plessey v. Furguson. . . . If we hold that school district boundaries are absolute barriers . . . we would be opening a way to nullify Brown. . . ." *Id.* at 249.

136. 349 U.S. at 300-01. This same passage was found authoritative by Judge Winter of the Fourth Circuit. 462 F.2d at 1078.

Madison[137] for the equitable maxim "no right without a remedy." The "splinter cases"[138] were also persuasive. "If school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose."[139] To dispel the criticism that they overlooked Tenth Amendment limitations, the court took pains to distinguish *Richmond.* Crucial was the different status of the state education officials in Michigan and in Virginia. Michigan officials clearly possessed the power to effectuate the order contemplated.[140]

The court concluded with a summary of the equitable duties and tools available to the district judge and the legal authority for their use. The summary traced much of the previous history of school desegregation.[141] The whole panoply of remedial tools outlined in *Swann* were available to be used.[142] Financing was no problem. "[A] District Court may order that public funds be expended, particularly when such an expenditure is necessary to meet the minimum requirements mandated by the Constitution."[143] Chief Judge Phillips had set the stage for the Supreme Court's second attempt at the "inevitable sequel."

Issues at the Supreme Court

While the issues posed by Chief Judge Phillips for the Sixth Circuit provided the general framework for the consideration of the Supreme Court,[144] the Sixth Circuit dissenters, like the majority in *Rich-*

137. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the law furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) 137, 163 (1803).

138. 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). See note 80, *supra*, and accompanying text.

139. 484 F.2d at 250.

140. *Id.* at 250-51.

141. *Id.* at 252-55 (delay no longer tolerable, state imposed segregation completely removed, eliminate past effects, resegregation impermissible).

142. *Id.* at 255-58 (racial ratios, noncontiguous zoning, busing).

143. *Id.* at 258, *citing, inter alia,* Griffin v. Prince Edward County, 377 U.S. 218, 233 (1964).

144. "1. Are the District Court's findings of fact pertaining to constitutional violations resulting in system-wide racial segregation of the Detroit Public Schools supported by substantial evidence or are they clearly erroneous?

"2. [C]an a constitutionally adequate system of desegregated schools be established within the geographic limits of the Detroit school district?

"3. [D]oes the District Judge's order requiring preparation of a metropolitan plan for cross-district assignment and transportation of school children throughout the Detroit

mond, accurately anticipated the Court's thinking. Three members of the nine member panel wrote dissenting opinions. All had the same basic difficulty with the majority's decision—the failure of the district judge to find, or even take proofs of, a constitutional violation by the suburban school districts—though the three were not in accord as to the effect of this error.

Judge William E. Miller wrote the shortest opinion because he felt the district judge's failure to allow the suburban defendants the opportunity to present evidence made any adjudication by the Sixth Circuit premature.[145] Behind this procedural stance was his conviction that the non-Detroit defendants could not be included in any desegregation plan until an affirmative finding had been made that they had committed acts of de jure segregation.[146]

Also objecting to Judge Roth's failure to allow the outside school districts to be heard on the segregation issue and the propriety of a metropolitan plan, Judge Kent viewed the impact differently from his brother Miller.[147] Since no acts were shown other than the de jure segregation of the Detroit system, plaintiffs can ask for no remedy other than the establishment of a unitary system within Detroit. Judge Kent adopted as his byword the phrase "the nature of the violation determines the scope of the remedy."[148]

> Absent proofs, which clearly were not taken, to establish a violation of the constitutional rights of these plaintiffs by the suburban school district personnel and by the State of Michigan in laying out suburban school district lines it would appear that we are in complete and absolute conflict with the prior decisions of this Court.[149]

Judge Kent found no law to support what he felt to be the majority's premise—" 'big city school systems for blacks surrounded by suburban

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metropolitan area represent a proper exercise of the equity power of the District Court?" *Id.* at 221.

145. *Id.* at 283-84 (Miller, J., dissenting).

146. "If any one of these issues is resolved in favor of parties outside the Detroit School District, the nature and scope of a remedy embracing outlying districts would not be reached." *Id.* at 284.

147. *Id.* at 274-83 (Kent, J., concurring in part and dissenting in part).

148. *Id.* at 275, *citing, Swann*, 402 U.S. at 16. This became the focus for the Supreme Court majority. See text accompanying notes 168-174, *infra.*

149. *Id.* at 276, *citing*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967). This case and others following its rationale have been strongly criticized. "*Deal* . . . strongly supported the Cincinnati 'neighborhood school' plan and school construction policies which concededly aggravated existing racial imbalance." *White Noose, supra* note 4, at 327.

school systems for whites cannot represent equal protection of the law.' "[150]

Judge Weick's opinion[151] raised the most far-reaching issues because he articulated his objection to the majority position beyond the failure to find violations in the suburban districts. Along with his fellow dissenters, Judge Weick found the failure to allow the suburban districts a meaningful opportunity to be heard an unconstitutional deprivation of due process of law. In his view, however, this was but one of many reversible errors. Furthermore, acceptance of the theory that proof need not be made against suburbia because the state defendants have committed the violation posed Eleventh Amendment problems of sovereign immunity.[152] Accordingly, plaintiffs should have been required to bear the burden of proving violations by the non-Detroit boards.

