WASHINGTON UNIVERSITY
LAW QUARTERLY

VOLUME 1975 NUMBER 3

METROPOLITAN DESEGREGATION IN THE WAKE OF *MILLIKEN*—ON LOSING BIG BATTLES AND WINNING SMALL WARS: THE VIEW LARGELY FROM WITHIN

ROBERT ALLEN SEDLER*

I. INTRODUCTION

The Supreme Court's decision in *Milliken v. Bradley*[1] has been regarded as a major defeat in the effort to bring about metropolitan desegregation[2] and as a decision that in effect "allow[s] our great

* Professor of Law, University of Kentucky. Visiting Professor of Law, Washington University, 1976. A.B., 1956, J.D., 1959, University of Pittsburgh.

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

2. Dell'Ario, *Remedies for School Segregation: A Limit on The Equity Power of the Federal Courts?*, 2 HAST. CON. L.Q. 113, 149 (1975); Kushner & Werner, *Metropolitan Desegregation After* Milliken v. Bradley*: The Case for Land Use Litigation Strategies*, 24 CATH. U.L. REV. 187, 188 (1975); Taylor, *The Supreme Court and Urban Reality: A Tactical Analysis of* Milliken v. Bradley, 21 WAYNE L. REV. 751 (1975); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 61, 69-71 (1974); Comment, Milliken v. Bradley *in Historical Perspective: The Supreme Court Comes Full Circle*, 69 NW. U.L. REV. 799, 818-19 (1975). *See generally* U.S. COMM'N ON CIVIL RIGHTS, MILLIKEN V. BRADLEY: THE IMPLICATIONS FOR METROPOLITAN DESEGREGATION (Conference, Nov. 9, 1974); *Symposium*—Milliken v. Bradley *and the Future of Urban School Desegregation*, 21 WAYNE L. REV. 751 (1975). Taylor takes the position that in the long run metropolitan desegregation can be effectively achieved only by concentrating on governmental responsibility for segregated housing and the resulting racial containment in the schools. This tactic, hopefully, will persuade the Court that racial factors are "responsible for the fact that the great mass of urban black children attend segregated public schools." Taylor, *supra*, at 778. To do this, it will be necessary to put together "a record so compelling that it will not permit the Court to countenance continued urban

metropolitan areas to be divided up each into two cities—one white, the other black."[3] Indeed, it is true that in *Milliken* a "big battle" was lost. No longer can urban and suburban school district lines be crossed to obtain metropolitan desegregation merely by invoking the theory that the state's overall responsibility for public education justifies imposing an interdistrict remedy whenever necessary to eliminate effectively de jure segregation. In *Milliken* the Court decided in favor of local autonomy rather than state responsibility and interpreted the fourteenth amendment's guarantee of equal protection to take into consideration this local autonomy of state units as represented by separate school districts. At the same time, however, the Court expressly recognized that federal courts do have the *power* to cross school district lines for desegregation purposes in appropriate cases, stating:

> Of course, no state law is above the Constitution. School district lines . . . are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies.[4]

To be sure, the import of *Milliken* was that "school district lines may [not] be casually ignored or treated as a mere administrative convenience"[5] and that the lines may not be crossed by showing only that an urban district was guilty of practicing de jure segregation. Nevertheless, the lines can be crossed "where there has been a constitutional violation calling for interdistrict relief."[6] Thus, although the "big battle" has been lost, the quest for metropolitan desegregation has not necessarily come to an end.[7]

In the wake of *Milliken*, the proponents of metropolitan desegregation and their lawyers have had to pick up the pieces and start over, this time concentrating on "winning small wars." The amazing thing—or perhaps not so amazing once the "behavioral dynamic" of *Milliken* is fully understood—is that they have been fairly successful in this process.

---

apartheid by rationalizing that its labors in eliminating governmentally imposed racial constraints have been successfully completed." *Id.*

3. Milliken v. Bradley, 418 U.S. 717, 815 (1974) (Marshall, J., dissenting).
4. 418 U.S. at 744.
5. *Id.* at 741.
6. *Id.*
7. Some commentators disagree:

> 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*. For the majority at least, Detroit should be the end of the line in the school desegregation cases.

Dell'Ario, *supra* note 2, at 149 (footnotes omitted).

At least in the cases in which the question has been litigated, the lower federal courts usually have found reasons to justify crossing school district lines and granting interdistrict relief. The purpose of this Article is to analyze the problem of metropolitan desegregation in light of both *Milliken* and these post-*Milliken* developments and to discuss what I believe to be the proper strategy in seeking metropolitan desegregation today, the strategy of winning small wars.

As the title indicates, this analysis and discussion will come "largely from within," based on my experiences as counsel in litigation designed to achieve metropolitan desegregation in Louisville-Jefferson County, Kentucky.[8] When the Supreme Court decided *Milliken*, it remanded the Louisville case for further consideration in light of *Milliken*. I have previously approached legal questions "from without and within," that is, from the perspective of an academician who is also a part-time movement lawyer,[9] but in this Article, I have gone even beyond the "without and within" approach and have approached the matter essentially from the perspective of the lawyer seeking to achieve metropolitan desegregation.

This Article presents, first, a discussion of the character of the problem of metropolitan desegregation and why urban and suburban school district lines must be crossed for there to be meaningful desegregation

---

8. Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918, *reinstated*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

9. *See* Sedler, *The Procedural Defense in Selective Service Prosecutions: The View from Without and Within*, 56 IOWA L. REV. 1123 (1971); Sedler, *The Summary Contempt Power and the Constitution: The View from Without and Within*, 50 N.Y.U. L. REV. — (1976); Sedler, *The* Dombrowski*-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within* (pts. 1-2), 18 U. KAN. L. REV. 237, 629 (1970); Sedler, Dombrowski *in the Wake of* Younger*: The View from Without and Within*, 1972 WIS. L. REV. 1. *See also* Sedler, Book Review, 80 YALE L.J. 1070 (1971). I believe that such an approach has much to commend it. It is not, of course, the approach of the impartial and dispassionate legal scholar, and to the extent that these characteristics are considered virtues, their absence must be noted by the reader. On the other hand, there is perhaps an existential as well as an objective component to legal scholarship, and there are perhaps insights to be gained by participation and involvement that detached observation cannot supply.

There are many varieties of "movement" lawyers. Some are full-time employees of movement or civil rights organizations. A larger number are lawyers engaged in private practice who devote considerable time to taking such cases, generally without compensation. And some, like the present author, are law professors who venture forth from the "groves of academe."

of many urban school districts. Second is a presentation of the legal posture and societal setting in which the question of metropolitan desegregation arises. Third is an examination of the *Milliken* litigation in terms of the cases leading up to the decision, the theory advanced by the plaintiffs, the basis of the majority, concurring, and dissenting opinions, and the significance of the decision as a guide to future developments in this area. Fourth is a discussion of what I believe to be the proper strategy in the wake of *Milliken*, as illustrated by the Louisville-Jefferson County litigation and other "contemporary *Milliken*" cases. Concluding the Article is a forecast of future developments.

II. METROPOLITAN DESEGREGATION: THE CHARACTER OF THE PROBLEM

Stated simply, the problem of metropolitan desegregation results from placing the responsibility for public education in local school districts, which are often organized along urban-suburban lines. Because the blacks in most metropolitan areas are concentrated in the central cities and seldom reside in the suburban areas, an urban school district will necessarily have a high percentage of blacks while the suburban districts will be substantially white in composition. Depending on the relative size of the urban district's black population, it may be impossible to achieve effective desegregation and elimination of predominantly black schools within that district alone. More significantly, desegregation of the urban district alone may actually be counterproductive. Experience indicates that such desegregation accelerates the general movement of middle-class[10] whites to the suburban school districts so that the urban district soon becomes resegregated, blacker and poorer than before. This flight to the suburbs to avoid desegregation—what has come to be called "white flight"—and the resulting resegregation of the urban district can only be stemmed if there is no place for whites to flee.[11] Since in most metropolitan areas, where although the population within the central city is predominantly black, the population within the metropolitan area

10. As used herein, the term "middle class" embraces "upper class" as well.

11. Of course there is always the possibility that whites will flee to private schools, and efforts must be taken to prevent the state from assisting this flight. *See, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Norwood v. Harrison, 413 U.S. 455 (1973); Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971). For the present, however, it will be sufficient to concentrate on the problem of flight to suburban school districts.

is predominantly white, desegregation on a metropolitan basis can often eliminate most, if not all, predominantly black schools.[12] In short, in many urban areas if desegregation is to be fully effective and if resegregation is to be avoided, it must be imposed on a metropolitan basis across existing urban-suburban school district lines.

It must be emphasized that we are talking about desegregation within a functional metropolitan area, where people who live in the suburbs work in the city, an area which is usually classified as part of a Standard Metropolitan Statistical Area to indicate that it is an area of "economic and social integration."[13] These metropolitan areas are not areas of racial integration for housing purposes, however, and the question is whether they will become areas of racial integration for school purposes by court decree.

It is unnecessary to enumerate all the factors that have produced, in the midst of a general population movement to the metropolitan areas, the present situation in which the cities are becoming blacker, poorer, and less populous as middle-class whites move out to the surrounding suburban areas.[14] The *result* of this movement to the suburbs, particularly the movement of middle-class white families with school-age children, is a pattern of urban school districts with large black populations surrounded by virtually all-white suburban districts. In Detroit, for

12. As will be discussed subsequently, the predominantly black school is also a predominantly lower socio-economic class school. When the effect of desegregation is to create schools that are majority white, these schools are likely to be predominantly middle-class in social composition. In such a case the motivation of middle-class whites to flee to private schools is considerably reduced.

13. United States v. Connecticut Nat'l Bank, 418 U.S. 656, 670 (1974). The tri-county area included in the metropolitan desegregation plan in *Milliken* was classified as a Standard Metropolitan Statistical Area. 418 U.S. at 804 (Marshall, J., dissenting).

14. *See generally* U.S. COMM'N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA (1974). If present trends continue, it is estimated that by the year 2000, whites will comprise only 25 percent of the central city population, while blacks will make up 75 percent. *Id.* at 4. And while it may be that "the root causes of the concentration of blacks in the inner cities of America are simply not known," Bradley v. School Bd., 462 F.2d 1058, 1066 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973), the location of public housing within urban ghettos and the racially discriminatory housing practices of real estate developers and brokers, aided and abetted by federal, state, and local governments, have certainly not facilitated the movement of blacks from the inner city to the suburbs. *See, e.g.*, Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974), *cert. granted sub nom.* Hills v. Gautreaux, 421 U.S. 962 (1975); United States v. Board of School Comm'rs, Civil No. 68-225 (S.D. Ind., Aug. 1, 1975) (memorandum of decision and judgment); Evans v. Buchanan, 393 F. Supp. 422 (D. Del.), *aff'd mem.*, 96 S. Ct. 381 (1975).

example, the black population of the Detroit school district was approximately 70 percent and increasing at the time of the *Milliken* litigation, while the black school population in the metropolitan area was less than 20 percent.[15] The same stark statistics prevail in most other urban areas, north and south,[16] which leads to the conclusion that a real danger of educational apartheid along school district lines exists today in metropolitan America.[17]

The concept of white flight has been recognized and used by the courts to describe the general acceleration of the movement of middle-class whites to the suburbs caused by efforts to desegregate urban school districts.[18] The concept has been demonstrated empirically in a number of urban school districts that have reached a "tipping point," the point at which the percentage of black students attending a particular school reaches a majority or some other lesser ratio. This point may be attained either as a result of increased black population in the area entirely apart from desegregation or as a result of desegregation. When white children are required to attend schools with a black majority or a large percentage of black students, the whites perceive these schools as "black" schools and do not want their children to attend them. Those white families who have children in these schools and are financially able to do so are motivated either to move to the suburban districts or to enroll their children in private schools. Families with children approaching school age will look for housing in the suburban districts to avoid the risk of their children having to attend predominantly black

15. Milliken v. Bradley, 418 U.S. 717, 765 n.1 (White, J., dissenting).

16. As of 1972, the black school population of Washington, D.C. was 95.5 percent; of Atlanta, 77.1 percent; of New Orleans, 74.6 percent; of Newark, 72.3 percent; of Richmond, 70.2 percent; of Gary, 69.6 percent; of Baltimore, 69.3 percent; of St. Louis, 68.8 percent; of Philadelphia, 61.4 percent; of Oakland, 60 percent; of Birmingham, 59.4 percent; of Memphis, 57.8 percent; of Cleveland, 57.6 percent; of Chicago, 57.1 percent; of Kansas City, Mo., 54.4 percent. In a number of other cities, it was approaching the 50 percent mark, and everywhere it is increasing. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, DIRECTORY OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS IN SELECTED DISTRICTS (1972). *See also* U.S. SENATE SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, TOWARD EQUAL EDUCATIONAL OPPORTUNITY 116-18 (1974).

