Milliken v. Bradley

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MILLIKEN v. BRADLEY

School Desegregation—Where school district is segregated de jure as the result of intentional discriminatory state action on the part of the school board or state, desegregation plan must be confined to that school district in the absence of an inter-district violation. ___ U.S. ___, 94 S.Ct. 3112 (1974).

Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.¹

Over strongly worded dissents,² a bare majority of the Supreme Court³ in Milliken v. Bradley⁴ rendered the most historic school desegregation decision since Brown v. Board of Education.⁵ The Court in Milliken was faced with a Michigan district court decision, affirmed by the Sixth Circuit Court of Appeals,⁶ holding that: (1) the Detroit public school system was in a state of de jure segregation⁷ and (2) the only effective remedy was a metropolitan

³ The majority consisted of Justices Burger, Stewart, Blackmun, Powell and Rehnquist. Justice Stewart filed a concurring opinion.
⁵ 347 U.S. 483 (1954) [hereinafter referred to as Brown I].
⁷ De jure segregation is segregation produced by intentional discriminatory state action and is unconstitutional in that it violates the equal protection clause of the four-
desegregation plan encompassing the predominantly black Detroit system and fifty-three predominantly white suburban school districts surrounding the city. Although the Supreme Court unanimously upheld the lower courts' finding that the Detroit public school system was segregated de jure, the five justice majority reversed the Sixth Circuit's holding that the metropolitan desegregation remedy was both mandated by the Constitution and lay within the equity powers of federal district courts.

So-called de facto segregation, on the other hand, is segregation produced by unintentional state action or by private action, and is not unconstitutional. De facto segregation can exist legally only in the North. See note 42 infra.

The state action requirement for a finding of a fourteenth amendment violation was first enunciated by the Supreme Court in the Civil Rights Cases, 109 U.S. 3 (1883), where the Court drew a distinction between discriminatory state action, which violated the fourteenth amendment, and private discrimination, which did not.

The discriminatory state action on the part of the Detroit school board which the district court found violated the equal protection clause of the fourteenth amendment included: (1) the creation and maintenance of optional attendance zones, Bradley v. Milliken, 338 F.Supp. 582, 587-88 (E.D. Mich. 1971); (2) the busing of black students past or away from white schools to black schools farther away, id. at 588; (3) the gerrymandering of school attendance zones, id.; and (4) school construction site policies, id. at 587-89.

The majority in Milliken accepted arguendo the lower courts' finding that the state of Michigan also was responsible for the de jure segregation in Detroit. The state had refused until 1971 to authorize funds for the purchase of school buses for Detroit, while at the same time providing ample funds for school buses for the suburban school districts. Although the district court did not say how this had promoted segregation, a reasonable inference is that the lack of state funds for transportation inhibited the Detroit school board from busing students for desegregation purposes. Bradley v. Milliken, 338 F. Supp. 582, 589 (E.D. Mich. 1971). See also ___ U.S. ___, ___, 94 S.Ct. 3112, 3150 (1974) (Marshall, J. dissenting). The district court also found that a recently passed state law which embraced the "free choice" and "neighborhood schools" concepts had implicated the state in the de jure segregation within Detroit. Bradley v. Milliken, 338 F. Supp. 582, 589 (E.D. Mich. 1971). See also ___ U.S. ___, ___, 94 S.Ct. 3112, 3150 (1974) (Marshall, J. dissenting).

8. The court did not direct the immediate implementation of a metropolitan desegregation plan. After rejecting "Detroit-only" and "metropolitan" plans submitted by the parties, the court appointed a panel to devise a plan for desegregation within a "Desegregation Area" encompassing the Detroit school system and fifty-three of the eighty-six suburban school districts located in Wayne, Oakland and Macomb counties which surround Detroit. 345 F. Supp. 914, 916-20 (E.D. Mich. 1972). Therefore the Supreme Court in Milliken did not have before it a plan for desegregating the Detroit school system. ___ U.S. ___, ___, 94 S.Ct. 3112, 3134 (1974).

9. ___ U.S. ___, ___, 94 S.Ct. 3112, 3124 n.18 (1974). The issue whether the Detroit school system was illegally segregated did not divide the Court. All members agreed that on the basis of the Court's holding in Keyes v. School District No 1, 413 U.S. 189 (1973), the lower courts had been correct in finding that Detroit was illegally segregated de jure. For a further explanation of Keyes see note 42 infra and accompanying text.

The Court held that a federal district court lacks the constitutional power to grant inter-district relief from de jure segregation existing in a single school district in the absence of a finding that (1) the de jure segregation found to exist in one school district has been a "substantial cause" of a significant "segregative effect" in a neighboring school district or that (2) the state drew the school district lines with the purpose of fostering segregation among school districts.\footnote{1}

Since the district court had failed to take evidence with regard to the establishment of the boundaries of the eighty-six school districts in the three counties surrounding Detroit or with regard to whether these districts had either committed or were affected by acts of de jure segregation,\footnote{2} the Court held that an

\footnote{11. Milliken v. Bradley, -- U.S. --, 94 S.Ct. 3112, 3127-28 (1974). The Court said an "inter-district violation," justifying an inter-district remedy, would be committed where a school district arranged for its students to attend schools in another district, resulting in cross-district segregation. The Court acknowledged that in the late 1950's Carver school district, a predominantly black suburban district, contracted to have its high school students sent to a predominantly black high school in Detroit. This was done because Carver school district did not have a high school and allegedly because the white suburban school districts would not accept Carver's students. However, the Supreme Court held that this "isolated instance affecting two of the school districts would not justify the broad metropolitan remedy . . . since it embraced potentially fifty-two districts having no responsibility for the arrangement . . . ." Id. at 3130. Justice Stewart in his concurring opinion said that the transfer of students across school district lines or a redistricting of school districts would also be justified if the state had "contributed to the separation of the races . . . by purposeful, racially discriminatory use of state housing or zoning laws." Id. at 3132. See also discussion at note 109 infra.}

\footnote{12. Bradley v. Milliken, 345 F.Supp. 914, 920 (E.D.Mich. 1972). After announcing the possibility of a metropolitan remedy, the district court allowed intervention by the outlying school districts only for the purposes of (1) advising the court on the legal propriety...}
inter-district remedy was not authorized by the Constitution. The inter-district remedy could not be justified on the ground that the Detroit school district lines had been drawn by the state on the basis of race, for those boundaries, which are coterminous with the city boundaries, had been established over a century ago as a result of "neutral legislation." Therefore, the Court concluded that the desegregation remedy for the de jure segregation found to exist within the Detroit school system must be confined to the boundaries of that school system.