In many respects Judge Weick mirrored the majority view in the Fourth Circuit in *Richmond.* Like the *Richmond* court, he failed to see how school assignments have caused or can relieve the concentration of blacks in the inner city.[153] Like the *Richmond* court, he found *Spencer v. Kugler*[154] controlling because "[i]n none of the schools of which the plaintiffs complain is any black pupil 'segregated' from any white pupil."[155] Like the *Richmond* court, he found the district court plan tantamount to the imposition of racial quotas prohibited in *Swann.*[156] Like the *Richmond* court, he failed to see how unitary schools in Detroit with a racial mix of 66 percent black and 34 percent white would fail to satisfy any constitutional mandate in *Brown I* or any other desegregation case.[157]

Judge Weick called the district court to task for presuming to use the judiciary to attain a social goal.[158] He, too, found reprehensible

150. 484 F.2d at 276. The phrase had been in the slip opinion of the panel which first heard *Detroit* but was omitted from the majority *en banc* opinion.

151. *Id.* at 259 (Weick, J., dissenting).

152. *Id.* at 271-72.

153. *Id.* at 260.

154. 326 F. Supp. 1235 (D.N.J. 1971), *aff'd,* 404 U.S. 1027 (1972).

155. 484 F.2d at 261.

156. "The metropolitan plan violates this principle which was applicable only to dual systems. It is even worse when the District Court applies broader orders to a unitary system than have ever been applied to dismantling of a dual system." *Id.* at 263.

157. *Id.*

158. *Id.* at 260-61. Yet later in his opinion he criticizes the district court for failing to allow defendant's sociologist to testify. *Id.* at 269. He urges reconsideration of the testimony of sociological experts relied upon by the *Brown I* court. *Id.* at 265.

the majority's premise concerning the "white noose" as a denial of equal protection of the laws. He found cross-district busing a potential denial of equal protection of the laws to the individuals required to be bussed. "[Courts] may not enter orders in school desegregation cases which impinge upon and violate the constitution [sic] rights of other persons."[159]

The dissent framed the issues for adjudication by the Supreme Court. As Judge Weick's opinion sharply indicated, the case was much the same as the *Richmond* case before the Court last term.[160] Though the lower *Detroit* courts did not have the benefit of the *Keyes v. School District No. 1* [*Denver*][161] opinion, the findings of segregation within Detroit proper seemed to satisfy the tests of *Keyes*.[162] The remaining issues were ones of first impression for the Court.

If Detroit schools are segregated, what is the remedy for that segregation? *Swann* permitted mathematical ratios as "a starting point in the process of shaping a remedy."[163] In *Swann*, the ratios used pertained solely to the particular school district. Do *Brown I* and the equal protection clause require more than that when the geographic area in which a desegregation order is feasible extends beyond the political bounds of the school district found to be segregated? Can a constitutionally adequate system of desegregated schools be established within the Detroit corporate limits? If the resulting balance is unsatisfactory, must the other districts being incorporated be found to have participated in the discrimination? Finally, if the proper violation is shown, do the state interests protected by federalism and the Tenth Amendment in the structure of its political subdivision and in local control over schools limit the equity power to order a consolidation remedy?

These are questions the Court set about to resolve. The case was difficult. In a long term filled with difficult cases, the Court did not announce its decision until July 25, well into the usual summer recess

159. *Id.* at 264, *citing*, Oyama v. California, 332 U.S. 633 (1948).

160. One commentator suggests that *Richmond* and *Detroit* are reconcilable—on the ground that the greater local control in Virginia required an imputation of segregative intent to all tri-county boards while no such imputation was necessary in Michigan. Note, *Segregative Intent and the Single Governmental Entity in School Desegregation*, 1973 DUKE L.J. 1111.

161. 413 U.S. 189 (1973). The Sixth Circuit's opinion in *Detroit* was delivered some two weeks prior to *Keyes*.

162. 94 S. Ct. 3124 n.18. *Compare* Keyes v. School Dist. No. 1, 445 F.2d 990, 1000 (10th Cir. 1971) *with* Bradley v. Milliken, 338 F. Supp. 582, 592-93 (E.D. Mich. 1971).

163. 402 U.S. at 25.

period. The analysis adopted followed the logical seqence of searching the record first for a proper finding of a constitutional violation and then proceeding to the question of remedy. This method may have been in part responsible for the result reached. While the majority would argue that no metropolitan violation was shown, the more accurate assessment seems to be that a violation was shown for which the only effective remedy affected parties who, themselves, had not directly participated in the violation.