17. "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." Milliken v. Bradley, 418 U.S. 717, 814-15 (1974) (Marshall, J., dissenting).

18. *See* text accompanying notes 113-15 *infra*. *See also* Milliken v. Bradley, 418 U.S. 717 (1974).

schools.[19] As a result of the general movement of middle-class whites to suburbia, many urban school districts are already more than 50 percent black;[20] thus, desegregating the urban districts alone will mean that many of the schools will be predominantly black or have a high percentage of black students, thereby precipitating white flight.[21] The result will not only be resegregation of those districts, but the whites who do remain will be largely lower-income families unable to flee.

The situation has been succinctly described by one commentator as follows:

> The urban segregation problem which this approach [metropolitan desegregation] is designed to remedy is the product of the massive flight of white families from the city to suburban communities located outside of the territory covered by the city school district. Various economic, political, social, and psychological factors combine to cause this movement, not the least of which is the desire of whites to avoid substantial racial integration in housing and in schools. Regardless of the cause, the result of this movement is that the remaining city public school population becomes predominantly black. When this process has occurred, no amount of attendance zone revision, pairing and clustering of schools and busing of students within the city school district could achieve substantially integrated student bodies in the schools, because there simply are not enough white students left in the city system.[22]

---

19. For a discussion of the relationship between the racial composition of the schools and resulting housing choices, see Taeuber, *Demographic Perspectives on Housing and School Segregation*, 21 WAYNE L. REV. 833, 842-43 (1975).

20. *See* note 16 *supra*.

21. Although it has generally been assumed by courts and commentators that court-ordered desegregation will accelerate the movement of middle-class whites from majority or high percentage black schools in the urban district to the virtually all white schools in the adjoining suburban districts, Professor Taeuber maintains that at this time the assumption cannot be empirically demonstrated because "only a few large cities have undertaken substantial desegregation of their schools, and much of this action has been very recent." Taeuber, *supra* note 19, at 846. While this assertion may be correct, the accelerated movement of whites from schools that have tipped black as a result of changing population patterns makes it very reasonable to assume that this accelerated movement would also occur whenever middle-class white students were assigned to majority or high percentage black schools as a result of court-ordered desegregation.

22. Smedley, *Developments in the Law of School Desegregation*, 26 VAND. L. REV. 405, 412 (1973). Thus, in Calhoun v. Cook, 522 F.2d 717 (5th Cir. 1975), the Fifth Circuit affirmed a finding that the Atlanta school system, which had an 85 percent black enrollment, was a unitary system, notwithstanding that 92 of its 148 schools had student bodies that were over 90 percent black.

It is as simple as that. Although this lack of white students will not prevent court-ordered desegregation of an urban school district found to be practicing de jure segregation,[23] the fact remains that an urban school district desegregated in this manner will only be minimally desegregated at best, and will probably not remain even minimally desegregated for very long. For meaningful desegregation of our urban school districts to occur, the desegregation in many cases will need to be on a metropolitan basis, crossing the lines that now separate the urban and suburban school districts.

Thus far we have been proceeding on the assumption that a legal basis for ordering desegregation exists—that is, that the urban school district is guilty of practicing de jure segregation.[24] As a practical matter, this legal basis will not generally be difficult to show. When the urban school district is located in a state formerly requiring segregation by law—the "southern situation"—it is clear from *Swann v. Charlotte-Mecklenburg Board of Education*[25] that the failure to eliminate the pattern of black and white schools by way of busing means that the district is in constitutional violation.[26] Most urban districts outside of the South will also now be found to have been pursuing a policy of segregation, a policy designed in all probability to make the district's schools more attractive to whites and to stem their movement to the suburbs. In both the North and the South, such segregation is de jure rather than de facto and therefore subjects the districts to the remedial process of the courts. The dilemma then is not a difficulty in showing the urban district to be in constitutional violation, but that any remedy addressed to the urban district alone will often produce limited actual desegregation, lead to white flight, and ultimately result in a resegregated district, blacker and poorer than before. Conversely, if metropolitan desegregation were required, many of the country's metropolitan

23. The fear of white flight "cannot . . . be accepted as a reason for achieving anything less than the complete uprooting of the dual public school system." United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972).

24. The Court has as yet been unwilling to abandon the de jure-de facto distinction, although Justice Powell and former Justice Douglas, coming from different directions and with different conclusions, have urged the Court to do so. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

25. 402 U.S. 1 (1971).

26. *See, e.g.*, Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925 (6th Cir. 1973), *vacated and remanded on other grounds*, 418 U.S. 918 (1974); Northcross v. Board of Educ., 466 F.2d 890 (6th Cir. 1972).

areas could be desegregated effectively.[27] In the end, whether educational apartheid along urban-suburban lines will exist in the United States will depend largely on whether or not metropolitan desegregation occurs.

III. METROPOLITAN DESEGREGATION: THE LEGAL POSTURE AND SOCIETAL SETTING

A. *The Legal Posture*

The legal posture in which the question of metropolitan desegregation arises dates back to *Brown v. Board of Education*[28] and its underlying premise of racial equality in education. Although the significance of *Brown* went far beyond educational equality,[29] what may be called its "educational rationale" stated that segregated education was inherently unequal and harmful to black children and deprived them "of some of the benefits they would receive in a racially integrated school system."[30] Since *Brown* arose as a challenge to school segregation required by state law, the initial emphasis of subsequent school desegregation actions was on the elimination of the dual school systems that existed in the southern and border states. The legal resistance to *Brown* and the tortuous development of school desegregation law[31] need not be reviewed here.

In 1968 in *Green v. County School Board*,[32] the Court reached the first "fork in the road" when it decided that meaningful desegregation must actually occur. The Court took this step by effectively invalidating the "freedom of choice" plans, which had produced little actual desegregation in the southern and border states,[33] and by making it clear

27. There are certain areas such as New York City where the degree of racial concentration is so great that any substantial amount of desegregation is made impossible. Similarly, as long as Washington, D.C. is maintained as a separate school district, *see* Bulluck v. Washington, 468 F.2d 1096 (D.C. Cir. 1972), its schools will remain overwhelmingly black. But, as the Detroit situation demonstrates most clearly, it is sometimes more practicable to achieve desegregation on a metropolitan basis than it is within the urban district itself. *See* notes 161-62 *infra* and accompanying text.

28. 347 U.S. 483 (1954).

29. *See generally* Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 423-34 (1967).

30. 347 U.S. at 494-95.

31. *See generally* Bickel, *The Decade of School Desegregation, Progress and Prospects*, 64 COLUM. L. REV. 193 (1964).

32. 391 U.S. 430 (1968).

33. *See* 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 65-70 (1967).

that the school board's duty was to "convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" that would be attended by children of both races.[34] In the nonurban school districts of the South, where the black and white populations were generally dispersed and therefore geographic attendance zoning would not create racially identifiable schools, the end of freedom of choice plans[35] virtually insured desegregation. This result was reinforced the following year when the Court, in *Alexander v. Holmes County Board of Education*,[36] finally laid to rest the "all deliberate speed" formulation, which had delayed full implementation of desegregation plans in many southern and border districts.

The next "fork in the road" was reached in 1971 in *Swann v. Charlotte-Mecklenburg Board of Education*.[37] As urban school districts outside the South had known all along, geographic attendance zoning could build on patterns of residential racial segregation and establish a system of substantially all-black and all-white schools, particularly at the elementary level. In *Swann*, the Court held that when segregation had formerly been required by law, geographic attendance zoning was insufficient to satisfy the school board's duty to convert to a unitary system if the result of such zoning was a large number of racially identifiable schools. The board would be required to desegregate these schools by transporting the students between the black and the white schools. Just as *Green* insured that the nonurban districts in the South would be effectively desegregated, *Swann* insured that, to the extent possible, meaningful desegregation would have to occur in the urban districts as well. In the aftermath of *Swann*, a new round of desegregation litigation occurred in the South and resulted in the rather anomalous situation of there being substantially more actual desegregation in the South, where segregation was formerly required by law, than in the rest of the country, where segregation had not been required.[38]

34. 391 U.S. at 442.

35. The same day that the Supreme Court decided *Green*, the Court also decided two other cases in which it held freedom of choice plans to be insufficient. Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968). In the wake of these cases, the lower courts invariably rejected freedom of choice plans. *See, e.g.*, Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969); United States v. Hinds County School Bd., 417 F.2d 582 (5th Cir. 1969).

36. 396 U.S. 19 (1969).

37. 402 U.S. 1 (1971).

38. *See generally* U.S. SENATE SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, *supra* note 16, at 102-05.

Paralleling this development in the South was a no less significant development elsewhere. The de jure-de facto distinction had allowed school boards in districts in which segregation had not been required by law to continue to operate factually segregated schools.[39] In the late 1960's, however, the courts began to scrutinize more carefully the actions of these school boards and came to recognize that the segregated condition of the schools was not wholly accidental.[40] Quite to the contrary, in case after case the courts held that this condition was due to a *policy of segregation* practiced by the boards. Consequently, the segregation was de jure rather than just de facto.[41] The courts emphasized that the segregated character of the schools resulted from a series of discretionary decisions made by the school boards over the years relating to school location and construction, closing of old schools and building of new ones, redrawing of boundary lines, transfer policies, and similar matters and concluded that the decisions "more often than not tended to perpetuate segregation."[42] Similarly, the school boards' attempts to justify those decisions in terms of supposedly neutral criteria would usually require "inconsistent applications of these criteria."[43] As the Sixth Circuit stated in *Davis v. School District*:[44]

---

39. *See, e.g.*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); *cf.* Barksdale v. Springfield School Comm., 348 F.2d 261 (1st Cir. 1965).

40. One of the first cases illustrating this new recognition was Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961). Earlier cases seemed to require the plaintiffs to prove that the segregated condition of the schools was "obviously deliberate." *E.g.*, Clemons v. Board of Educ., 228 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956) (school district lines gerrymandered). Typically, the plaintiffs were not able to sustain their burden of showing discriminatory intent. *See, e.g.*, Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958); Sealy v. Department of Pub. Instruction, 159 F. Supp. 561 (E.D. Pa. 1957), *aff'd*, 252 F.2d 898 (3d Cir.), *cert. denied*, 356 U.S. 975 (1958).