I. A Retreat from Supreme Court Precedents

The Supreme Court majority declared that the inter-district remedy approved by the lower courts was a "wholly impermissible remedy based on a standard not hinted at in Brown I or II or any holding of this Court," and that it could be supported "only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." While it is true that the Supreme Court had never

or impropriety of a metropolitan desegregation plan, and (2) suggesting modifications or substitutions for such a plan. See ___ U.S. ___, 94 S.Ct. 3112, 3120-21 (1974).

13. ___ U.S. ___, 94 S.Ct. 3112, 3130 (1974). In addition to holding that the Detroit school system was segregated de jure, the district court also held that the entire Detroit metropolitan area was segregated de jure as well, due to discrimination in housing by state and private organizations.

Government actions and inactions at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area.


This finding was not relied upon by the court of appeals in its affirmance of the district court's decision. 484 F.2d 215, 242 (6th Cir. 1973). Therefore, the majority of the Supreme Court in Milliken found that "this case does not present any question concerning possible state housing violations." ___ U.S. ___, 94 S.Ct. 3112, 3119 (1974).

If the district court's finding had been upheld on appeal, Milliken would have been decided differently. Such a finding would have fulfilled Justice Stewart's requirement for an "inter-district violation," thus justifying an inter-district remedy. See notes 11 and 109 infra. The court of appeals did, however, find that state-approved sites for school construction had "fostered segregation throughout the Detroit metropolitan area." 484 F.2d 215, 241 (6th Cir. 1973). The Supreme Court rejected this finding as not based on sufficient evidence. The Court said that the trial evidence was directed solely to the question of whether school construction policies had produced de jure segregation within the city of Detroit, and not whether it had contributed to segregation outside of Detroit. ___ U.S. ___, 94 S.Ct. 3112, 3130 (1974).


15. Id. at ___, 94 S.Ct. at 3131.


17. Id. at ___, 94 S.Ct. at 3128.
before ruled on the propriety of an inter-district remedy, it is also true that the implication of past decisions was that, under certain circumstances, such a remedy would not only be permissible, but constitutionally required.

Ever since Brown I declared segregated schools "inherently unequal," black students have had the constitutional right not to be forced by state action to attend a segregated school system. In Brown I the "state action" which the Court found sufficient to violate the equal protection clause of the fourteenth amendment was state laws which either mandated or permitted school districts to operate segregated or dual school systems. Subsequent decisions defined what steps a state was obligated to take once it was shown that black students were attending segregated schools as a result of state action.

Brown II, the first Supreme Court decision to deal with remedies for unconstitutional segregation in the public schools, contemplated the possibility that school districts might have to be altered by the state in order to comply with the Court's holding in Brown I:

18. In Bradley v. School Board of Richmond, 338 F.Supp. 67 (E.D. Va.), rev'd, 462 F.2d 1058 (4th Cir. 1972), aff'd by an equally divided Court 412 U.S. 92 (1973), the district court had ordered the consolidation of the Richmond school district with surrounding suburban school districts on the basis of a finding that both Richmond and the Richmond metropolitan area were illegally segregated de jure. The Court of Appeals for the Fourth Circuit reversed, holding that a Richmond-only desegregation plan would completely eliminate state-imposed segregation within that school district and that the district court's finding of de jure segregation throughout the Richmond metropolitan area was not based on sufficient evidence. The court held that absent "joint interaction" between school districts resulting in inter-district segregation, an inter-district remedy was not required by the Constitution. The Supreme Court split 4-4 in an unwritten decision, thus affirming the Fourth Circuit. Justice Powell did not participate.


Justice White dissenting in Milliken stated:

The malady addressed in Brown II was the statewide policy of requiring or permitting school segregation on the basis of race, while the record here concerns segregated schools only in the city of Detroit. The obligation to rectify the unlawful condition nevertheless rests on the State. The permissible revision of school districts contemplated in Brown II rested on the State's responsibility for desegregating its unlawfully segregated schools, not on any segregative effect which the condition of segregation in one school district might have had on the
To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

Although Brown II appeared to impose upon the states a duty to integrate their school systems, it was not until Green v. County School Board was decided in 1968 that the Supreme Court clearly defined the obligation of the states to correct past constitutional violations. Green held that school boards located in states which prior to the 1954 Brown I decision had allowed their school systems to operate segregated schools pursuant to state laws which either mandated or permitted them to exist, were under an “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.” Further, the Green Court said that “[t]he obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation.”

The “affirmative duty” to integrate doctrine was used in Green to invalidate a “freedom of choice” plan under which students could choose to attend one of two schools, one of which was primarily black, the other white. The plan was not invalidated because it was unconstitutional, but rather because it was ineffectual in eliminating the dual school system existing in the school district. Significantly, the Court in Green held that it was incumbent upon the school board to weigh any desegregation plan “in light of any alternatives which may be shown as feasible and more promising in their effectiveness.” The objective of any desegregation plan, said the Court, was to “fashion steps which promise realistically to convert promptly to a system without a ‘white’ school and a ‘Negro’ school but just schools.”

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schools of a neighboring district. The same situation obtains here and the same remedial power is available to the District Court.

22. Id. at 439 (emphasis added).
23. Id. at 441.
24. Id. at 439.
25. Id. at 442.
The clear import of *Green* was that any desegregation plan was to be judged according to its effectiveness in eliminating dual school systems in which identifiably white and black schools existed. The key inquiry was whether or not the plan worked: "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."26

The Court gave substantive meaning to the right of students not to be forced by state action to attend segregated schools by imposing a remedy which required that states operate integrated school systems. The constitutional violation in *Green* was the same as in *Brown I* — pre-1954 segregation laws. On the basis of that past constitutional violation, the state was put under an affirmative duty to integrate.

In *Monroe v. Board of Commissioners*,27 a companion case to *Green*, a "free transfer" plan was invalidated because it, like the "freedom of choice" plan invalidated in *Green*, did not work to achieve a "unitary, nonracial, nondiscriminatory school system."28 The Court said that the plan "patently operates as a device to allow resegregation of the races to the extent desegregation would be achieved by geographically drawn zones."29 The meaning of *Monroe* was that a district court, in assessing the effectiveness of a desegregation plan, was to take into account whether the plan would result in resegregation of the races. If it did, then the plan was ineffectual and therefore unacceptable.