The Supreme Court

Chief Justice Burger delivered the majority opinion in which he was joined by the other three Nixon appointees, Blackmun, Powell and Rehnquist and Eisenhower appointee Stewart.[164] The chief justice initially outlined the history of the litigation before proceeding to the substance of the opinion.[165] The tone of the majority approach was reflected in his characterization of the *Brown I* mandate.

> The target of the *Brown* holding was clear and forthright: the elimination of state mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for White pupils.[166]

As the balance of the opinion made clear, the prior course of broad, expansive treatment of school desegregation remedies was coming to an end. The chief justice reviewed the Court decisions that had previously examined the extent of the equity power in desegregation cases.[167] He focused on *Swann's* proscription that the remedy must be aimed at "the condition that offends the Constitution." The offending condition in *Detroit* was the segregation within the Detroit city school system.[168] The nature of this violation was to be determinative of the scope of the remedy.[169]

In revising and remanding for a new decree, the Court took the district judge and court of appeals to task because to the Court

> it seems clear that [they] shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable.[170]

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

165. *Id.* at 3116-23.

166. *Id.* at 3123.

167. See text accompanying notes 19-50, *supra.*

168. The Court had no trouble with the finding that the Detroit City schools were subject to de jure segregation. 94 S. Ct. at 3124 n.18.

169. *Id.* at 3124.

170. *Id.* at 3125.

The Chief Justice noted that *Swann* did not require any particular degree of racial balance though the existence of one race schools placed a burden on school officials to show the nondiscriminatory nature of the assignments.[171] *Swann* had sanctioned the use of racial quotas as a "starting point."[172] When the lower courts looked at Detroit alone, the resulting degree of racial balance was widely divergent from the population ratio of the entire metropolitan region—the area in which integration was physically feasible.

The majority took exception to this approach. Unless an inter-district violation could be shown, the school district boundary lines were sacrosanct.[173] While the Court restated the constitutional precept that state law including political subdivisions must give way to the Fourteenth Amendment,[174] it made clear that a showing of a constitutional violation having segregatory impact across district lines would be required to offset the principles of federalism which supported the inviolability of the school district boundaries.

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.[175]

The chief justice attached great importance to the historic system of local control over schools in Michigan. The Court conjured up an administrative Pandora's box whose horrors would be unleashed with the sanction of an inter-district remedy. Taxing, finance, curriculum and other administrative concerns in the multidistrict area would be under the initial province of the district judge whose powers were deemed unequal to the task.[176] Consequently, an inter-district remedy would

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171. *Id.*

172. 402 U.S. at 22-31. See text accompanying note 47, *supra.*

173. 94 S. Ct. at 3125-31.

"Boundary lines may be bridged where there has been a constitutional violation calling for inter-district relief, but, the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our county." *Id.* at 3125.

"Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." *Id.* at 3127.

174. *Id.*

175. *Id.* at 3125-26.

176. "But it is obvious from the scope of the inter-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a *de facto* 'legislative authority' to resolve these complex ques-

be permissible only where it was "shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district,"[177] or shown that all districts encompassed in the desegregation order had participated in the discriminatory activity. Any other result was seen as providing remedy that put the victims in a different position than that which they would have enjoyed absent the discrimination.[178]

Chief Justice Burger searched the record and, save for one isolated instance of an inter-district violation, found no evidence that the state or any district engaged in activity with a cross-district effect.[179] This result was not surprising since the trial court had not taken proofs as to possible violations by the metropolitan districts. Participation by state officials, with power over all Michigan schools, in the Detroit segregation did not provide state action sufficient to justify the inter-district remedy. The Court concluded that the lower courts had applied an erroneous standard and returned the case for the adoption and implementation of a Detroit-only desegregation plan.

Justice Stewart, in his concurring opinion,[180] highlights the problem the majority had with the lack of factual showing of overt segregative acts having an inter-district effect. He does not reject an inter-district remedy out of hand.[181] "The courts were in error for the simple reason that the remedy they thought necessary was not commensurate with the constitutional violation found."[182] The importance of local school control and the difficulty of judicial school administration would not permit this broad remedy absent an affirmative showing. This showing had not been made in his eyes. "No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the

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tions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives." *Id.* at 3126-27.

177. *Id.* at 3127.

178. *Id.*

179. *Id.* at 3129-31.

180. *Id.* at 3131-33 (Stewart, J., concurring).

181. "This is not to say, however, that an inter-district remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, . . ., by transfer of school units between districts, . . ., or by purposeful racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of districts lines might well be appropriate." *Id.* at 3132.

182. *Id.*

surrounding areas were in any significant measure caused by governmental activity."[183] Reversal was therefore proper as a matter of course.