41. *See, e.g.*, United States v. Board of School Comm'rs, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973); Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972); Davis v. School Dist., 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); United States v. School Dist. No. 151, 404 F.2d 1125 (7th Cir. 1968); Booker v. Special School Dist. No. 1, 351 F. Supp. 799 (D. Minn. 1972); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970).

42. Davis v. School Dist., 443 F.2d 573, 576 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

43. *Id.*

44. 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

> Although . . . each decision considered alone might not compel the conclusion that the Board of Education intended to foster segregation, taken together, they support the conclusion that a purposeful pattern of racial discrimination has existed in the Pontiac school system for at least 15 years.[45]

In essence, the courts were holding that discretionary decisions having the *effect* of producing a racially segregated school system were to be equated with the *intent* to produce such a system, and thus the resulting segregation was de jure rather than de facto.[46]

This development outside of the South reached a peak in 1973 when *Keyes v. School District Number One*[47] was decided. The Supreme Court held that in a state in which racial segregation had never been required by law, proof of segregative intent with respect to *part* of a school system created a presumption that the segregated character of the rest of the school system was also the result of this segregative intent. The burden then shifted to the school board to rebut the presumption.[48] As a practical matter, this decision means that proof of a policy of segregation in part of a system will have the effect of making the entire system segregated, because, as Justice Powell observed,

> there is . . . not a school district in the United States, with any significant minority school population, in which the school authorities—in

---

45. *Id.* at 576.

46. The Court has made it clear that whenever a claim of racial discrimination is made, the primary emphasis must be on discriminatory effect rather than on discriminatory purpose. *See* Wright v. Council of Emporia, 407 U.S. 451, 461-63 (1972); *cf.* Palmer v. Thompson, 403 U.S. 217, 225 (1971). The school boards are held to be aware of the "natural and foreseeable consequence[s]" of their actions. Hart v. Community School Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975). When the effect of the actions is to produce a racially segregated school system, it is as much a de jure segregated system as if segregation were required by state law. *See id.*

47. 413 U.S. 189 (1973).

48. In this regard, the Court stated:

> [W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that the other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system.

413 U.S. at 208.

> one way or another—have not contributed in some measure to the degree of segregation which still prevails.[49]

Although the Court in *Keyes* talked in terms of segregative intent, an actual intent to discriminate need not be proved. The necessary intent can be shown simply by examining a series of discretionary decisions that have produced a condition of actual segregation.[50] When this showing is made, at least with respect to part of the school system, the school board will be found guilty of practicing de jure segregation throughout the system and will be required, in the same manner as a school district in which segregation was formerly required by law, to dismantle the dual school system "root and branch."[51]

With the decision in *Keyes*, school desegregation has clearly become a national problem,[52] as has the question of metropolitan desegregation. No longer is it difficult to prove that urban school districts, wherever located, are in constitutional violation if they have a high degree of racial segregation. In states in which segregation was formerly required by law, segregation is found to be a vestige of state-imposed segregation under *Swann*, and in other states segregation is found to result from segregative intent under *Keyes*. If metropolitan desegregation were to be required, it would certainly be required on a nationwide basis. This

---

49. *Id.* at 252-53.

50. As the Seventh Circuit has emphasized, "there are very few cases of school segregation today in which the defendants admit that they had an improper intent. Such intent may then be properly inferred from the objective actions." United States v. Board of School Comm'rs, 474 F.2d 81, 88 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973). *See generally* Note, *Segregative Intent and the Single Governmental Entity in School Desegregation*, 1973 DUKE L.J. 1111, 1114-17.

51. Keyes v. School Dist. No. 1, 413 U.S. 189, 213 (1973). Because of this development as well as the general unwillingness of courts to find any affirmative duty to integrate, *see* cases cited and text accompanying note 39 *supra*, the duty to integrate issue has lost its earlier significance. The issue was revived in the wake of *Swann*, at least temporarily, by the plaintiffs in Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd mem.*, 404 U.S. 1027 (1972). The plaintiffs unsuccessfully contended that *Swann* required a redistricting of school district lines to eliminate the racially-identifiable black schools in a state in which segregation had not been required by law and in which any de facto segregation was due solely to the geographical limitations of the municipal boundaries, which were coextensive with the school district lines. At the same time, however, the New Jersey Supreme Court held that school district lines could be disregarded by the Commissioner of Education in order to eliminate racial imbalance. Jenkins v. Township of Morris School Dist., 58 N.J. 483, 279 A.2d 619 (1971).

52. Opposition to busing has become nationwide, as evidenced in most recent election campaigns and in the enactment by Congress of anti-busing legislation, entitled, oddly enough, the "Equal Educational Opportunity Act of 1974." 20 U.S.C.A. §§ 1701-58 (Supp. 1975).

was the next "fork in the road," the one reached in *Milliken v. Bradley*.[53]

B. *The Societal Setting*

Before proceeding to a discussion of *Milliken*, this Article will consider both the societal setting in which the question of metropolitan desegregation arises and the implications, in terms of social class and race, of the demand for actual desegregation. Some years ago, in speaking of school desegregation, Professor Kaplan commented that "it is unfortunate that what is essentially a class problem is being fought as a racial one."[54] The Supreme Court in *Brown* had proceeded upon the educational rationale that racial segregation was harmful to black children because it deprived them "of some of the benefits they would receive in a racially integrated school system."[55] Professor Kaplan, however, argued that the generally poor academic performance of black children is traceable not to their attendance at racially segregated schools but rather to the entrapment of a large percentage of blacks in the lower socio-economic class. As a result, segregated black schools are predominantly lower socio-economic class schools.

According to Kaplan, "[t]he first and most obvious relation between social class and the educational process is that, in general, the higher the student's social class, the better he will do in school."[56] The second, and for our purposes more important, relation is that "the social class composition of a given school has a powerful effect upon the education of all the children in it."[57] Because residential patterns are generally socially as well as racially homogeneous, geographic attendance zoning has the effect of producing social class isolation as well as, outside the South, factually segregated schools.[58] Kaplan then reasoned:

> Despite certain specifically racial problems, it seems that the problem of de facto segregation is in the main a class problem. . . . The mere racial integration of Negro children with lower class white children will not be enough. What lower class Negro children need is integration

53. 418 U.S. 717 (1974). It is significant for these purposes that *Milliken* arose in a northern state in which school segregation had never been required by state law.

54. Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U.L. REV. 157, 214 (1963).

55. Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954).

56. Kaplan, *supra* note 54, at 196.

57. *Id.* at 197.

58. *See id.* at 208.

> with middle class children of any race. It is because there are simply not enough middle class Negro children available that integration with middle class white children becomes important. This integration, however, is exactly what is needed by the lower class white child, too. The problem of the lower class child, both Negro and white, is the real problem of de facto segregation.[59]

In this connection, it should be noted that the mere existence of separate suburban school districts intensifies the social class, as well as the racial, isolation of the urban district because lower socio-economic class whites are generally unable to move to the suburbs.

Professor Kaplan's observations foreshadowed (and perhaps were obscured by) the now famous *Coleman Report*,[60] which found that the most significant factor affecting student achievement was the social class composition of the school.[61] With respect to the relation between social class and racial integration, the *Report* concluded:

> Thus the apparent beneficial effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background and higher educational aspirations that are, on the average, found among white students. The effects of the student body environment upon a student's environment appear to lie in the educational proficiency possessed by that student body, whatever its racial or ethnic composition.[62]

The following year the United States Commission on Civil Rights also issued a report.[63] Although the Commission endorsed the major findings of the *Coleman Report*, it contended that the racial characteristics of fellow students *did* have an independent effect on the academic performance of black children but that this factor was chiefly effective at the classroom level rather than at the school level.[64] Demonstrating this independent effect was the finding that the average academic performance of disadvantaged blacks improved by two grade levels when disad-

---

59. *Id.* at 207.

60. J. COLEMAN, et al., EQUALITY OF EDUCATIONAL OPPORTUNITY (1965) [hereinafter cited as COLEMAN REPORT]. The study was undertaken by the United States Office of Education in accordance with directives contained in the Civil Rights Act of 1964.

61. The conclusions are effectively summarized in Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 407-12 (1972).

62. COLEMAN REPORT 307, 310.

63. U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967).

64. 1 *id.* at 81-82, 84-86.

vantaged blacks were in a class with advantaged whites and by one full grade level even when disadvantaged blacks were in a class with similarly disadvantaged whites.[65]

From the standpoint of blacks seeking improved educational opportunities for their children, the race-class question is neither legally nor functionally significant. The Supreme Court has indicated no disposition either to depart from the educational rationale of *Brown* or to suggest that racial segregation is not harmful to black children because the problem is rooted in class rather than in race. Nor has the Court been willing to assimilate discrimination on the basis of socio-economic class to discrimination on the basis of race,[66] or even to hint that the Constitution may prohibit different treatment for educational purposes on the basis of social class membership.[67] Legal attacks on the denial of equal educational opportunity for black chidren must, therefore, still be based on racial grounds. This race-class distinction does not have even a real functional importance, however, since as Kaplan has cogently pointed out, there simply are not enough middle-class black children available to achieve social class integration in predominantly black schools.[68]

In the context of desegregation litigation, lawyers for black plaintiffs have learned to scrutinize desegregation plans and attempt to require, whenever possible, that the plans achieve social class as well as racial integration so that the former black schools do not become lower socio-economic class schools. There is, however, little "legal clout" for arguing that these ends must be incorporated in a plan.[69] If within the school district there is a substantial white population which is predominantly middle class in composition, full desegregation will mean that

65. *Id.* at 90-91.

66. *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971).

67. *Cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

68. *See* text accompanying note 59 *supra.* The middle-class black child attending a predominantly black school will be attending a school that is also of predominantly lower socio-economic class composition. From an educational standpoint the child will be disadvantaged.

69. *Jefferson v. Board of Educ.*, a case in which I was counsel for the plaintiffs, exemplifies this lack of legal clout. After the plaintiffs succeeded in obtaining an order directing the desegregation of the Fayette County (Lexington) schools, *see* 344 F. Supp. 688 (E.D. Ky. 1972), the school board proposed a plan which converted two former black inner-city schools into schools having a 56 percent to 44 percent white-black ratio, but which drew the whites almost entirely from lower-income areas. The two census tracts included in the attendance zones had the lowest median income for both blacks and whites in Fayette County. The court did not find this "legally" objectionable.

black children, most of whom are lower socio-economic class, will be attending schools in which middle-class whites form the majority.[70] By the same token, when desegregation is limited to the urban district, very often the schools that black children will be attending not only will be predominantly black, but also will be lower socio-economic class in composition because of the absence of middle-class whites.