In *Swann v. Charlotte-Mecklenburg Board of Education*,30 the "state action" which violated the fourteenth amendment was once again state segregation laws which had existed prior to 1954. The Court stated that, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."31 The Court went on to reaffirm its holding in *Monroe* that district courts must consider the possibility of resegregation when assessing a desegregation plan:32

In devising remedies where legally imposed segregation has been

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26. *Id.* at 439.
28. *Id.* at 459.
29. *Id.*
31. *Id.* at 15.
32. *Id.* at 21 (emphasis added).
established, it is the responsibility of local authorities and dis-


tribution courts to see to it that future school construction and aban-
donment are not used and do not serve to perpetuate or re-
establish the dual system.

The most significant aspect of Swann was its definition of what constituted the minimum constitutional remedy for a past constitutional violation: "The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools."33 The pairing and grouping of noncontiguous school zones was specifically ap-


proved, as was the transportation of students.34 With regard to bus transportation, the Court added one proviso: "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."35 The desegregation plan in Swann, which called for thirty-five minute bus rides for elementary school children, was held permissible because it compared favorably with the pre-existing bus transportation system under which Charlotte students had been required to ride an average of fifteen miles one way for an average time of over one hour.36 The Court used the words "workable," "feasible," "reasonable," "effective," and "realistic" to describe constitutionally required desegregation plans which were consist-

ent with the equitable remedial power of a federal district court.37

In Davis v. Board of School Commissioners,38 a companion case to Swann, the Court repeated that case's definition of the minimum remedy for a constitutional violation: "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation," but added, "taking into account the practicali-


ties of the situation."39 In achieving an effective plan, the Court held that an artificial barrier, a highway, could not stand in the way of a court's duty to achieve the greatest possible degree of

33. Id. at 26.
34. Id. at 28-30.
35. Id. at 30-31.
36. Id. at 30.
37. Id. at 31.
39. Id. at 37.
actual desegregation taking into account the practicalities of the situation.40

In Keyes v. School District No. 1,41 the Supreme Court for the first time was faced with a desegregation suit arising in a northern state which had no prior history of school segregation laws. The issues were whether the requisite state action for a finding of a fourteenth amendment violation could be found in the actions of a school board operating as an agent of the state, and if it could, what the proper remedy was. The Court held that the intentional discriminatory actions of a school board constituted sufficient state action for a finding of a constitutional violation, and that the remedy was the same remedy which must be imposed where the constitutional violation took the form of a state segregation law.42

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41. 413 U.S. 189 (1973).
42. Id. at 213.

While the remedy for a constitutional violation is the same throughout the country, the Supreme Court in Keyes v. School District No. 1, 413 U.S. 189 (1973) drew a distinction between de jure segregation, which is unconstitutional, and de facto segregation, which is permissible. The distinction between the two rests on a finding of "segregative intent" which the plaintiff has the burden of proving:

[I]n the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.

Id. at 198 (emphasis added).

We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.

Id. at 208.

Although the Supreme Court in Milliken affirmed the lower court's finding that the Detroit school system was segregated de jure as the result of intentional discriminatory state action on the part of the Detroit school board, the Court did not find an "inter-district violation," which would have justified the inter-district desegregation plan, because the existing school district boundary lines had not been drawn with segregative intent.

The Court found that the existing boundary lines of the Detroit school system had been the result of "neutral" legislation enacted a century earlier. Thus the de jure/de facto distinction was the basis of the Court's holding that no "inter-district violation" had been shown in the case, and that therefore the inter-district remedy was beyond the power of the federal court.

This segregative intent requirement cannot be justified by any principled constitutional rationale. State action which produces "inherently unequal" segregated schools is still state action for the purposes of the fourteenth amendment whether it is motivated by segregative intent or not. After Keyes, the substantive constitutional right of a black student to the equal protection of the laws varies, depending upon whether the black student lives in the South or in the North. Segregated school systems cannot legally exist in the South no matter what their cause because the Supreme Court has proceeded on the fiction that if segregated schools exist in the South, they exist because of prior segrega-
The clear import of every major Supreme Court decision from *Brown II* through *Keyes* was that, once a dual school system is shown to exist as the result of intentional discriminatory state action, the state is under an "affirmative duty" to dismantle that dual school system. If a school board failed to implement a plan which promised realistically to work, then the district courts were...

Northern states, on the other hand, are not under an affirmative duty to integrate their schools. Apparently, they are merely under a negative duty to refrain from being motivated by segregative intent when they impose segregation. Thus black students in the North have a different constitutional right—the right not to attend segregated schools imposed by *intentional* discriminatory state action.

The Second Circuit Court of Appeals in *Hart v. Community School Board*, No. 74-2076 (2d Cir. Jan. 27, 1975), may have recognized the injustice of such a double standard when it was called upon to interpret the meaning of *Keyes'* segregative intent requirement for a finding of *de jure* segregation. The district court had held a community school board responsible for unconstitutional segregation at a New York City junior high school, *Hart v. Community School Board*, 383 F.Supp. 699 (1974), finding that various actions (re zoning of feeder patterns and new school construction) and inactions (refusals to adopt effective plans for integration) on the part of the school board had the "natural and foreseeable" effect of bringing about and perpetuating segregation at the school. *Id.* at 716, 721.

While acknowledging that under *Keyes* there was a constitutional difference between *de jure* and *de facto* segregation, No. 74-2076 at 1468, 1473 (2d. Cir. Jan. 27, 1975), the Second Circuit held: (1) a finding of discriminatory motivation or segregative desire was not necessary for a finding of segregative intent, *id.* at 1470, and (2) " . . . a finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation." *Id.* at 1469.

The Second Circuit would, however, require some kind of "affirmative" action by state authorities: "We assume that mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation. Since here there has been a finding of affirmative action, coupled with intentional inaction, the case is different." *Id.* at 1465. The Second Circuit apparently rejected the District Court's finding that "*de facto* segregation which can be avoided is unconstitutional." 383 F. Supp. at 728.