To a large degree, the outcome in *Detroit* was predictable. A careful examination of the Court's earlier desegregation opinions provided a few significant clues to the justices' inclinations. *Wright v. Council of City of Emporia*[184] and its companion case, *United States v. Scotland Neck Board of Education*,[185] were the only desegregation cases decided in a written opinion by the Court as presently constituted. In both cases, the majority held that a municipality, formerly part of a county school system, could not separate its schools from that county system where the effect would be to create a racial disparity in the systems and hinder the desegregation effort. In *Wright*, the separation would have established a 48 percent white, 52 percent black city system while altering the ratio in the county system from 34:66 to 28:72. Justice Stewart, writing for a five man majority, found this effect, coupled with a fear of white flight from the city, disparate facilities, and the city's timing,[186] violated the constitutional mandate of *Brown I*.

Scotland Neck presented a more compelling situation. There, the new ratios would have been 57:43 in the city, and 11:89 in the county compared to a previous county ratio of 22:78. Also telling was special state legislation required to effect this plan, sought just as a full desegregation decree was to be implemented. Even the four *Wright* dissenters were constrained to concur in the decision of the Court in *Scotland Neck*.

The majority opinion in *Wright* shows the continued importance those members of the Court attach to the ethnic ratios in the schools. Though consistently eschewing racial ratios as the sole index of the desegregated system, the decisions of the Court demonstrate their prominent feature in finding a constitutional violation.[187] The Court has not found a system to lack meaningful desegregation simply because blacks comprise a majority of the school population.[188] Nonetheless, the

183. *Id.* at 3133 n.2.

184. 407 U.S. 451 (1972).

185. 407 U.S. 484 (1972).

186. *Wright*, 407 U.S. at 464-66.

187. Chief Justice Burger chastises the majority on this point. *Id.* at 474. Yet even the unanimous decisions of the Court reflect this. *E.g., Swann, Davis, Green.*

188. *E.g., Scotland Neck, Davis*; listed by the Chief Justice in *Detroit*. 94 S. Ct. at 3128 n.22. Chief Justice Burger criticized Justice Marshall for his apparent adoption of the opposite position. *Id.*

Court had never found a school system integrated when the racial disparity between parts of the system is as great as exists between Detroit and the rest of the area of feasible integration.[189]

Chief Justice Berger's dissenting opinion,[190] in which Justices Powell, Blackmun and Rehnquist joined, contrasted with their concurrence in *Scotland Neck*, suggested they would find a Detroit-only plan satisfactory and indicated a retreat from the numbers game. They found adequate a system in which the "assignment of children to schools would depend solely on their residence,"[191] absent other factors. "It is quite true that the racial ratios of the two school systems would differ, but the elimination of such disparities is not the mission of desegregation."[192] Only where the separation would leave the county sector nearly all one race, the municipality was newly created by special enactment, and its creation was definitely racially motivated, would the *Wright* dissenters find the situation constitutionally intolerable.

The previous decisions of the Court also provide broad clues as to the outcome of other specific issues. The equitable remedy of metropolitan consolidation was not rejected in toto in *Detroit*. Support for such a remedy was recognized. Judicial remedial power in cases involving racial discrimination has been guided by the traditional principles of equity.[193] While these attributes include practicality and flexibility, the traditional equity cases considering the remedies provide little guidance in perceiving the limits on such power short of the impractical.[194]

The authority relied upon in *Detroit* and by Judge Merhige and Judge Winter in *Richmond* is relatively straightforward. These judges saw the voting rights cases, notably *Gomillion v. Lightfoot*[195] and *Reynolds v. Sims*,[196] as authority for the proposition that a state may not offer its political subdivisions as an impediment to the rectification of a constitutional violation. In *Gomillion*, the Supreme Court invalidated the actions of the Alabama legislature in gerrymandering the boundaries of Tuskegee from a square to a 28-sided configuration excluding

189. The variance in Detroit is city, 37:63, to tri-county, 75:25. 484 F.2d at 270.
190. *Wright*, 407 U.S. at 471 (Burger, C.J., dissenting).
191. *Id.*
192. *Id.* at 473.
193. *Brown II*, 349 U.S. at 300.
194. *Cf.* POMEROY'S EQUITY JURISPRUDENCE § 109 (5th ed. 1941).
195. 364 U.S. 339 (1960).
196. 377 U.S. 533 (1964).

all but four or five of the 400 black voters.[197] *Reynolds* ordered both houses of the Alabama legislature apportioned on a population basis.[198] While recognizing the power of the states over their political subdivisions, the Supreme Court held in both cases that this state power may not be used to circumvent the equal protection clause.[199] The recent cases of *Wright* and *Scotland Neck* are seen by the judges[200] and the commentators[201] as an application of the theory of the voting rights cases to desegregation remedies. The *Detroit* court did not alter this rationale.[202]

The federalism limitation which was applied by the *Detroit* majority to require an active segregative effect or participation by the outlying districts was also perceivable in the case's antecedents. Though "it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy,' "[203] the federal court may grant equitable relief if it "is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief. . . .' "[204] Notwithstanding the decline of federalism and the ascent of the powers of the federal government during the twentieth century,[205] the federal courts have been mindful of legitimate state interests in devising remedies for constitutional violations. In response to attempts to subvert its rulings in *Brown I* and *II*, the Court had occasion to reassert "the historic doctrine that the federal judiciary is supreme in the exposition of the federal Constitution. . . ."[206] The federal courts are the final arbiters of these questions but will consider ways to protect both the state interest and the constitutional right.