I would submit that from the standpoint of middle-class whites, however, the intensive opposition to busing and, of course, to metropolitan desegregation is *founded much more on the basis of class than on the basis of race.*[71] Surveys show, for example, that although two-thirds of the American public approves of desegregated schools, over two-thirds of the public opposes busing as a means of achieving desegregation.[72] Professor Derrick Bell contends that since meaningful desegregation in urban areas is obviously impossible without busing,

> these seemingly contradictory findings reflect still another manifestation of the traditional pattern of white America's racial behavior, expressed in the formula of a public posture of democratic ideals combined with actual racial policies that maintain blacks in a subordinate and oppressed status.[73]

I would suggest, however, that approval of desegregated schools and opposition to busing to achieve them is more an example of white middle-class America's *class* behavior. Although today's white middle-class America has softened its racism to the extent that it recognizes the existence of middle-class blacks[74] and is willing to allow them to attend

70. Such attendance should have a positive effect on the academic performance of the black children. *See* text accompanying note 65 *supra.* This does not mean, however, that such improvement always occurs or that there are not additional barriers to equality of educational opportunity for blacks even in desegregated schools. *See* Bell, *Integration: A No Win Policy for Blacks?*, 11 INEQUALITY IN EDUCATION 35, 37, 40 (1972).

71. On the part of working-class and lower-class whites, the opposition to metropolitan desegregation is indeed racial in nature and is a clear illustration of how racism divides working-class and lower-class whites from blacks, preventing these groups from pursuing their common class interests. The "Boston situation" arose in the wake of a desegregation plan that bused blacks into schools in South Boston, a predominantly working-class and lower-class white area. *See* Kopkind, *Banned in Boston: Busing into Southie*, RAMPARTS, Dec. 1974, at 34-38.

72. *See* Bell, *supra* note 70, at 35.

73. *Id.*

74. The term "middle-class black" covers a very wide income range and essentially represents lifestyle values that are similar to those of middle-class whites. *See generally* Drake, *The Social and Economic Status of the Negro in the United States*, 94 DAEDALUS 771, 779-84 (1965).

"its schools," just as it is willing, somewhat more reluctantly and perhaps under the compulsion of open housing laws, to allow middle-class blacks to live in "its neighborhoods,"[75] it is opposed to busing. Busing would mean that all blacks, the great majority of whom are lower class, would be included in school desegregation, and today's white middle-class America does not want its children to be forced to attend school with lower-class blacks. *But it does not want its children to be forced to attend school with lower-class white children either.* Rather, white middle-class America wants its children to attend socially homogeneous schools,[76] just as it wants them to live in socially homogeneous neighborhoods. And it knows that the hallowed neighborhood school system—for which it will go to the barricades—will produce these socially homogeneous schools. Because desegregation by busing will destroy the neighborhood school system and thus destroy the perceived class advantage of having its children attend socially homogeneous schools, white middle-class America, although "broadminded enough" to accept racial desegregation, is vehemently opposed to busing.

I cannot emphasize this point strongly enough, for I believe that it profoundly influences the societal setting within which the question of metropolitan desegregation arises. The perceived class advantage derives from the belief of white middle-class parents that if their children are required to attend school with lower-class children, black or white, their children's academic performance will be pulled down.[77] Because most residential areas are socially as well as racially homogeneous, the neighborhood school system affords to white middle-class children the perceived class advantage resulting from attendance at socially homogeneous schools, regardless of the class composition of the student population in the rest of the district. In addition, the neighborhood school system enables a school board to allocate the district's educational

75. Since few middle-class blacks will actually live in these neighborhoods, there is no longer any real fear that their presence will depress property values. As has long been known, it is not blacks who depress property values but rather the attitudes of middle-class whites toward blacks living in "their neighborhoods." *Id.* at 774. For information on the income and urban-suburban distributions of the black population in 1972, see UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 17, 382 (1974).

76. The social homogeneity in turn means that the schools will, for the most part, be racially homogeneous as well.

77. This belief will only be true, of course, if the school is of predominantly lower socio-economic class composition, but middle-class white parents believe that this result will occur "across the board."

resources in a manner favoring those schools attended by middle-class white children.[78] By compelling middle-class white children to attend school with lower-class black children,[79] desegregation by busing completely destroys this perceived class advantage, and it is at this point, when urban districts are compelled to desegregate or the neighborhood school system is otherwise abandoned, that the process of white flight occurs.[80]

Because blacks and lower-class whites are not likely to reside in suburbs, the perceived class advantage flowing from socially homogeneous schools is maximized by separate suburban school districts.[81] In addition, such districts may add to the perceived class advantage a tangible benefit derived from the use of real estate taxes as the primary method of local school financing and the expenditure of the tax monies so raised exclusively in the local school district. Because of the high value of the homes in suburbia, suburban school districts generally will have more taxable wealth per student than urban districts. But even in areas where this disparity does not exist, for example where an urban district has a high tax base because of the presence of substantial industrial and commercial properties, suburban district residents may be willing to tax themselves at a higher rate, knowing that the money will be spent for the education of their own children and not for the education of lower-income children. In many respects, the socially homogeneous suburban schools are not significantly unlike private schools. It can thus be said that the suburban school districts are operating "semi-private" schools for the benefit of the middle-class whites who reside there.

Metropolitan desegregation, however, with the crossing of school district lines between urban and suburban districts that it entails, would destroy the perceived and often tangible class advantages of middle-class

78. *See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401, 436-38, 495-96 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

79. Such compulsion would include white middle-class children's attendance at generally older and tangibly inferior schools located in the inner city.

80. The matter of white flight is the basis for a "new Coleman Report," which argues that "forced integration in large cities is reinforcing the racial isolation it was meant to overcome." *See Busing Backfired,* National Observer, June 7, 1975, at 1, 18.

81. In this connection I am referring to what may be called the "typical" suburban school district, which is predominantly middle-class white in composition. Particular suburban school districts, of course, may be populated predominantly by working-class whites, and in some suburban districts there may also be a substantial lower-income white and/or black population.

white children attending school in a socially homogeneous suburban district.[82] Not only would these children be compelled to attend school with lower-class blacks, but there would also necessarily be some sharing of the educational resources formerly reserved for the benefit of the homogeneous middle-class white school districts. Metropolitan desegregation would also eliminate all but the last public school "escape hatch" for middle-class whites, because parents could preserve social homogeneity only by sending their children to private schools.[83]

My point, therefore, is that the societal setting in which the question of metropolitan desegregation arises is one of conflict between the interest of middle-class whites in perpetuating a perceived class advantage obtained from attendance at socially homogeneous schools and the interest of blacks, the great majority of whom are members of the lower socio-economic class, in achieving the equality of educational opportunity that is reflected in attendance at racially and socially desegregated schools. When viewed in these terms, the *societal question* before the Court in *Milliken* was whether the perceived class advantage enjoyed by middle-class whites residing in suburban school districts was to be taken away to achieve racial integration for lower-class black children residing in illegally segregated urban school districts. To the extent that metropolitan desegregation was rejected in *Milliken*—and to the extent that it cannot be achieved in *Milliken*'s wake—the societal effect of the decision is the relegation of most black children to blacker and poorer schools in the urban districts and the preservation of the perceived class advantage enjoyed by middle-class whites. Certainly, without overstatement, *Milliken* presented a question of enormous societal importance going to the essence of class advantage in public education.[84]

82. Another challenge to what may be called the tangible class advantage reflected in separate suburban school districts was the school financing litigation that came to a head in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). The theory of these cases was that under the equal protection clause the state could not rely on local real estate taxes as a primary means of financing public education because of the great disparity in taxable wealth existing between different districts. After the Court in *Rodriguez* upheld the state practice, suburban school districts could continue to enjoy the tangible class advantage that existed because of the greater wealth of their residents (when this was the case). Moreover, the suburban districts would not be required to share their educational resources with lower-class children who were not fortunate enough to reside within their boundaries.

83. *See* notes 10, 12 *supra*.

84. Although the legal question of metropolitan desegregation is necessarily approached in terms of race, it must be recognized that the societal setting in which the question arises is defined in terms of class.

IV. *Milliken v. Bradley*: On Losing Big Battles

A. *The Legal Build-Up*

Although *Milliken* was the first occasion that the Court was forced to consider "the validity of a remedy mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district,"[85] there existed clear prior judicial experience in disregarding school district lines to achieve effective desegregation and in disregarding the significance of local governmental units in order to implement federal constitutional rights. As the Court stated in *Reynolds v. Sims*,[86] a voting district reapportionment case:

> Political subdivisions of States—counties, cities or whatever—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.[87]

Thus, upon finding that the state legislative districting schemes denied citizens their constitutional right to "substantially equal state legislative representation,"[88] the Court in *Reynolds* required the voting districts to be reapportioned on the basis of population without regard to the boundaries of political subdivisions. In *Gomillion v. Lightfoot*,[89] the Court found unconstitutional discrimination when the effect of redrawing municipal boundaries was the removal of virtually all black voters from the city, preventing those voters from participating in municipal elections. It was assumed by many persons that, at least in certain situations, school district boundaries could be similarly disregarded to achieve effective school desegregation.

One situation in which boundaries have been disregarded occurs when separate black and white school districts, created in pre-*Brown* days to facilitate state-imposed segregation, have remained separate after *Brown*. For example, in *Haney v. County Board of Education*,[90] a 1948 school district reorganization lumped three small black school districts into a single district and assigned the black children who lived in the surrounding white school district to the schools in the new black

85. 418 U.S. at 744.
86. 377 U.S. 533 (1964).
87. *Id.* at 575.
88. *Id.* at 568.
89. 364 U.S. 339 (1960).
90. 410 F.2d 920 (8th Cir. 1969).

district. Thereafter, the property of the black families in the white district was transferred for school purposes to the black district, which resulted in that district "having noncontiguous and irregularly shaped geographical areas."[91] In holding that county-wide desegregation was required, the Eighth Circuit noted:

> School district reorganization took place under the color of state law that then required segregated schools. Under these circumstances, when the resulting district lines drawn reflect a discriminatory pattern, *de jure* segregation is established.[92]

In *Milliken* the Court cited *Haney* approvingly to illustrate the situation in which the state "contributed to separation of races by drawing of school district lines."[93]

Another case in which school district boundaries were disregarded was *United States v. Texas*.[94] Before 1954, the Texas school districts were segregated by state law, and many school district lines were drawn to create all-black or all-white districts. After 1954, consolidation of small districts was encouraged, but school district officials could act to merge with other districts, annex territory, or otherwise alter the district boundaries only with the approval of the county boards of education. The defendant county boards had consistently refused to consolidate the all-black districts with contiguous all-white districts and by numerous arrangements or acquiescences in boundary changes had acted to "create and perpetuate all-black districts."[95] In those districts with bi-racial student populations, many of the schools became virtually all white or all black as a result of a general pattern of voluntary interdistrict student transfers approved by the county superintendents. Noting the responsibilities of the various defendant state, county, and school district officials for the continued segregated character of the all-black districts, the court ordered the defendants to formulate a plan to desegregate completely the districts, disregarding the existing school district lines. In *Milliken* the Supreme Court cited this case approvingly to illustrate the situation of "one or more school districts created and maintained for one race."[96]

---

91. *Id.* at 922.
92. *Id.* at 924.
93. 418 U.S. at 744.
94. 321 F. Supp. 1043 (E.D. Tex. 1970), *aff'd*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972).
95. *Id.* at 1048.
96. 418 U.S. at 744.

In another series of cases, the lower federal courts enjoined the creation of separate school districts when the resulting secession, although authorized by state law, would have had a "substantial adverse effect on desegregation of the [existing] school district."[97] Two of these cases, *Wright v. Council of Emporia*[98] and *United States v. Scotland Neck City Board of Education*,[99] involving small rural districts, reached the Supreme Court in 1972. All of the Justices agreed with the basic approach of the lower courts, but disagreed among themselves about its proper application in *Wright*.