It is significant to note that the Supreme Court in *Milliken* was unanimous in holding that Detroit was segregated *de jure* as the result of *intentional* discriminatory state action; the district court had apparently held that segregative motivation or desire was not necessary for a finding of segregative intent. The district court held: (1) a finding of evil intent, motive, ill will or bad faith was not necessary for a finding of unconstitutional segregation, *Bradley v. Milliken*, 338 F. Supp. 582, 592 (E.D. Mich. 1971); (2) "school districts are accountable for the natural, probable and foreseeable consequences of their policies and practices", *id.*, and, (3) the school board had an "affirmative obligation to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation." *Id.* at 593.

obligated to impose a remedy which would. In so doing, district
courts were to be guided by a basically pragmatic approach—the
minimum remedy for a constitutional violation is the greatest
degree of actual desegregation taking into account the practicali-
ties of the situation. A reasonable inference from past decisions
was that artificial barriers—a highway in Davis, an invisible
school district line in Milliken—were not to stand in the way of
efforts to desegregate public school systems.

On the basis of past Supreme Court precedents it appeared
that a desegregation plan which encompassed more than one
school district would be constitutionally mandated if (1) the plan
was deemed necessary to dismantle a dual school system and
prevent its re-emergence, and (2) it encompassed a geographical
area not so large as to render the plan impractical or unworkable.
With regard to the latter, a necessary consideration would be the
time and distance involved in bus transportation. Such transpor-
tation would not be allowed if it either risked the health of the
students or significantly impinged on the educational process.

The holdings in two other Supreme Court decisions support
this view of the proper scope of a desegregation remedy. Wright
v. Council of the City of Emporia and a companion case, United
States v. Scotland Neck City Board of Education appear to
stand for the proposition that, once a constitutional violation has
been shown to exist and the inquiry has shifted to the appropriate
remedy, school district boundary lines which impede the effec-
tiveness of a desegregation plan can be crossed, regardless of
whether they were established with segregative intent.

Wright and Scotland Neck involved attempts by cities to
secede from the county school systems to which they had pre-
viously belonged after the county systems had been ordered to
dismantle their pre-existing dual school systems. The Court in
each case held that, despite the fact that each of the two new
school districts would operate unitary school systems within their
borders, and regardless of the purpose or motivation behind the
proposed secession, the effect of the secession would be to impede
the effectiveness of a school desegregation plan, and the plans
were therefore enjoined. The Court in Wright considered the

possibility that the new school district boundary lines would result in “white flight” out of the county schools into private academies and out of the county system into the city system, thus making the county system almost entirely black. It also took into account the adverse psychological effect on black students in the county which would result from the erection of an invisible school district boundary line separating them from white schools nearby. In Scotland Neck the secession was enjoined because “[t]he traditional racial identities of the schools in the area would be maintained” if the secession were allowed.

Lending support to the view that existing arbitrary school district lines cannot stand in the way of a desegregation remedy are the reapportionment cases, especially Reynolds v. Sims. In Reynolds the Supreme Court held that Alabama’s existing voting district lines had the effect of diluting the voting strength of some citizens as compared to others, thereby denying them the equal protection of the laws. The remedy was a complete revision of the existing lines so that the vote of every citizen would be equally weighted. The Court justified its power to compel a state to alter its political subdivisions by stating:

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.

Significantly, for the purpose of analyzing Milliken, the “state action” which violated the equal protection clause was simply state inaction in not changing the voting district lines. The lines were not established with the purpose of discriminating against voters on the basis of where they lived. The inequality existed because of voluntary shifts in population from one voting district to another. The Court in Reynolds did not stop to question whether state action was responsible for the population shifts, nor whether voting districts had been established with discriminatory intent. The mere maintenance of the existing

47. Id. at 464.
48. Id. at 466.
51. Id. at 575.
voting district lines was sufficient state action for a finding of a constitutional violation.52

II. THE MAJORITY IN MILLIKEN MISINTERPRETED THE LOWER COURTS' DECISIONS

Since the Supreme Court in Milliken unanimously agreed that the Detroit school system was illegally segregated as the result of intentional discriminatory state action on the part of the Detroit school board, the only issue which divided the Court was the scope of the remedy which the Constitution mandated. In the words of the district court: "The task before this court, therefore, is now, and . . . has always been, how to desegregate the Detroit public schools."53 The issue, in short, was once a constitutional violation has been shown, how much desegregation does the Constitution require?

The Supreme Court majority said the lower court had "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."54 The Court construed the lower court's decision to mean that true desegregation could only be achieved if "the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole."55

The Court held that the Constitution does not require any particular degree of racial balance or mixing in the public schools and that Detroit could be completely "desegregated" in constitutional terms by integrating the schools of the Detroit system alone without drawing upon the large number of white students in the suburban school districts.56 In support of this holding, the majority quoted from Swann:57

52. The Court held:
Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, Brown v. Board of Education, 347 U.S. 483. . . . [T]he weight of a citizen's vote cannot be made to depend on where he lives.
55. Id. at 533, 94 S.Ct. at 3125.
If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

The majority said the lower courts had applied an "erroneous standard" in determining that inter-district relief was necessary to cure the constitutional violation in Detroit. The Court held that, "absent an inter-district violation there is no basis for an inter-district remedy." The Supreme Court in Milliken misinterpreted the basis on which the district court had concluded that "relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city." The lower court did not base this conclusion on a finding that a Detroit-only remedy would not produce a "desirable racial balance." The true basis for the conclusion was a finding that a Detroit-only remedy would not produce desegregation at all because of the specter of resegregation resulting from white flight to the suburbs following the imposition of a Detroit-only remedy. The district court specifically found that white-flight would be the result of state action; namely, any school desegregation plan limited to Detroit. The fact that this state action would not be intentionally discriminatory should be irrelevant since it would come at the remedial stage after the constitutional violation had already been shown.

The startling reality of white migration out of Detroit, which was amply supported by statistical demographic evidence, led the district court to the conclusion that in time Detroit would become an all black city. The court of appeals upheld this find-

59. Id. at ___, 94 S.Ct. at 3131.
60. 484 F.2d 215, 244 (6th Cir. 1973). The district court's ruling that a Detroit-only remedy would not accomplish desegregation is reported only in the court of appeals' decision. Id. at 242.

62. The percentage of black students in Detroit public schools in 1975-76 will be 72.0 percent, in 1980-81 will be 80.7 percent and in 1992 it will be virtually 100 percent if the present trends continue.

ing, stating that any remedy confined to the boundaries of Detroit would:

lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black.

The court of appeals, like the district court, concluded that the only feasible desegregation plan involved the inclusion of suburban school districts “for the limited purpose of providing an effective desegregation plan” for Detroit.