197. 364 U.S. at 341.

198. 377 U.S. at 586-87.

199. *Id.* at 568. *See* 364 U.S. at 344-45 (Fifteenth Amendment).

200. Judge Merhige and the Fourth Circuit did not have the benefit of *Wright* and *Scotland Neck* when they rendered their decisions. The Sixth Circuit found this analogy persuasive. 484 F.2d at 250.

201. *White Noose, supra* note 4, at 351; *Inevitable Sequel, supra* note 56, at 1690-91.

202. *Detroit*, 484 F.2d at 250.

203. Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943).

204. Alabama Pub. Serv. Comm'n v. Southern Rwy. Co., 341 U.S. 341, 349-50 (1951).

205. W. BENNETT, AMERICAN THEORIES OF FEDERALISM 199-220 (1964) [hereinafter cited as BENNETT]. "The [Tenth] amendment states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941).

206. BENNETT, *supra* note 205, at 209. The two major cases were Cooper v. Aaron, 358 U.S. 1 (1958) and Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 366 U.S. 212 (1961).

Sixty-Seventh Minnesota State Senate v. Beens[207] applied this principle to the voting rights cases. There the district court had ordered redistricting of the Minnesota Legislature and reduced the size of the body by 50 percent. The state interest in the size of the legislature imposed a limit on the court's power to fashion a remedy, since size itself did not effect a constitutional violation. The Court would not permit "such radical surgery in reapportionment."[208]

Justice Powell, a key figure in *Detroit*, had recently gone on record in favor of strong consideration for federalism limits on the equity power. In his separate opinion in *Keyes* he discussed at length his views on the scope of a permissible desegregation remedy. The limit of the desegregation area for Justice Powell is definitely smaller than the maximum distance a child can be bused each day.[209]

> A *constitutional requirement* of extensive student transportation solely to achieve integration presents a vastly more complex problem. It promises on the one hand a greater degree of actual desegregation, while it infringes on what may fairly be regarded as other important community aspirations and personal rights. Such a requirement is also likely to divert attention and resources from the foremost goal of any school system: the best quality education for all pupils.[210]

Indeed, Justice Powell noted that the degree of busing required to substantially integrate large urban areas "would have the gravest economic and educational consequences."[211] He saw in *Swann*'s refusal to require racial balance throughout the district a recognition that state, local and personal interests are to be considered in fashioning a remedy.

As the author of the Court's opinion in *San Antonio Independent School District v. Rodriguez*,[212] Justice Powell would have recognized that a consolidation in *Detroit* would tend to do by indirection what the Court refused to do in Texas—impose statewide financing of schools. The Sixth Circuit was aware of the problem but felt other decisions of the Court requiring the state to make funds available to finance a constitutional remedy were controlling.[213] Affirming the *Detroit* order

207. 406 U.S. 187 (1972).

208. *Id.* at 198. Justice Stewart dissented, citing *Swann* as authority for a broad, flexible federal equity power. *Id.* at 202.

209. "To the extent that Swann may be thought to require large-scale or long-distance transportation of students in our metropolitan school districts, I record my profound misgivings." 413 U.S. 189, 238.

210. *Id.* at 242.

211. *Id.* at 242 n.21.

212. 411 U.S. 1 (1973).

213. 484 F.2d at 258, *citing, e.g.*, Griffin v. Prince Edward County, 377 U.S. 218 (1964).

would substantially limit the power of the affected localities to fund their schools as they see fit. The *San Antonio* language is instructive:

> It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system.
>
> . . . .
>
> The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. . . . Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate.[214]

Justice Powell also found support in the language of both Justice Stewart and Chief Justice Burger in *Wright* concerning the importance of the local control element in education.[215]

This federalism restraint was reflected in the strict showing the *Detroit* Court required. The four justices voting for affirmance in *Richmond* had already expressed their position tacitly. The type of violation required had been a key problem for the *Richmond* appellate court. That court accepted findings on state action in housing segregation but failed to find "that there was ever joint interaction between any of two of the units involved (or by higher state officers) for the purpose of keeping one unit relatively white by confining blacks to another."[216] The state's participation in school construction site selection in the Richmond area lacked constitutional significance.

This very same sort of finding was the basis for the state action finding in *Detroit* and the district judge's conclusion that a metropolitan remedy was within the equity power of the court. The state legislature had the power in Michigan to effect the remedy.[217] No proof was needed of segregative action by the suburban districts.

Through an application of its reasoning in *Keyes* to the Michigan state action found in *Detroit*, the Court could have accepted the notion

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214. 411 U.S. at 44, 49-50.

215. *Id.* at 49. The language of the Chief Justice in *Wright* highlights his *Detroit* opinion. "Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.

. . . .