The issue in *Wright*, as stated by Mr. Justice Stewart writing for the majority, was in what circumstances "a federal court may enjoin state or local officials from carving out a new school district from an existing district that has not yet completed the process of dismantling a system of enforced racial segregation."[100] In *Wright* the racial composition of the county school system, which was under a desegregation order, was 66 percent black and 34 percent white. If the city of Emporia had been permitted to become a separate school district, it would have had a racial composition of 52 percent black and 48 percent white, while the racial composition of the county district would have been 72 percent black and 28 percent white.[101] Although emphasizing that the test to determine whether the separation was permissible was discriminatory effect rather than discriminatory purpose,[102] the Court carefully avoided a declaration that "this disparity in the racial composition of the two systems would be a sufficient reason, standing alone, to enjoin the creation of the separate school district."[103] Nonetheless, the Court noted:

> Certainly, desegregation is not achieved by splitting a single school system operating "white schools" and "Negro schools" into two new systems, each operating unitary schools within its borders, where one of

97. Lee v. Macon County Bd. of Educ., 448 F.2d 746, 752 (5th Cir. 1971); *see* Stout v. United States, 448 F.2d 403 (5th Cir. 1971); Aytch v. Mitchell, 320 F. Supp. 1372 (E.D. Ark. 1971); Turner v. Warren County Bd. of Educ., 313 F. Supp. 380 (E.D.N.C. 1970); Burleson v. County Bd. of Election Comm'rs, 308 F. Supp. 352 (E.D. Ark.), *aff'd mem.*, 432 F.2d 1356 (8th Cir. 1970).

98. 407 U.S. 451 (1972).

99. 407 U.S. 484 (1972).

100. 407 U.S. at 453.

101. *Id.* at 464.

102. *Id.* at 461-62.

103. *Id.* at 464.

> the two new systems is, in fact, "white" and the other is, in fact, "Negro."[104]

In holding that separation would not be permitted, the Court relied on the findings of the district court that separation would increase the percentage of blacks in the county school district and that Emporia's establishment of a separate system "would actually impede the process of dismantling the dual school system."[105] Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, dissented on the ground that after the separation both systems would be unitary and that the racial disparity between the two districts following separation was not sufficient to deny Emporia the right that it had under state law to become a separate entity.[106]

In *Scotland Neck* the racial composition of the existing district, which was in the process of being desegregated, was 78 percent black and 22 percent white. If the separate district had been created, it would have been 43 percent black, while the remaining county district would have been 89 percent black.[107] The Court was unanimous in holding that the separate districts could not be created. The Justices who had dissented in *Wright* felt constrained, however, to write a separate opinion. They distinguished *Scotland Neck* from *Wright* on the grounds that (1) if Scotland Neck were permitted to establish a separate district, most of the black children residing in the county district would necessarily be attending virtually all-black schools; (2) special legislation had to be enacted by the state to enable Scotland Neck to establish a separate school district; and (3) the district court had found that the severance of Scotland Neck "was designed to minimize the number of [black] children attending school with the white children residing in Scotland Neck."[108]

In *Milliken*, the Court cited *Wright* and *Scotland Neck* for the proposition that a new school district could not be created from an existing school district when the effect would be to impede the "process of dismantling a dual school system."[109] Although the majority and the dissenters in *Wright* seemingly agreed on this proposition, differing only

104. *Id.* at 463.
105. *Id.* at 466.
106. *Id.* at 471-75, 478-79 (dissenting opinion).
107. 407 U.S. at 489-90.
108. *Id.* at 492.
109. 418 U.S. at 744.

on its application to the facts, *Wright* marked the first time that the Court had sharply divided on the result in a school desegregation case. This case may have had some portent for the future because the same four Justices who dissented in *Wright*[110] two years later made up the core of the majority in *Milliken*. *Wright* also provided a vehicle for the dissenters to emphasize the importance of local autonomy in public education[111] and to express concern that too much attention was being paid to racial balance.[112] In addition, for the first time the matter of white flight was specifically discussed by the Court: by the *Wright* majority in the context of white students leaving public schools when the ratio of black students in the public schools increased and returning when the ratio decreased,[113] and by the *Wright* dissent in the context of white families migrating to adjoining districts where there were fewer blacks.[114] The Court made it clear in *Scotland Neck*, however, that a fear of white flight "cannot be accepted as a reason for achieving anything less than complete uprooting of the dual public school system,"[115] a principle the Court reaffirmed in *Milliken*.

While *Haney, United States v. Texas, Wright*, and *Scotland Neck* all sanctioned judicial disregard of local autonomy when necessary to achieve effective desegregation, the first case squarely to raise before the Supreme Court the question of crossing school district boundaries to achieve metropolitan desegregation was *Bradley v. School Board*.[116] The Court's four-to-four split, with Justice Powell not participating, indicated that metropolitan desegregation would not have "easy going" in the Supreme Court. In the course of the *Bradley* litigation, the district court had originally approved a desegregation plan for the Richmond, Virginia, school district that would eliminate "the racial identifiability of each facility to the extent feasible within the City of Richmond."[117]

110. Justices Powell, Blackmun, and Rehnquist and Chief Justice Burger—the four Justices appointed by former President Nixon.

111. 407 U.S. at 477-79 (dissenting opinion).

112. *Id.* at 473-74.

113. 407 U.S. at 464.

114. The dissent noted in this regard: "Of course, when there are adjoining school districts differing in their racial compositions, it is always conceivable that the differences will be accentuated by the so-called 'white flight' phenomenon." 407 U.S. at 475. In *Wright* the dissent found the possibility to be remote because the entire area was predominantly black.

115. 407 U.S. at 491.

116. 412 U.S. 92 (1973), *aff'd by an equally divided Court*, 462 F.2d 1058 (4th Cir.), *rev'd*, 338 F. Supp. 67 (E.D. Va. 1972).

117. 325 F. Supp. 828, 835 (E.D. Va. 1971).

Because the Richmond school district was over 60 percent black at the time of the litigation, the plan would have left most of the Richmond schools heavily black.[118]

The district court then proposed a consolidation of the Richmond city district with two adjoining county districts, each of which was over 90 percent white, to form a new district that would be about two-thirds white.[119] Although the two adjoining districts had already achieved unitary systems and although Richmond, under the city desegregation plan previously approved by the district court, would also achieve a unitary system,[120] the district court nevertheless held that it had the power to order consolidation of the three districts. The court recognized that both the state officials and the Richmond school board were responsible for the segregated condition of the Richmond schools, with some active participation by the two adjoining districts.[121] Primarily, however, the court proceeded on the premise that education was a state responsibility and asserted that

> [t]he State cannot escape its constitutional obligations by relinquishing or delegating to local officials the authority to discriminate, nor can it escape such obligations by dividing such power between them and others of statewide authority.[122]

The Fourth Circuit reversed,[123] emphasizing:

> (1) the boundaries of the city and the two counties had not been originally established or subsequently maintained for the purpose of perpetuating racial segregation in the schools, and (2) each of the three governmental units, acting either under court orders or [otherwise], had eliminated the racially dual school system within the confines of its own territory to the extent that this result feasibly could be attained.[124]

---

118. During the 1971-1972 school year when the plan first went into effect, four of the seven high schools were 70 percent or more black, and all but one high school were majority black; five of the nine middle schools were more than 70 percent black, and all but two middle schools were majority black; and 17 of the 40 elementary schools were more than 70 percent black, and all but four elementary schools were majority black. 338 F. Supp. 67, 240-42 (E.D. Va. 1972).

119. *Id.* at 184-85. For the order and the data on which it was based, see *id.* at 231-48.

120. 462 F.2d 1058, 1061, 1070 (4th Cir. 1972).

121. 338 F. Supp. 67, 167-68 (E.D. Va. 1972).

122. *Id.* at 102.

123. 462 F.2d 1058 (4th Cir. 1972).

124. Smedley, *supra* note 22, at 414 (summarizing the Fourth Circuit's holding).

The court of appeals also concluded that while the discriminatory actions of county officials may have restricted access of blacks to the counties,

> what little action, if any, the counties may seem to have taken to keep blacks out is slight indeed compared to the myriad reasons, economic, political and social, for the concentration of blacks in Richmond and does not support the conclusion that it has been invidious state action which has resulted in the racial composition of the three school districts.[125]

Because the Fourth Circuit's approach in *Bradley* was not significantly different from that of the Supreme Court majority in *Milliken*, it is not fruitful to dwell on the opinion at length, particularly since all of the school districts involved in *Bradley* were unitary systems[126] while the urban district involved in *Milliken* was not.[127]

The final step in the legal build-up to *Milliken* was *San Antonio Independent School District v. Rodriguez*,[128] and in retrospect, I believe that it foreshadowed the result in *Milliken*. The Justices lined up in *Rodriguez* just as they later did in *Milliken*, Justice Stewart casting the swing vote in both cases.[129] Apart from the Court's holding that education was not a "fundamental right" and that no readily definable class was victimized by the alleged discrimination,[130] the essential point of *Rodriguez* was the need for local autonomy in public education, a concept that clearly carried over into *Milliken*. In this regard the Court stated:

> While assuring a basic education for every child in the State, it [the Texas system of school finance] permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. . . .

---

125. 462 F.2d at 1066.

126. The Richmond system became a unitary one during the 1971-1972 school year when the "Richmond only" plan was put into effect.

127. Because the Detroit school system was in constitutional violation and metropolitan desegregation would be designed to remedy that violation, *Milliken* presented a stronger case for metropolitan desegregation than did *Bradley*.

128. 411 U.S. 1 (1973).

129. In both cases, Justice Stewart wrote short concurring opinions seeking to limit the scope of the decisions.

130. Neither of these points would carry over into *Milliken* as such, since blacks have a "fundamental right" to be free from government-imposed discrimination.

> The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local controls means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children.[131] Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. 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. . . . No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.[132]

The effect of *Rodriguez* and its emphasis on local autonomy was clearly to protect the tangible class interest of middle-class suburban whites in using their tax monies for the education of their own children in what were racially and socially homogeneous schools. In *Milliken* the class advantage reflected in the attendance of middle-class white children at such schools was threatened even more significantly. If metropolitan desegregation were ordered "across the board," not only would the suburban white children have to share their educational advantages with lower-class black children, but they would also have to attend the same schools. In the context of public education today, local autonomy has become synonymous with class interest, and the same deference that the majority gave to local autonomy in *Rodriguez*, as might have been expected, appeared again in *Milliken*.

B. *The* Milliken *Decision: On Losing Big Battles*

The essential theory of metropolitan desegregation advanced by the plaintiffs and accepted by the district and circuit courts in *Milliken* was that the federal courts could impose an interdistrict remedy when: the urban district was in constitutional violation; the actions of the state contributed to this violation; and the state had the primary responsibility for public education and could exercise significant control over the local school districts.[133] The necessity for such a remedy was premised on

131. As noted above, this "freedom" is what *Rodriguez* was all about. Even if the suburban districts did not have greater taxable wealth per pupil than the adjoining urban district, their residents could vote higher taxes, knowing that the taxes would not be used for the education of blacks and lower-income whites. *See* text following note 81 *supra*.

132. 411 U.S. at 49-50.