The district court was not concerned with achieving a particular black-white ratio in the Detroit schools. In fact, it specifically rejected one metropolitan desegregation plan which had as its only purpose the achievement of a “particular racial ratio” in the schools, and another whose only purpose was to “increase the average socio-economic balance of the schools.” Rather, it was concerned with (1) dismantling the dual school system within Detroit and preventing resegregation due to white flight which would result from a Detroit-only remedy and (2) achieving the greatest possible degree of actual desegregation taking into account the practicalities of the situation. This two-point remedial standard for curing a constitutional violation is firmly grounded in the Supreme Court precedents discussed earlier.

The inter-district remedy was chosen by the district court because it would be “physically easier and more practicable and feasible than desegregation efforts limited to the corporate geographic limits of the City of Detroit.” For example, the court found that, while a Detroit-only plan would have required the purchase of 900 school buses, an inter-district remedy would have required the purchase of only 350. Although the metropolitan
plan would have required the transportation of 310,000 students, the school districts in the tri-county Detroit metropolitan area were already busing 300,000 students to school each day. 69 Whereas the metropolitan remedy would have required an average bus ride of 40 minutes in each direction, 70 the students in the tri-county Detroit metropolitan area were already accustomed to bus rides lasting from an hour to an hour-and-a-half each way. 71

In light of the district court’s finding that a metropolitan plan would have been more practical and feasible than a Detroit-only plan, the Supreme Court’s holding that all desegregation efforts must stop at the school district boundary line appears arbitrary. Moreover, the district court’s decision to cross school district boundary lines was supported by Wright and Scotland Neck. 72 The factual situation in Milliken was simply the obverse of the situations in those two cases. 72 1 In Wright and Scotland Neck, the Supreme Court held that school boundaries could not be redrawn, regardless of intent or purpose, if the effect would be to retard the effectiveness of a desegregation plan. The Court in Milliken should have similarly held that school district boundary lines could not be maintained, regardless of intent or purpose, since they impeded the only desegregation plan which would have effectively eliminated the de jure segregation in Detroit.

The relevant inquiry should not have been whether the Detroit school district boundary lines had been drawn with segregative intent when they were established over a century ago. The relevant inquiry should have been whether or not the lines, if drawn today, would be constitutional. Since the natural, probable, foreseeable and actual effect of drawing the present Detroit


The District Court found that statewide, 35-40 percent of all students already arrive at school on a bus. In those school districts in the tri-county Detroit metropolitan area eligible for state reimbursement of transportation costs, 42-52 percent of all students rode buses to school. In the tri-county areas as a whole, approximately 300,000 pupils arrived at school on some type of bus, with about 60,000 of these apparently using regular public transit. In comparison the desegregation plan, according to its present rough outlines, would involve the transportation of 310,000 students, about 40% of the population of the desegregation area.


school district boundary lines would be to impede the effective-
ness of a Detroit desegregation plan, thus perpetuating segrega-
tion within Detroit and between Detroit and its suburbs, the lines
should have been declared invalid by the Court in *Milliken*.

III. THE STATE IS RESPONSIBLE FOR CURING CONSTITUTIONAL VIOLATIONS

The lower court in *Milliken* placed the responsibility for pro-
viding an education consistent with the commands of the equal
protection clause where the fourteenth amendment places it—on
the state.73 The district court said that Michigan could not “es-
cape its constitutional duty to desegregate the public schools of
the City of Detroit by pleading local authority”74 and that:25

School district lines are simply matters of political conveni-
ence and may not be used to deny constitutional rights. If the
boundary lines of the school districts of the City of Detroit and
the surrounding suburbs were drawn today few would doubt
that they could not withstand constitutional challenge.

The district court simply followed the holdings of Wright and
Scotland Neck to their logical end, stating: “If a state is constitu-
tionally forbidden to institute a system of racial segregation by
the use of artificial boundary lines, it is likewise forbidden to
perpetuate a system whose effect is to maintain segregation.”76

The lower court also observed that under the Michigan State
Constitution, final authority over education rested with the state
legislature. The state had “plenary power” over school districts,
including the power to “create, alter, reorganize or even dissolve
a school district, despite any desire of the school district, its
board, or the inhabitants thereof.”77

The court of appeals, in affirming the district court’s inter-
district remedy, asserted that the black students’ constitutional
right to the equal protection of the laws could not be “hemmed in
by the boundaries of a school district.”78 The appellate court

72. See notes 44-49 supra and accompanying text.
74. 484 F.2d 215, 244 (6th Cir. 1973).
75. Id.
78. 484 F.2d. 215, 245 (6th Cir. 1973).
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It cited numerous instances where Michigan had exerted its plenary power over local school districts, including the merger of local school districts for financial reasons.\textsuperscript{79} It observed that under the state constitution and state laws, “the public school system is a State function and . . . local school districts are instrumentalities of the State created for administrative convenience.”\textsuperscript{80} It further asserted that:

\begin{quote}
[T]he record establishes that the State has committed de jure acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts.
\end{quote}

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. We therefore conclude that the District Court in the present case is not confined to the boundary lines of Detroit in fashioning equitable relief.

The Supreme Court majority in \textit{Milliken} erred when it refused to acknowledge that school district lines, like the boundary lines of any other political subdivision of a state, are often arbitrarily and capriciously drawn, bearing no rational relationship to any governmental purpose.\textsuperscript{82} When the Court held that school district boundary lines could not be “casually ignored” because “[n]o single tradition in public education is more deeply rooted
than local control over the operation of schools," the Supreme Court chose to ignore the fact that an inter-district remedy would not destroy local control of the schools. Local control would have continued to be exercised but within a larger geographical area.31

Local autonomy over school districts was plainly a false issue for a second reason. As both lower courts amply demonstrated, Michigan has ultimate control over its school districts, including the power to "consolidate and merge school districts, even without the consent of the districts themselves or the local citizenry."35

Even assuming, arguendo, that education in Michigan was in the hands of local autonomous school districts, that fact would be irrelevant in the context of the governing constitutional law—the fourteenth amendment. The constitutional right of American citizens to the equal protection of the laws cannot be made to stand or fall on the basis of whether or not a state has retained plenary control over its school districts or whether it has vested them with local autonomy.