"The discretion of a district court is further limited where . . . it deals with totally separate political entities." 407 U.S. at 478.

216. Bradley v. School Board, 462 F.2d 1058, 1065 (4th Cir. 1972).

217. The *Detroit* court tried to distinguish Michigan's power over its schools from Virginia's. 484 F.2d at 250-51. If Virgina's system is operated to achieve an unconstitutional result, it should be no less sacrosanct.

that the suburban districts need not have created or perpetuated a condition of segregation. In *Keyes*, the Court held that plaintiffs need not prove segregatory policies toward each school in the district to establish a presumption that such policies were applied to all other schools.[218] In *Detroit* the state has pursued a course of segregation in a meaningful portion of the metropolitan Detroit area. "Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation. . . ."[219] With *Richmond* as background and Justice Powell's well articulated feelings on federalism, however, the Court's failure to take this step is not surprising.

The Dissenters

Three of the four dissenters, Justices Douglas, White and Marshall, felt compelled to express their views in written opinions. All three perceived the Court's narrow view of the state action required to justify an inter-district remedy as a retreat from the previously adjudicated desegregation principles. All were distressed at what they saw to be a constitutional violation for which the only effective remedy had been foreclosed.

Justice Douglas finds in the majority opinion "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*."[220] Given the state's extensive control over schools in Michigan, he could find little trouble with the metropolitan remedy on the record before the Court. Metropolitan remedies were in wide use as solutions to other problems, such as sewage or water treatment.[221] Justice Douglas pointed out what he felt to be the fatal oversight in the majority thinking. School site selection, state-enforced racially restrictive covenants, public housing and more were all state action within the meaning of the Fourteenth Amendment. Once the state action leading to segregated schools was found to exist, then any remedy which could be effected by the state was a permissible one.[222] The simple location and construction of schools within a single district necessarily has an effect

218. 413 U.S. 189, 203.

219. *Id.* One commentator has argued that the state is the defendant in fact in all school segregation cases and that the state-action concept should be expanded to frankly admit this. Once done, a consolidation remedy presents little problem. *Inevitable Sequel, supra* note 56.

220. 94 S. Ct. at 3134 (Douglas, J., dissenting).

221. *Id.*

222. *Id.*

on the housing pattern in that district with a concomitant effect on the housing patterns in surrounding districts and the racial make-up of their schools. Justice Douglas recognized that "it is conceivable that ghettos develop on their own without any hint of state action," but he concluded that that clearly was not the situation in Detroit.[223]

Justice White was acutely distressed over what he viewed as a blatant constitutional violation going without an effective remedy.

> The core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State.[224]

Justice White was mindful that segregation remedies were not without limit. But the limits he saw were those imposed by the educational requirements of the youngsters whose schools were to be desegregated. When efforts to bus children and otherwise desegregate schools infringe too greatly on the education of the children, then the limit on the equitable remedies for school segregation would be reached.[225] Manifestly, he argued, this limit would not be reached through an approval of a Detroit metropolitan remedy. He searched the record and found convincing the conclusions of the trial court and the court of appeals that even the best proposed Detroit-only plan would still leave many schools in Detroit 75-90 percent black.[226]

As did his other dissenting brethren, Justice White saw the segregative acts found to have been committed by the state of Michigan within the Detroit school district as state action which amply justified the imposition of the metropolitan remedy.

> The Court draws the remedial line at the Detroit School District boundary, even though the Fourteenth Amendment is addressed to the State and even though the *State* denies equal protection of the laws when its public agencies, acting in its behalf, invidiously discriminate. The State's default is "the condition that offends the constitution." . . . [T]here is no acceptable reason for permitting the party responsible for the constitutional violation to contain the remedial powers of the federal court within administrative boundaries over which the transgressor itself has plenary power.[227]

Justice White made his independent examination of the school

223. *Id.* at 3136.
224. *Id.* at 3136 (White, J., dissenting).
225. *Id.* at 3136-37.
226. *Id.* at 3137.
227. *Id.* at 3140-41.

desegregation cases leading to *Detroit*. He examined the voting rights cases which mandated that state drawn political boundaries must give way in the face of the equal protection clause. Along with the district judge and the court of appeals, he found this authority supportive for the remedy approved below.[228]

Justice White was unprepared to take the state interest in maintaining local control over its schools and raise it as a barrier to a truly effective constitutional remedy. Indeed, he was unable to fathom how the metropolitan remedy would destroy the local control deemed desirable by the majority. He noted that in *Swann* inter-district revisions of attendance zones, pairing and grouping of schools were approved for a geographic area similar to that of Detroit while the court remained sensitive to the interests of parents in the education of their children.[229]

Finally, Justice White took issue with the conclusion of the majority that a Detroit-only remedy could restore the victims of segregation in Detroit to the situation they would have enjoyed absent such discrimination.[230] In order that the effects of past official segregation be eliminated "root and branch" a remedy was necessary that could achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. For Justice White, the majority approach failed sadly to achieve this result.