133. *See generally* Comment, *Consolidation and Desegregation: The Unresolved Issue of the Inevitable Sequel*, 82 YALE L.J. 1681, 1687-94 (1973).

the district court's finding that a remedy limited to the urban district alone would be inadequate to achieve meaningful and lasting desegregation. This finding was clearly supported by the record in *Milliken* and was not questioned by either the Sixth Circuit[134] or the Supreme Court.[135] Rather, the major question was whether the district court had the *power* to impose an interdistrict remedy in this case, the answer depending on judicial acceptance of the plaintiffs' theory of metropolitan desegregation. The Sixth Circuit accepted this theory and stated its rationale clearly and succinctly:

> Thus, the 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. There can be little doubt that a federal court has both the power and the duty to effect a feasible desegregation plan. . . . In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines. . . .
>
> . . . .
>
> We reject the contention that school district lines are sacrosanct and that the jurisdiction of the District Court to grant equitable relief in the present case is limited to the geographical boundaries of Detroit. We reiterate that school districts and school boards are instrumentalities of the State.[136]

If this theory of metropolitan desegregation had been accepted by the Supreme Court, an interdistrict remedy would have become as conventional in urban desegregation cases as the interschool busing remedy ordered in *Swann*, for presumably a district court would often find that effective desegregation could not be achieved within the boundaries of the urban district alone. *Milliken*, like *Swann*, would have given rise to a new round of litigation, this time seeking broad metropolitan desegre-

134. Bradley v. Milliken, 484 F.2d 215, 242-45, 250 (6th Cir. 1973).

135. 418 U.S. at 766-67 (White, J., dissenting).

136. 484 F.2d at 249-50. The court also noted that in Brown v. Board of Educ. (II), 349 U.S. 294, 300-01 (1955), the Court referred to "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." 484 F.2d at 250. For the Sixth Circuit's efforts to distinguish *Bradley v. School Bd.*, see *id.* at 250-51.

gation of many of the urban areas in this country. This future, however, was not to be.

The Supreme Court, splitting essentially on a four-one-four basis,[137] rejected this metropolitan desegregation theory, reversed the judgment of the Sixth Circuit, and remanded the case for a "Detroit only" plan.[138] Although noting the Sixth Circuit's reasoning that metropolitan desegregation was appropriate in Detroit "because of the State's violations, and [that it] could be implemented because of the State's authority to control local school districts,"[139] Chief Justice Burger, writing for the majority,[140] found the reasoning wanting. First, there was the problem of local autonomy. The Sixth Circuit had begun its analysis with the "conclusion that school district lines are no more than arbitrary lines on a map drawn 'for politcal convenience,' "[141] a premise with which the Supreme Court sharply disagreed.

> Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict 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 country. No single tradition in public education is more deeply rooted than local control over the operation of schools . . . .[142]

The Court then discussed the provisions for local autonomy in Michigan law, observing that the metropolitan remedy ordered by the district court "would require, in effect, consolidation of 54 independent school districts historically administered as separate units into a vast new super school district."[143] Major administrative problems would result from such a consolidation, and

> absent a complete restructuring of the laws of Michigan relating to school districts the District Court [would] become first, a *de facto*

137. Although Justice Stewart wrote a separate concurring opinion, he also joined in the opinion of the Court.

138. 418 U.S. at 752-53.

139. *Id.* at 735.

140. *See* note 137 *supra.*

141. 418 U.S. at 741.

142. *Id.* The Court cited San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 50 (1973), for the proposition that

> local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."

418 U.S. at 742.

143. 418 U.S. at 743.

"legislative authority" to resolve these complex questions, and then the "school superintendent" for the entire area.[144]

This did not mean, however, that school district lines could not be bridged for desegregation purposes. As will be emphasized throughout the remainder of this Article, the Court expressly held that school district lines could be bridged "where there has been a constitutional violation calling for interdistrict relief,"[145] stating: "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."[146] The problem, however, was to determine what constituted a "constitutional violation calling for interdistrict relief." In the *Milliken* situation in which only one district was found to be in constitutional violation, the majority was unwilling to premise an interdistrict remedy either on that violation, even if the state had contributed to it, or on the state's responsibility for public education and its control over local school districts. Something more was required:

> 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. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. . . . Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.[147]

Since the evidence in *Milliken* was limited to violations occurring in the Detroit school district, and there was no showing of any signficant

144. *Id.* at 743-44.

145. *Id.* at 741.

146. *Id.* at 744, *citing* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972), Wright v. Council of Emporia, 407 U.S. 451 (1972), Haney v. County Bd. of Educ., 410 F.2d 920 (8th Cir. 1969), United States v. Texas, 321 F. Supp. 1043, *aff'd*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); *see* text accompanying notes 90-109 *supra*.

147. 418 U.S. at 744-45.

violation by any of the outlying districts,[148] the majority believed that approving an interdistrict remedy "would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in . . . any holding of this Court."[149]

The majority emphasized that any acts of racial discrimination committed by the state of Michigan were limited to causing segregation within the Detroit district alone.[150] Taking the position that the "right" of black children to attend a unitary system was limited to the system in which the constitutional violation occurred, the majority reasoned that because the record showed only that "[d]isparate treatment of white and Negro students occurred within the Detroit school system . . . the remedy must be limited to that system."[151] In relating the entitlement to an interdistrict remedy to the constitutional right of black children to attend desegregated schools, the Court continued:

> The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit district to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in *Detroit* can be made the basis for a decree requiring cross-district transportation of pupils cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established

148. It was shown that in the late 1950's, the predominantly black Carver District contracted to have its black high school students sent to a predominantly black high school in Detroit, since it did not have a high school of its own. In 1960, Carver was annexed by the predominantly white Oak Park School District and this arrangement ceased. The Court held that even if the contractual arrangement could justify the assumption that the Carver blacks were sent to Detroit because adjoining white districts would not accept them,

> this isolated instance affecting two of the school districts would not justify the broad metropolitanwide remedy contemplated by the District Court and approved by the Court of Appeals, particularly since it embraced potentially 52 districts having no responsibility for the arrangement and involved 503,000 pupils in addition to Detroit's 276,000 students.

418 U.S. at 750.

149. *Id.* at 745.

150. *See id.* at 748-52.

151. *Id.* at 746.

> by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent.[152]

Justice Stewart, who cast the decisive fifth vote rejecting the plaintiffs' theory of metropolitan desegregation, felt constrained, "in view of some of the extravagant language of the dissenting opinions,"[153] to write a concurrence stating his understanding of what the Court had decided. First he emphasized that no "questions of substantive constitutional law" were presented to the Supreme Court; the issue involved, "rather, the appropriate exercise of federal equity jurisdiction."[154] Imposing an interdistrict remedy was improper because the remedy "was not commensurate with the constitutional violation found"[155] and "would go beyond the boundaries of the district where the constitutional violation was found, and include schools . . . in many other school districts that have presumptively been administered in complete accord with the Constitution."[156] Nevertheless, echoing the Court opinion Justice Stewart explicitly reaffirmed the power and perhaps the duty of the federal courts to impose an interdistrict remedy in a proper case. Justice Stewart focused on the responsibility of the state for interdistrict school segregation—for example, when "state officials had contributed to the separation of the races by drawing or redrawing school district lines," or (Justice Stewart here added a new possibility) had contributed "by purposeful, racially discriminatory use of state housing or zoning laws."[157] No interdistrict violation had been shown, however, and

> 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 . . . .[158]

Finding no interdistrict violation, Justice Stewart concluded:

> By approving a remedy that would reach beyond the limits . . . of Detroit to correct a constitutional violation found to have occurred solely within that city the Court of Appeals thus went beyond the governing equitable principles established in this Court's decisions.[159]

152. *Id.* at 746-47 (footnote omitted).
153. *Id.* at 753 (Stewart, J., concurring).
154. *Id.*
155. *Id.* at 754.
156. *Id.* at 755.
157. *Id.*
158. *Id.* at 756.
159. *Id.* at 757.

For Justice Stewart, as long as one district was in violation and there was no interdistrict violation, an interdistrict remedy could not be imposed, notwithstanding the state's overall responsibility for public education and its control over local school districts.

Justices Douglas,[160] White, and Marshall each filed dissenting opinions, with Justices Douglas and Brennan joining in the White and Marshall dissents and Justices White and Marshall each joining in the dissent of the other. The dissenters essentially agreed with the theory of metropolitan desegregation asserted by the plaintiffs and accepted by the district court and court of appeals, but they made some important additional points. First, there was the matter of practicability. Although the majority was concerned with the practical problems of administering an interdistrict remedy,[161] there was no suggestion that metropolitan desegregation was impracticable in the Detroit area in the sense that too many students would have to be transported for excessive distances. Quite to the contrary, as Justice White pointed out, the majority left "unchallenged the District Court's conclusion that a plan including the suburbs would be physically easier and more practical and feasible than a Detroit-only plan."[162]

Second, the dissenters emphasized that metropolitan desegregation was necessary to remedy effectively the segregation existing within the

160. Justice Douglas noted that the effect of *Milliken* and *Rodriguez*, taken together, was "that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only 'separate' but 'inferior.'" 418 U.S. at 761.

161. Such practical problems would be present whenever an interdistrict remedy is ordered, however, and the Court has clearly recognized that an interdistrict remedy can be imposed in certain circumstances. For a discussion of how to deal with these problems, see Hain, *Techniques of Governmental Reorganization to Achieve School Desegregation*, 21 WAYNE L. REV. 779 (1975).

162. 418 U.S. at 767 (White, J., dissenting). The most promising "Detroit-only" plan before the Court would have left many schools 75 to 90 percent black, involved busing 82,000 students, and required the purchase of 900 new buses. Although the metropolitan plan would have involved the busing of a total of 310,000 students in the metropolitan area, about 300,000 students were already riding to school on some type of bus so that only 350 new buses would have been required to implement the metropolitan plan. *Id.* at 767, 800, 813 (White & Marshall, JJ., dissenting). Moreover, 17 of the districts included in the metropolitan plan were contiguous to the Detroit district, and the remainder were no more than eight miles outside Detroit's city limits; the maximum one-way travel time by bus under the plan was 40 minutes. *Id.* at 813 (Marshall, J., dissenting). In *Swann* the Court noted that the one-way bus trips for elementary school students would "take not over 35 minutes at the most." 402 U.S. at 30. For a summary of the plan adopted by the district court on remand, see note 172 *infra*.

Detroit school district because a "Detroit-only" plan would *not* remedy the constitutional violation. Justice Marshall chided the majority for ignoring both the district court's "explicit finding that a Detroit-only decree . . . 'would not accomplish desegregation,' "[163] and the district court's belief that "interdistrict relief was . . . a necessary part of any meaningful effort by the State of Michigan to remedy the state-caused segregation within the city of Detroit."[164] Justice Marshall himself concluded that a Detroit-only plan was hopeless:

> Because of the already high and rapidly increasing percentage of Negro students in the Detroit system, as well as the prospect of white flight, a Detroit-only plan simply has no hope of achieving actual desegregation. Under such a plan white and Negro students will not go to school together. Instead, Negro children will continue to attend all-Negro schools. The very evil that *Brown I* was aimed at will not be cured, but will be perpetuated for the future.[165]

Third, the dissenters insisted that the need for metropolitan desegregation was not premised on any notion of racial balance, as the majority had intimated,[166] but rather on the realization that only by metropolitan desegregation would it be possible to eliminate the large number of racially identifiable schools within the Detroit school district. In Justice Marshall's words:

> 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. It is one thing to have a system where a small number of students remain in racially identifiable schools. It is something else entirely to have a system where all students continue to attend such schools.[167]

Finally, the dissenters' crucial point of difference with the majority was over the matter of showing an interdistrict violation. Although the

---

163. 418 U.S. at 783 (Marshall, J., dissenting).