When segregation within Detroit was proven to exist as the result of intentional discriminatory state action, it became the duty of the state to provide the remedy. Not only was the state responsible for remedying the constitutional violation, it was the only political body which could effectively do so; the only feasible and effective remedy required the transfer of students across school district boundary lines maintained by the state itself.36

83.1. See note 112, infra.
84. The majority's emphasis on local governmental control and local autonomy of school districts will come as a surprise to those with any familiarity with that State's system of education. School districts are not separate and distinct sovereign entities under Michigan law, but rather are "auxiliaries of the State," subject to its "absolute power." The courts of the State have repeatedly emphasized that education in Michigan is not a local governmental concern, but a state function.

85. Id. at ----, 94 S.Ct. at 3152.

There have been over 1,000 school district consolidations in the State of Michigan. Id. at ----, 94 S.Ct. at 3159. Whereas in 1912 there were 7,362 school districts, in 1972 there were only 608. Id. at ----, 94 S.Ct. at 3152.
86. Justice Marshall recognized that the state is ultimately responsible for remedying constitutional violations of which it is guilty:

We recognized only last Term in Keyes that it was the State itself which was ultimately responsible for de jure acts of segregation committed by a local school board. A deliberate policy of segregation committed by the local school board, we held, amounted to "state-imposed segregation." 413 U.S. at 200.
The Supreme Court majority in *Milliken* said that the inter-district remedy “could disrupt and alter the structure of public education in Michigan” and that it would “give rise to an array of other problems in financing and operating this new school system.” Administrative inconvenience is hardly a relevant or principled basis for holding that a state is not responsible for correcting constitutional violations which it has itself committed.

### IV. State Action and the Constitutional Right of Black Students to Equal Protection of the Laws

The Supreme Court in *Milliken* held that it makes no constitutional difference that Detroit will become an all-black city as a result of state action in the form of a Detroit-only desegregation plan. As long as the state has not drawn school district boundary lines with the purpose of segregating the public schools, and as long as de jure acts of segregation within one school district are not a “substantial cause” of segregation in another, an inter-district remedy aimed at curing a constitutional violation found in a single school district is, according to the Court, beyond the power of a federal court.

The import of this holding is clear. The states may now freeze the present boundaries of school districts. Should whites then choose to move to all-white districts, the effect will be to create a state-imposed form of invidious discrimination—segregation between all-black and all-white school districts.

The Supreme Court in *Milliken* declared that “[t]he constitutional right of the Negro respondents residing in Detroit is to

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Wherever a dual school system exists, whether compelled by state statute or created by a local board's systematic program of segregation the *State* automatically assumes an affirmative duty “to effectuate a transition to a racially non-discriminatory school system” [and] to eliminate from the public schools within their school system “all vestiges of state-imposed segregation.” *Keyes*, supra, 413 U.S. at 200.


88. *Id.*

89. Justice White, in dissent, stated:
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.


90. *Id.* at ___, 94 S.Ct. at 3127.
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attends a unitary school system in that district." It is questionable after this decision whether this constitutional right has any substantive value. How meaningful is a constitutional right to attend integrated schools within a school system if that system eventually becomes all-black?

The holding in Brown I, the first school desegregation decision which declared segregated schools “inherently unequal,” was based in part on evidence which showed that segregated schools had a deleterious psychological effect on black students. The black students in Detroit will readily perceive that they are attending all-black schools because of artificial school district boundary lines maintained by the state which separate them from nearby all white schools. As the court of appeals noted, it is difficult to understand how such segregation can be any less harmful to the minority students than segregation existing within the confines of a single school district. Milliken raises serious doubt as to the continuing validity of the constitutional right of black students not to be forced to attend segregated schools as a result of state action.

The Supreme Court justified its holding that any desegregation remedy must be confined to the city limits of Detroit by stating that “the scope of the remedy is determined by the nature and extent of the constitutional violation,” and that “without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy.”

Within the context of the facts in Milliken, the Court's second statement does not logically follow from the first. It is true that the purpose of any remedy is to cure the constitutional violation, but it does not follow from this simple truism that in the absence of an inter-district violation there is no constitutional wrong calling for inter-district relief. Both of the lower courts found that in order to remedy the de jure segregation in Detroit (the constitutional wrong) the only effective remedy was an inter-district remedy. The Court’s holding, therefore, was completely arbitrary, and was ineffective as a remedy for the constitutional violation which it admitted existed in the Detroit school system.

91. Id. at ___, 94 S.Ct. at 3128.
95. Id.
The Court’s decision to handcuff the federal courts in the exercise of their remedial powers was not based on a finding that school district boundary lines cannot be altered when it is necessary to correct a constitutional violation. The majority acknowledged that:

Of course, no state law is above the Constitution. School district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies. [citations omitted].

The Court could not reasonably have found otherwise in light of the legislative reapportionment cases. The issue which divided the Court in *Milliken* then, was not whether school district lines could be crossed, but rather under what circumstances they could be crossed.

The dissent asserted that school district lines could be crossed whenever such action (1) was necessary to effectively eliminate from a school district all vestiges of state-imposed segregation and to prevent resegregation and (2) to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. Thus, for the dissent, the meaning of the equal protection clause in the field of public education is that, once a constitutional violation has been shown, blacks and whites should in fact go to school together whenever it is practical, feasible and reasonable for them to do so. The dissent apparently concluded that since black students in Detroit had been denied their constitutional right to attend a unitary integrated school system in the past, they should not continue to attend segregated schools in the future just because large numbers of whites had moved and would continue to move across school district boundary lines maintained by the state.

The majority, on the other hand, held as a matter of law that in the absence of an “inter-district violation,” state-imposed segregation found to exist within a single school district can always be eliminated by a desegregation plan confined to that district. The Court in essence held that black students do not have a constitutional right to attend integrated school systems. The

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96. *Id.*
97. *See* notes 50-52 *supra* and accompanying text.
98. *Id.* *U.S.* *at* 3112, 3140-41 (1974) (White, J., dissenting).
99. *Id.* *at* 3145.
right is to attend a “unitary” school system—even if that system becomes all black and is surrounded by virtually all white school districts. The Court did not find that the maintenance of the present school district boundary lines amounted to state-imposed segregation, despite the fact that the lines were maintained by the state and impeded the only plan which promised to effectively integrate the schools of Detroit.