Justice Marshall was the most outspoken and bitter in his dissent. For him, the Court's opinion was a giant step backward after twenty years of small, difficult steps toward the goal of making a living truth of our constitutional ideal of equal justice under the law.

> The rights at issue in this case are too fundamental to be abridged on grounds 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. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future. Our Nation, I fear, will be ill-served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together.[231]

Justice Marshall concluded, as did his other dissenting brethren, that the state of Michigan was ultimately responsible for curing the condition of segregation within the Detroit city schools, and that a Detroit-

228. *Id.* at 3143.
229. *Id.* at 3144.
230. *Id.*
231. *Id.* at 3146 (Marshall, J., dissenting).

only remedy would not accomplish this task.[232] He castigates the majority for what he feels to be an unjust accusation that the district court and the court of appeals were only trying to achieve a particular degree of racial balance.[233] Such criticism, he contends, flies in the face of the repeated pronouncements of these lower courts that the result sought was desegregation of the Detroit schools, a desegregation that could be achieved only in the event the surrounding districts were incorporated into the plan.[234]

The remedy envisioned by the majority was in effect no remedy at all. When coupled with the very real phenomenon of "white flight" from the city schools which would be forthcoming from any Detroit-only decree, the majority's limitation on a remedy would have the effect of turning the Detroit city schools into an all-black school system.

> We cautioned in *Swann*, of course, that the dismantling of a segregated school system does not mandate any particular racial balance. . . . We also concluded that a remedy under which there would remain a small number of racially identifiable schools was only presumptively inadequate and might be justified. . . . But this is a totally different case. The flaw of a Detroit-only decree is not that it does not reach some ideal degree of racial balance or mixing. It simply does not promise to achieve actual desegregation at all.[235]

The administrative problems alluded to by the majority, were not of sufficient magnitude to thwart the clear constitutional mandate perceived by Justice Marshall.[236] The district court would be empowered to act only in the event of a default by the state authorities. Nowhere in the record could Justice Marshall find any indication that the district judge had acted or tended to act in any manner other than as a reviewing authority for constitutional violations. Justice Marshall would not countenance any limitation on a metropolitan remedy when the record before him showed the metropolitan remedy to be less administratively burdensome in terms of number of students bused, number of buses, and time of busing than the Detroit-only plan.[237] Justice Marshall concluded with a warning for the future.

> 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

232. *Id.* at 3149.
233. *Id.* at 3148.
234. *Id.*
235. *Id.* at 3156.
236. *Id.* at 3158.
237. *Id.* at 3160.

> 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.[238]

Conclusion

With his concluding remarks, Justice Marshall has focused on what truly appears to be the long-range effect of the Court's opinion. Absent a near-impossible showing that various school districts have conspired to keep black children isolated in one of them or that the state has so operated, the state interest in local control over education will impose an outer limit on a federal court's power to order desegregation. The outer limit will be the political boundary of the individual school system. Within those boundaries, a school system should look much like that of Charlotte-Mecklenburg, North Carolina.[239] The nation and the courts are weary of twenty years of school segregation litigation. Prior to its decision in *Detroit,* the Court had begun to indicate that it will decline to interfere in local school plans for desegregation that are in general accord with the strictures of *Swann.*[240] For the majority at least, Detroit should be the end of the line in the school desegregation cases.

To the extent this approach of the Court fails to provide for maximum integration of schools subject only to legitimate practical limits, it is reprehensible. The position adopted by the majority will be viewed by those dissatisfied with busing and court-imposed integration as a weakening of the Court's resolve to give meaning to the Fourteenth Amendment's guarantee of equal protection of the laws in the field of education, thereby increasing resistance where integration plans are underway.[241]

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238. *Id.* at 3161.

239. *See id.* at 3160-61.

240. *E.g.,* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); Davis v. Board of School Comm'rs, 402 U.S. 33 (1971).

241. *See, e.g.,* the extreme resistance to court ordered busing in Boston and the unfortunate speech by President Ford questioning the wisdom of busing. *From the Schools to the Streets,* TIME, Oct. 21, 1974, at 24-25. Renewed congressional attempts to limit busing and integration are also likely. Congress has in fact attempted to restrict the power of the courts to order busing as a remedy in the Broomfield Amendment. The amendment has not been judicially construed and has been largely ignored. Former Justice Goldberg argues that both non-jurisdictional and jurisdictional attempts to limit equity remedies now available to the courts would be unconstitutional because if a remedial limitation perpetuates segregation it would violate Fifth Amendment due process, violate the separation of powers and would be neither "necessary and proper" (U.S.