164. *Id.* at 789.

165. *Id.* at 802.

166. 418 U.S. at 739-41 (majority opinion).

167. 418 U.S. at 803 (Marshall, J., dissenting). The racially identifiable character of the black schools in Detroit was intensified for Justice Marshall because "[f]or these purposes the city of Detroit and its surrounding suburbs must be viewed as a single community." *Id.* at 804. Justice Marshall continued:

> It will be of scant significance to Negro children who have for years been confined by *de jure* acts of segregation to a growing core of all-Negro schools surrounded by a ring of all-white schools that the new dividing line between the races is the school district boundary.

Id. at 805.

dissenters attempted to show some connection between the state's segregatory acts bearing upon the Detroit school system and the resulting racial disparity between the Detroit and suburban school districts,[168] the dissenters' basic position was that, "[g]iven the State's broad powers over local school districts, it was well within the State's powers to require those districts surrounding the Detroit school district to participate in a metropolitan remedy."[169] In response to the majority's requirement of an interdistrict violation, Justice White 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. The result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts. If this is the case in Michigan, it will be the case in most States.[170]

The sharpness of the division among the Court, as well as the significant societal implications of the decision, is reflected in the closing words of Justice Marshall's dissent:

> Desegregation is not and never was expected to be an easy task. . . . But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. 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. I dissent.[171]

The Court had come to another "fork in the road," but for the first time

168. *Id.* at 805-06.

169. *Id.* at 807.

170. 418 U.S. at 763 (White, J., dissenting). Justice White also noted that provisions for community participation could be included in the interdistrict desegregation plan. *Id.* at 778-79.

171. 418 U.S. at 814-15 (Marshall, J., dissenting).

it chose the road that led away from desegregation and away from equal educational opportunities for black children. In the wake of *Milliken*, interdistrict relief and metropolitan desegregation would not become the conventional remedy for eliminating state-imposed segregation in urban school districts. A big battle had indeed been lost.[172]

C. *The Meaning of* Milliken: *Where Do We Go from Here?*

In the wake of *Milliken*, the proponents of metropolitan desegregation have had to "pick up the pieces"[173] and ask, "Where do we go from here?" The starting point in formulating new strategies, of course, is to determine just what it was that the Court decided in *Milliken*. It is not necessary to embark upon the game of doctrinal anaylsis, looking for significance in each judicial utterance and trying to find the "legal rationale" for imposing interdistrict relief that the Court purportedly propounded in *Milliken*. What is necessary, though, is to focus on the majority's *approach* to the problem of metropolitan desegregation and to the imposition of an interdistrict remedy and then determine from that

172. For the memorandum opinion and remedial decree of the district court on remand, see Bradley v. Milliken, Civil No. 35257 (E.D. Mich., Aug. 15, 1975). On remand, the district court rejected the plans of both the plaintiffs and the Detroit Board of Education because they involved too much busing and were too rigidly structured according to racial percentages. Instead, the court ordered the Detroit board to draw up a considerably more limited busing program within the guidelines provided by the court. Finding that it was "impossible to avoid having a substantial number of all black or nearly all black schools in a school district" over 70 percent black and that any remedy "must prevent resegregation at all costs," the court adopted guidelines that considered the " 'practicalities of the situation' and at the same time [made] 'every effort to achieve the greatest possible degree of actual desegregation.' " *Id., quoting* Davis v. School Comm'rs, 402 U.S. 33, 37 (1971). Under the plaintiffs' plan every school would have been racially identifiable as black because each school would reflect the racial composition of the Detroit school system. The court, however, held that if the white identifiable schools were eliminated, the Detroit schools would be sufficiently desegregated. Under the court's definition of "desegregated," any school 30 to 55 percent black would be considered desegregated, but no school would be permitted to remain more than 70 percent white. Neither black nor white children were to be bused to any school already desegregated under the court's definition, and busing was in all events to be minimized. Notably, the court suggested that the Detroit board consider the "Weighted Poverty Index" of each school when pairing schools for desegregation. "The socioeconomic mix, as measured by the poverty index, is a significant factor and should be considered along with the racial mix." *Id.* n.13. The court also ordered the development of a massive educational program to improve the quality of the Detroit schools.

173. My use of this term is doubtless a projection of my own feelings when I was informed of the *Milliken* decision and the concomitant remand of the Louisville-Jefferson County litigation.

approach the majority's likely *institutional behavior*[174] in future cases. This analysis must also take into account the sharp split within the Court on the issue of metropolitan desegregation and the pivotal position occupied by Justice Stewart on this issue.[175] Finally, from the standpoint of the litigating lawyer, consideration must be given to the manner in which lower federal court judges will "read" the decision in *Milliken* since they will be the first ones presented with the question, "What did the Court decide in *Milliken*?"

Academic commentators, whether approaching the matter in terms of doctrinal analysis or result orientation, tend to read Supreme Court opinions broadly, particularly in landmark cases. In a case such as *Milliken* they would be looking for the "test" to be used in determining whether federal courts have the power to issue desegregation orders that cross school district lines. These academicians would assume that this "test" would be applied to the facts of particular cases by lower federal courts and, should the question come before it again, by the Supreme Court. Approaching *Milliken* in this way, we would probably be correct to state that the majority's test is whether "there has been a constitutional violation calling for interdistrict relief,"[176] and that this question is answered affirmatively when there has been "an interdistrict violation and interdistrict effect."[177] An example of such a violation would be a case in which there has been proof that school district lines have been drawn in a racially discriminatory manner or that other discriminatory acts of state officials or of one or more school districts have substantially caused interdistrict segregation.[178] Using that test alone, a commentator focusing upon the result might conclude, not unreasonably,

174. I continue to believe, as Justice Holmes observed so long ago, that law is no more than "prophecies of what the courts will do in fact." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

175. As Justice Clark, sitting by designation, observed in Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 935 (7th Cir. 1974), *cert. granted*, 421 U.S. 962 (1975): "Justice Stewart's view is pivotal because his vote makes a majority when added to any of the other opinions. It is also significant that the Chief Justice's opinion does not indicate any disagreement with Justice Stewart's understanding." The recent resignation of Justice Douglas and his replacement by Justice Stevens will, of course, affect this analysis, which was based on an assumed constancy in Court personnel.

176. 418 U.S. at 741.

177. *Id.* at 745.

178. *See id.* at 744-45.

> [a]bsent 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.[179]

I would submit that it is not proper to read *Milliken* in this way, either from the standpoint of conventional doctrinal analysis or, more significantly, from the standpoint of result orientation.[180] The Court in *Milliken* was faced with the question of when there could be a remedy "mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district."[181] The Sixth Circuit had accepted a particular theory to justify imposing an interdistrict remedy in that situation. Under strict stare decisis, what the Court held was only that an interdistrict remedy could not be imposed in the factual situation presented and on the theory of metropolitan desegregation accepted by the Sixth Circuit; anything that the Court said about the broader circumstances in which an interdistrict remedy might be appropriate was, strictly speaking, dicta.[182]

But, of course, it is unrealistic to treat Supreme Court decisions, particularly those in "landmark" cases, in terms of doctrinal analysis. What is important is the Court's approach in *Milliken* to the problem of metropolitan desegregation and the imposition of an interdistrict remedy. That approach was, on the one hand, to reject the theory of metropolitan desegregation that had been advanced by the plaintiffs

---

179. Dell'Ario, *supra* note 2, at 149.

180. There has been some question about whether the decision in *Milliken* represented constitutional doctrine rather than, as was explicitly stated by Justice Stewart, 418 U.S. at 753, "the appropriate exercise of federal equity jurisdiction." *See* Comment, *supra* note 2. Relying on Justice Stewart's concurrence, the courts have viewed the decision as being based on "remedies considerations." *See, e.g.*, Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 935-36 (7th Cir. 1974), *cert. granted*, 421 U.S. 962 (1975); Evans v. Buchanan, 393 F. Supp. 428, 431-32 (D. Del.), *aff'd mem.*, 96 S. Ct. 381 (1975). Since the functional question, however, is whether school district lines may be crossed to remedy de jure segregation, I cannot see how the result would differ depending on whether *Milliken* is viewed as setting constitutional or remedies limitations on the power of the federal courts.

181. 418 U.S. at 744.

182. In *Gautreaux v. Chicago Housing Authority*, Justice Clark, writing for the majority attempted to fit *Milliken* "into an established line of precedent," and noted that "any application of the opinion to factual situations other than the one before the Court would be dictum." Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 935-36 (7th Cir. 1974), *cert. granted*, 421 U.S. 962 (1975).

and, on the other hand, to affirm explicitly the power of federal courts to impose interdistrict remedies in appropriate circumstances, which might be ascertained by some guidelines furnished by the Court. The focal point for the majority was a "constitutional violation calling for interdistrict relief,"[183] which, in the view of five members of the Court, was not to be found merely because the state contributed to the constitutional violation existing within the urban district or because the state had overall responsibility for education and substantial control over local school districts.

The guidelines' importance is not that they constitute an inflexible rule or that they furnish the only means by which it is possible to show a "constitutional violation calling for interdistrict relief," but rather that they indicate the circumstances in which the Court will find such relief to be clearly appropriate. For example, the guideline governing cases in which school district lines have been drawn in a racially discriminatory manner, buttressed by the citation to *Haney* and *United States v. Texas*,[184] is very specific. As the following discussion will indicate, this guideline can be used not only when the lines were drawn on a racial basis to conform to pre-*Brown*, state-required segregation, but also when the result of *recent* school consolidation or reorganization has been the creation of a predominantly or disproportionately black district surrounded by predominantly white districts.[185]

In contrast to the specificity of the first guideline, the second guideline, governing cases in which other discriminatory acts of state officials or one or more school districts have substantially caused interdistrict segregation,[186] is phrased very broadly. This guideline can be interpreted to cover a number of situations, including those in which the acts of the suburban district helped perpetuate segregation in the urban district,[187] the particular state law relating to school district boundaries impedes desegregation efforts in the urban district,[188] or state laws relating to school district consolidation or metropolitan government have contributed to the maintenance of a predominantly black urban school district.[189] The very breadth of the guideline indicates that the *Milliken*

183. 418 U.S. at 741.
184. *Id.* at 744; *see id.* at 745; 418 U.S. at 755 (Stewart, J., concurring).
185. *See* text accompanying notes 200, 296-303 *infra.*
186. *See* 418 U.S. at 745.
187. *See* text accompanying notes 271-72 *infra.*
188. *See* text preceding and accompanying notes 257-61 *infra.*
189. *See* text accompanying notes 314-39 *infra.*

majority was keeping open its options on the question of what constitutes a "constitutional violation calling for interdistrict relief." For example, another possibility suggested by Justice Stewart in his concurring opinion is the situation in which the state has "contributed to the separation of the races . . . by purposeful, racially discriminatory use of state housing or zoning laws."[190]

Because the majority's approach was based on a rejection of the Sixth Circuit's "state responsibility" rationale, I would submit that the majority, or at least Justice Stewart, still might permit metropolitan desegregation if, for instance, the other districts included in the metropolitan plan were themselves in constitutional violation or if there had been an historic and continuing relationship between the districts included in the plan, even though there was no interdistrict segregatory effect. Since the Court recognized a power in the federal courts to impose interdistrict relief in appropriate cases and rejected only the theory of metropolitan desegregation advanced in *Milliken*, I think it is clearly unsound to read the case broadly as a sweeping rejection of metropolitan desegregation and the interdistrict remedy. Justice Stewart in his concurring opinion seemed to agree.[191]

What then is the "behavioral message" of *Milliken*? What was the Court majority really saying about metropolitan desegregation? Although behavioral analysis in this area is highly speculative,[192] I nevertheless believe that in terms of the result and articulated rationale, the majority was warning that metropolitan desegregation will not be an easy remedy to obtain and that it will not be the conventional remedy for segregation in urban school districts. At the same time, the majority expressly recognized that imposing such a remedy is appropriate in certain circumstances. I strongly disagree with the assertion, referred to above, that

> [a]bsent a near-impossible showing that various school districts have conspired to keep black children isolated in one of them or that the

190. 418 U.S. at 755 (Stewart, J., concurring). The three-judge court in Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 96 S. Ct. 381 (1975), expressly relied on this ground, as did the district court in United States v. Board of School Comm'rs, Civil No. 68-225 (S.D. Ind., Aug. 1, 1975) (memorandum of decision). *See* text accompanying notes 332-35, 344-51 *infra*.