The majority in *Milliken* attempted to justify its holding in part by declaring that the metropolitan desegregation plan was a “wholly impermissible remedy” imposed upon outlying districts “not shown to have committed any violation.”100 This statement overlooks the fact that the fourteenth amendment does not address itself to school districts, but to states. Of course, school districts as agents of the state are capable of violating the equal protection clause. Once a violation has been shown to exist in one portion of a state the state assumes responsibility for the remedy—even if this means including other portions of the state, not shown to have committed any violation, within the remedy. This is the message contained in *Brown II*, which contemplated the revision of school district boundary lines as a proper remedy for past unconstitutional segregation. This is also the message of *Keyes*, where the Court held that the intentional discriminatory actions of a school board amounted to “state-imposed” segregation, which the state had the responsibility to remedy.101 The reapportionment cases also support this proposition.102

100. *Id.* at ____ , 94 S.Ct. at 3127.
101. See note 86 *supra*.
102. Justice Marshall said:

    Nor should it be of any significance that the suburban school districts were not shown to have themselves taken any direct action to promote segregation of the races . . . it was well within the State’s powers to require those districts surrounding the Detroit school district to participate in a metropolitan remedy. The State’s duty should be no different here than in cases where it is shown that certain of a State’s voting districts are malapportioned in violation of the Fourteenth Amendment. *See Reynolds v. Sims*, 377 U.S. 533 . . . (1964). Overrepresented electoral districts are required to participate in reapportionment although their only “participation” in the violation was to do nothing about it. Similarly, electoral districts which themselves meet representation standards must frequently be redrawn as part of a remedy for other over- and under-inclusive districts and no finding of a discriminatory effect on each district is a prerequisite to its involvement in the constitutionally required remedy. By the same logic, no finding of fault on the part of the suburban school districts in this case and no finding of a discriminatory effect on each district should be a prerequisite to their involvement in the constitutionally required remedy.

Moreover, the majority could not have based its holding on the district court’s failure to find that the outlying districts had themselves committed any constitutional violation, because the Court had conceded that an inter-district remedy would have been permissible if the de jure segregation in Detroit had produced a “significant segregative effect” in the outlying districts. 103

Where is the constitutional precedent for the requirement that before an inter-district remedy can be imposed, plaintiffs must prove not only that de jure segregation exists in one school district, but that it has been the “substantial cause” of a “significant segregative effect” in another? The Supreme Court has apparently announced in *Milliken* a new state action requirement—not for finding a constitutional violation but for imposing a particular remedy once a constitutional violation has been found. 104

[T]he Court confuses the inquiry required to determine whether there has been a substantive constitutional violation with that necessary to formulate an appropriate remedy once a constitutional violation has been shown. While a finding of state action is of course a prerequisite to finding a violation, we have never held that after unconstitutional state action has been shown, the District Court at the remedial stage must engage in a second inquiry to determine whether additional state action exists to justify a particular remedy.

Although the majority in *Milliken* held that school district lines were not sacrosanct and could be bridged if they conflicted with the fourteenth amendment, it did not satisfactorily explain why the Detroit school district lines did not conflict with that amendment. Incantation by the Court of the truism that “the scope of the remedy is determined by the nature and extent of the constitutional violation” 105 does not adequately explain why the Detroit school district lines are permitted to stand today as invisible, yet impenetrable barriers to an effective remedy for the illegal segregation which the Court found to exist within that school district. If, as the Court held, school district boundary lines cannot be drawn for the unconstitutional purpose of promoting school segregation, how can the Court justify the maintenance of lines which produce this same evil?

104. Id. at ___, 94 S.Ct. at 3154 n.19.
105. Id. at ___, 94 S.Ct. at 3127.
V. CONCLUSION

Justice Stewart, in his concurring opinion in Milliken, asserted that, "the Court [here] does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather the appropriate exercise of federal equity jurisdiction." The Court in Milliken, however, did indeed deal with substantive constitutional law, for it defined the constitutional right of black students vis-à-vis the equal protection clause.

Although remedies are designed to enforce substantive rights, the substantive right itself is in turn made meaningful only by the nature and extent of the remedy. A substantive right is real only to the extent that courts are willing to enforce it. Chief Justice John Marshall recognized this fundamental principle in Marbury v. Madison when he declared:107

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 laws furnish no remedy for the violation of a vested legal right.

Recognition of this principle may have been the reason why the majority in Milliken made a point of holding that, "[t]he constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." Having thus defined the constitutional rights of Detroit's black students, the Court said as well that if de jure segregation existing in Detroit had a "significant segregative effect" on outlying districts, then an inter-district remedy would be appropriate. In the event of a "significant segregative effect," the constitutional right of black students would expand into a right to attend a unitary school system within the boundaries of the inter-district remedy. Further, the Court declared that an inter-district remedy would be appropriate if the state drew the school boundary lines in a discriminatory fashion, or, as Justice Stewart stated, in his concurring opinion, if the disparity in racial composition between or among school districts "was imposed, fostered, or encouraged by the State or its political subdivisions."109

106. Id. at __, 94 S.Ct. at 3131.
107. 5 U.S. (1 Cranch) 137, 163 (1803).
109. Id. at ___, 94 S.Ct. at 3133.

The key to achieving integration within the metropolitan context may lie in Justice
The majority held that an inter-district remedy could not be based on a finding of de jure segregation within a single school district. Such a remedy would only be appropriate where de jure segregation in the entire metropolitan area (an inter-district violation) had been proven, i.e., if the state had drawn the school district boundary lines with segregative intent. The difference between a substantive constitutional right to attend a “unitary” school system within the boundaries of Detroit and the substantive constitutional right to attend a “unitary” school system within the boundaries of a definable metropolitan geographical area is crucial; it is the difference between a “right” to attend an “inherently unequal” segregated school system and a right to attend integrated schools.

The majority’s holding that no inter-district violation had been proven in Milliken was based on the de jure/de facto distinction in the law of school desegregation. The establishment of the Detroit school district boundary lines and their maintenance was admittedly “state action” resulting in the perpetuation of segregation between all-black and all-white school districts. But the establishment and maintenance of the lines was “neutral” state action and therefore the existing segregation in the Detroit metropolitan area was de facto segregation, which is not unconstitutional.

The differentiating factor between de jure and de facto segregation is segregative intent. Had the Detroit school district boundary lines been established with the purpose of creating segregation between school districts in the Detroit metropolitan area, that would have been intentional discriminatory state action. The resulting segregation between school districts would have been de jure segregation, and would have been under the Court’s analysis, an inter-district violation justifying an inter-district remedy.