The majority position, when examined superficially, appears to be based on sound constitutional principles. As the sharp dissents point out, however, the majority's logic will not withstand close scrutiny, a scrutiny required when the result reached by the majority leaves a patent constitutional violation essentially remediless. Had the metropolitan area envisaged by the district court's consolidation remedy comprised one single school district, the Court would not likely have had difficulty in approving a plan similar to the one suggested below. In this context the Court seems to have raised to constitutional importance the state-drawn political subdivisions that make up its school districts, even though the Court has consistently recognized that these political subdivisions are not sacrosanct when they conflict with the Fourteenth Amendment. Throughout the country the idiosyncrasies of school district boundary lines will determine the "equality" reached in the schools in each area. The majority refuses to attach any constitutional significance to the increasing pattern of black urban ghettos surrounded by white suburbs, even when there has been a showing of state-imposed segregation within those urban ghettos. The majority assumes here a lack of relationship between school segregation and demographic change even though the dissent has pointed out the fallacy of this reasoning.

Perhaps the Court, as it did when it considered *Brown I*, should again consider the sociological evidence to aid in its definition of "meaningful integration." The judges at the court of appeals level who opposed consolidation as the only feasible remedy in *Richmond* and *Detroit* intimated a possible change in the view of educators concerning the adverse psychological effects of racially identifiable schools.[242] Certainly the near-unanimity that faced the *Brown I* Court is no longer present.[243] Some sociologists oppose busing[244] while others persist-

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CONST. art. 1, § 8) nor within Congress' Fourteenth Amendment enforcement power. Goldberg, *The Administration's Anti-Busing Proposals—Politics Makes Bad Law*, 67 NW. U.L. REV. 319 (1972). Justice Goldberg would approve the remedy in *Richmond* and *Detroit*. *Id.* at 345.

242. Judge Craven of the Fourth Circuit notes the testimony of an expert that questions the busing of children out of the black cities as "paternalistic and patronizing" and as limiting their interest in the local control over their schools. Bradley v. School Bd. [Richmond] 462 F.2d 1058, 1063. This position is that of the Congress of Racial Equality (CORE). *Id.*

Judge Weick, dissenting in the Sixth Circuit *Detroit* decision, criticizes the District Judge for failing to admit the deposition of Harvard sociologist, David Armour, an opponent of large-scale busing. 484 F.2d 215, 269.

243. Clark, *supra* note 22, at xxxvi.

244. Noel A. Day, an urban sociologist, suggests that integration to full practical

ently argue for continued efforts toward truly integrated schools while expanding the drive for higher quality schools in depressed areas.[245]

The Supreme Court appears to be following a pattern already familiar to constitutional scholars who have analyzed its opinions. The Burger Court has retreated substantially from many positions advanced by its predecessor Warren Court, not by directly overruling prior decisions, but by adjusting one way or the other the factual situations that are required to make operative these earlier articulated principles.[246] In *Detroit*, the Court has not turned its back totally on the principle of full integration subject only to legitimate practical limitations, but it has imposed a barrier that will prove difficult for those who attempt to hurdle it. Had the majority sustained the lower court in *Detroit*, it would have proven a bold step in eliminating school segregation in both the North and South. Yet the majority is reticent to impose a consitutional requirement with such sweeping impact. Sweeping changes are required if integrated schools and quality education are ever to become a reality for the United States. Integration to full practical limits would not mean the abrogation of local control. The legislative branches of our government have defaulted in their duty to effect the necessary changes. The *Brown I* court was not afraid to issue its mandate for sweeping change. The *Detroit* majority to a man would denounce any notion that the *Brown I* principles had been diluted, yet they appear unwilling to take the last step in fully developing those principles.[247]

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limits involving busing may defeat the real local control, by blacks, of schools that is needed to provide equal educational opportunity. Day, *The Case for All-Black Schools* in EQUAL EDUCATIONAL OPPORTUNITY 205 (HARV. EDUC. REV. ed. 1969).

Charles V. Hamilton, a professor at Roosevelt University, admits his plans facially correspond to those of white segregationists, but argues for ghetto community schools as "a central meeting place to discuss and organize around community issues, political and economic." Hamilton, *Race and Education: A Search for Legitimacy* in EQUAL EDUCATIONAL OPPORTUNITY 187, 201 (HARV. EDUC. REV. ed. 1969).

245. M. WEINBERG, DESEGREGATION RESEARCH: AN APPRAISAL 378-85 (1970); Cohen, *Compensation and Integration* in EQUAL EDUCATIONAL OPPORTUNITY 91 (HARV. EDUC. REV. ed. 1969); Gallagher, *Integrated Schools in the Black Cities?*, 42 J. NEGRO EDUC. 336 (1973). Clark, *supra* note 22. Clark also notes that, notwithstanding the social policy benefits, schools in which more whites attend are better schools. "It is not the white child *per se* whose presence leads to higher achievement for the Negro child who associates with him in class, but the quality of education provided because the white child is there that makes the difference . . . ." *Id.* at xliv.

246. *See, e.g.*, Robinson v. United States, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).

247. Broad equity power should direct the authority whose policies have contributed to segregation in the schools to take affirmative action to remedy the effects and encourage integrated neighborhoods. Hart v. Community School Bd., 42 U.S.L.W. 2428 (E.D.N.Y. Jan. 28, 1974).