It is difficult to understand how the de jure/de facto distinction in Milliken, where he stated that an inter-district remedy would be appropriate if the state had contributed to the separation of the races by “purposeful racially discriminatory use of state housing or zoning laws,”... U.S. ____ , ____ , 94 S.Ct. 3112, 3132 (1974). According to a report in the New York Times, the NAACP plans to file an amended complaint and reopen the issue of redistricting or cross-district busing between Detroit and its suburbs. According to the report, the NAACP believes it can produce evidence that the state of Michigan has indeed contributed to the separation of the races in the Detroit metropolitan area through the use of discriminatory state housing or zoning laws. N.Y. Times, Feb. 24, 1975, at 28, col. 2.

110. See discussion in note 42 supra.
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The Supreme Court from Brown I through Milliken has held that segregated schools are "inherently unequal." The fourteenth amendment directs its prohibitions against states. If state action is responsible for maintaining and perpetuating "inherently unequal" segregated schools, then it follows that there has been a violation of the equal protection clause, regardless of whether the state action was motivated by segregative intent.

The de jure/de facto distinction should be abandoned. If segregated schools are "inherently unequal" and therefore an evil which the Constitution should not tolerate, then states should be put under an affirmative duty to provide, to the greatest degree practicable, an integrated education for black students residing within their borders. The right to an integrated education cannot be made to depend upon how the state chooses to maintain school district boundary lines. States should be compelled to redraw school district boundary lines if that is what is necessary to eliminate "inherently unequal" segregated school systems.

Under this theory, the constitutional violation would be found in the existing configuration of school district lines which create segregation between school districts. If segregation exists between virtually all-white and virtually all-black school districts then the state has failed in its affirmative duty to provide to the greatest degree practicable an integrated education for its black citizens.

The analogy to the legislative reapportionment cases is too compelling to ignore. In those cases, the Supreme Court placed an affirmative duty on the states to equalize the voting strength of its citizens. Because the existing configuration of voting districts denied some of the state's citizens their substantive constitutional right to have their votes weighted to the same degree as all other citizens, the states were forced to redraw the voting district lines. The Court did not require a finding that the voting district lines had been drawn with a discriminatory purpose or that state action had been responsible for the population shifts among voting districts. The state action in the reapportionment

111. See notes 50-52 supra and accompanying text.
cases was simply state inaction in maintaining the existing configuration of voting districts.

If states are compelled to redraw voting district lines because the pre-existing lines nurture an unequal situation, states should similarly be compelled to redraw school district boundary lines if the pre-existing lines create an "inherently unequal" situation. As in the reapportionment cases, citizens cannot be discriminated against on the basis of where they choose to live.

The equal protection clause cannot be made to say one thing with regard to voting rights and another with regard to racial discrimination—at least not if the premise that segregated school systems are "inherently unequal" is still accepted. As Justice Marshall stated in dissent:

It is the State, after all, which bears the responsibility under Brown of affording a nondiscriminatory system of education. The State, of course, is ordinarily free to choose any decentralized framework for education it wishes, so long as it fulfills that Fourteenth Amendment obligation. But the State should no more be allowed to hide behind its delegation and compartmentalization of school districts to avoid its constitutional obligations to its children than it could hide behind its political

112. The existing configuration of school district boundary lines in the tri-county Detroit metropolitan area amounts to a classification based on race since the Detroit school system is predominantly black and is surrounded by virtually all-white suburban districts. The district court in Milliken held that there had been no showing that this configuration was rationally related to any legitimate governmental purpose. Moreover, the Court specifically held that the existing configuration was not necessary for the promotion of any compelling state interest. 345 F.Supp. 914, 935 (E.D. Mich. 1972).

Although it is arguable that a state has a compelling interest in allowing for local control of schools, there is no compelling state interest in allowing for such local control within the boundaries of the existing districts. The societal value of local control of schools could still be exercised within the boundaries of new school districts drawn in such a manner so as not to discriminate on the basis of race. As Justice White in dissent clearly stated:

Local autonomy over school affairs, in the sense of the community's participation in the decisions affecting the education of its children, is of course, an important interest. But presently constituted school district lines do not delimit fixed and unchangeable areas of a local educational community. If restructuring is required to meet constitutional requirements, local authority may simply be redefined in terms of whatever configuration is adopted, with the parents of the children attending schools in the newly demarcated district or attendance zone continuing their participation in the policy management of the schools with which they are concerned most directly.

subdivisions to avoid its obligations to its voters. Reynolds v. Sims, 377 U.S. at 575 . . . .

It is a hollow remedy indeed where "after supposed 'desegregation' the schools remained desegregated in fact." (citation omitted).

The Supreme Court, however, has rejected the notion that the maintenance of school district boundary lines which create inherently unequal segregated school systems is a violation of the equal protection clause. By so holding, Milliken is inconsistent with the Constitution's promise that every American citizen shall enjoy the equal protection of the laws.

James R. Freeswick

114. Justice Stewart, in his concurring opinion, stated:
Since the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation of the Equal Protection Clause in the absence of a showing that such disparity was imposed, fostered, or encouraged by the State or its political subdivisions, it follows that no inter-district violation was shown in this case.

. . . .

It is this essential fact of a predominantly Negro school population in Detroit—caused by unknown and perhaps unknowable factors such as immigration, birth rates, economic changes, or cumulative acts of private racial fears—that accounts for the 'growing core of Negro schools,' a 'core' that has grown to include virtually the entire city. The Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist.

See also Spencer v. Kugler, 326 F.Supp. 1235 (D.N.J. 1971), aff'd, 404 U.S. 1027 (1972), wherein the plaintiffs alleged that several school districts in New Jersey were "racially imbalanced" in violation of the equal protection clause and asked for general redistricting or compensatory education programs for those districts which were racially imbalanced. The district court held that the state law which provided that school district boundary lines were to be coterminous with municipal boundary lines was "reasonable" and not promulgated with the intention of fostering segregation. The court held that the racial imbalance existing among New Jersey school districts was de facto segregation, "defined as racial imbalance that exists through no discriminatory action of state authorities," 326 F. Supp. 1235, 1242 (1971), and dismissed the complaint for failure to state a claim upon which relief could be granted. The Supreme Court summarily affirmed without opinion, with Justice Douglas dissenting:

The black students in this case want nothing more than to receive the same quality of education from our public schools as is enjoyed by the whites. To deny them that equality is to sanction the dispensation of public benefits according to the invidious classification of race . . . .

The remedy is redistricting. We have sponsored that process to protect the right to vote. Reynolds v. Sims, 377 U.S. 533. The right to education in the environment of a multi-racial community seems equally fundamental.