191. The majority opinion did not indicate any disagreement with Justice Stewart's understanding of the holding. *See* note 175 *supra*.

192. Such an analysis is also obviously influenced by my "adversary perspective."

> state has so operated,[193] the state interest in local control over education will impose an outer limit on a federal court's power to order desegregation.[194]

And I think it is utterly absurd to conclude that, "[f]or the majority at least, Detroit should be the end of the line in school desegregation cases."[195] Quite to the contrary, I think that *Milliken* must be seen as the *starting point* for a new round of litigation based on an entirely different approach, an approach that looks to the interdistrict circumstances prevailing in particular metropolitan areas and sets forth a justification for imposing an interdistrict remedy *in that case.*

Looking at *Milliken* and the rationales articulated there, we see not only a Court badly split on the question of metropolitan desegregation—a question with strong class implications clashing with the Court's previously articulated commitments to racial equality and to equality of educational opportunities for black children—but also a Court majority ambivalent, rather than hostile, toward metropolitan desegregation. Because of this ambivalence, five members of the Court are saying, with perhaps Justice Stewart being a bit more encouraging:

> Go slow, proceed on a case-by-case basis rather than "across the board," and in a proper case we will approve the imposition of an interdistrict remedy and perhaps give more guidance about the circumstances in which we think it is appropriate. In the meantime, try out new approaches in the lower federal courts.

This is the behavioral message that the lower federal courts have found in *Milliken.* Their post-*Milliken* "institutional behavior" has been to look to the circumstances of a particular case to discover reasons why imposing an interdistrict remedy might be appropriate in that case. And it is on this basis that I believe proponents of metropolitan desegregation must proceed to develop a post-*Milliken* strategy. While the "big battle" has been lost, the "small wars" may still be won.

V. The Strategy for Metropolitan Desegregation Today: On Winning Small Wars

A. *General Strategy and Preliminary Considerations*

The essential strategy of metropolitan desegregation today must be to

193. As the post-*Milliken* cases indicate, it has not been "near-impossible" to persuade the courts of the appropriateness of interdistrict relief in the particular case.

194. Dell'Ario, *supra* note 2, at 149.

195. *Id.*

win small wars, to focus on the interdistrict situation existing in a particular metropolitan area, and to show that in the particular circumstances there is a "constitutional violation calling for interdistrict relief." There are a number of grounds, which will be discussed in more detail shortly, that I believe can be relied upon to obtain interdistrict relief. To the extent that these grounds are present in a particular situation, they should be advanced cumulatively—that is, the advocate should argue that while any one of the grounds would be sufficient if standing alone, taken together, they clearly mandate an interdistrict remedy in the special and limited circumstances of the case. The narrowness of a favorable holding reduces the likelihood of Supreme Court review—and at this time there is nothing to be gained by Supreme Court review of a favorable lower court decision. Conversely, the narrowness of the grounds advanced may make the Court more disposed to grant review of an unfavorable decision because the Court could then make clear, without undercutting *Milliken*, that there are circumstances in which it will approve the imposition of an interdistrict remedy. In addition, if interdistrict relief has been granted in a number of lower federal courts, the Court may be persuaded to uphold such relief in the particular case and will also have the "data" available if it wishes to formulate new or broader guidelines.

In dealing with *Milliken* itself, the emphasis should be on its limited sweep. The advocate should refer to the Court's own description of the metropolitan desegregation question presented in *Milliken*:

> [w]hether a federal court may impose a multidistrict, areawide remedy to a single-district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim . . . that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in the public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violation by those neighboring districts.[196]

On the one hand, *Milliken* should be distinguished in every factual particular possible, but on the other hand, *Milliken* must be relied upon *affirmatively* for the power of federal courts to cross school district lines

196. 418 U.S. at 721-22 (footnote omitted).

whenever "there is a constitutional violation calling for interdistrict relief."

With respect to the necessary showing of a violation, it may make a difference if the case arises in a state in which segregation was formerly required by law—the "southern situation"—because there may be a connection between the state-imposed segregation and the racial disparity between school districts. Suburban districts, even though they have relatively fewer black students than urban districts, may still be trying to segregate students, as was the situation in the Louisville-Jefferson County litigation. Finding these suburbs to be in constitutional violation for having failed to eliminate all vestiges of state-imposed segregation may loom significant in the determination of the propriety of interdistrict relief.

Because of the deference that the *Milliken* majority gave to the principle of local autonomy, consideration should also be given to the particular state's law governing local school districts and to the structural posture in which the question of metropolitan desegregation arises. For example, both in *Milliken* and in *Bradley v. School Board*, school district lines were coterminous with political boundaries, and metropolitan desegregation would have involved more than one county. But in Kentucky the boundary lines of independent school districts are not likely to be coterminous with political boundaries because annexing a territory to a municipality does not also involve annexing that territory to the municipal school district. Since suburban territory recently annexed to the municipality is more likely to have a predominantly white population than a black one, the effect will be, as it was in the Louisville-Jefferson County litigation, that a substantial number of white children will reside within both the urban municipality and a suburban school district. Thus, fewer whites will be available to desegregate the urban district than if the school district lines and municipal boundaries were coterminous.

Whether metropolitan desegregation can be accomplished within a single county also may be important. In many states, as in Kentucky, the county is the basic unit of education, and there are likely to be statutory provisions for consolidating and merging independent school districts in the county with the basic county district. Judicially ordered merger, in accordance with the applicable provisions of state law, can solve the administrative problems that so concerned the Court in *Milliken*. If, to be fully effective, an interdistrict remedy must embrace more

than one county, there may also be state provisions authorizing the consolidation of different county districts.

Another showing, that of interrelationship between the districts, can be made to the extent that state law authorizes cooperation between local school districts and to the extent that such cooperation has actually occurred. With or without any showing that this interrelationship has had a demonstrable segregative effect, it can be relied upon as an independent factor to justify imposing an interdistrict remedy. All of the above factors contribute to the structural posture in which the question of metropolitan desegregation arises, and all should be considered in "making the case" for interdistrict relief in the particular circumstances.

B. *The Grounds to Be Advanced*

Turning to the grounds that may be advanced for the imposition of an interdistrict remedy in particular cases, I shall consider initially the grounds expressly recognized in *Milliken*. The first ground, that school district lines have been drawn in a racially discriminatory manner, is illustrated by cases such as *Haney* and *United States v. Texas*.[197] Seemingly, this ground depends upon a showing of segregatory intent. As that concept was defined in *Keyes*,[198] however, it may well be satisfied by a showing of segregatory effect.[199] The ground is particularly applicable in states in which segregation was formerly required by law. Although *Haney* and *United States v. Texas* both involved small rural districts, it may be possible in the metropolitan context to show that particular urban-suburban lines were drawn to avoid requiring the suburban districts to provide separate schools for the relatively few blacks residing outside the inner city. Moreover, when the effect of *recent* school consolidations has been to concentrate black students within a particular district, a strong argument can be made that the school district lines were drawn in a racially discriminatory manner. Certainly the concentration of black students within a particular district raises the presumption that the concentration was not "accidental."[200]

197. *See* text accompanying notes 90-96 *supra*.

198. *See* text accompanying notes 47-51 *supra*.

199. *See, e.g.*, United States v. Missouri, 363 F. Supp. 739 (E.D. Mo. 1973); Hoots v. Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973), *appeal dismissed*, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974).

200. *See* Hoots v. Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973), *appeal dismissed*, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974).

The second ground, that discriminatory acts of state officials or of one or more school districts "have been a substantial cause of interdistrict segregation,"[201] is a broad ground, susceptible to numerous interpretations. Necessarily left unanswered are the questions of how the causal connection between the discriminatory acts and the resulting segregation is to be established and what is meant by "substantial cause." Again, the functional criterion may be one of showing a discriminatory effect rather than a deliberate discriminatory intent. For example, in the Louisville-Jefferson County litigation, the Louisville School District, in cooperation with the Jefferson County district, located a high school within the boundaries of the county school district, far from the centers of black population within the Louisville district. This act, although not contributing to interdistrict segregation, did contribute to the segregation that existed in the Louisville district. To this extent, the Jefferson County district was responsibile for segregation existing in the Louisville district.

The Kentucky law providing that boundaries of an independent school district do not expand with municipal annexation also had a discriminatory effect, even if it was unintended. Approximately 10,000 children, mostly white, lived between the boundaries of the Louisville School District and the outer boundaries of the city of Louisville. If the "annexation area" had been included within the boundaries of the Louisville School District, it would have been easier to accomplish desegregation within that district. In that sense the state law provisions substantially contributed to the "blackness" of the Louisville School District and thus to interdistrict segregation.

Another example of state laws having a discriminatory effect and substantially contributing to interdistrict segregation would occur if a state law authorizing school district consolidation specifically excluded urban school districts having a large percentage of blacks,[202] or if a plan for metropolitan government did not include school district consolidation when there was a separate urban school district having a large number of blacks.[203] As these examples indicate, the second ground

201. 418 U.S. at 745.

202. *See* Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 96 S. Ct. 381 (1975).

203. *See* United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

can be used to good advantage in arguing that the circumstances of the particular case justify interdistrict relief.

The third ground articulated in *Milliken* is the one suggested by Justice Stewart, that racial disparity in urban-suburban residential areas, with its concomitant effect on interdistrict school segregation, has been caused "by purposeful, racially discriminatory use of state housing or zoning laws."[204] Certainly, plaintiffs should make every effort to establish governmental responsibility for urban-suburban residential segregation;[205] either by itself, or in combination with other factors, this responsibility may persuade the court that an interdistrict remedy is appropriate.[206]

Moving beyond the grounds specifically articulated in *Milliken*, I would suggest that there are at least two other "basic" grounds, consistent with *Milliken*, for imposing an interdistrict remedy. The first is the situation in which the suburban districts sought to be included in the metropolitan plan are themselves in constitutional violation; this violation alone should be sufficient to justify an interdistrict remedy involving those districts. Especially in states in which segregation was formerly required by law, such a violation may be common, as for example when a suburban district attempts to confine its relatively few blacks to one or more schools by means of geographic attendance zoning. In *Milliken* the Court emphasized again and again that none of the districts included in the metropolitan plan were shown to have "failed to operate unitary school systems within their districts,"[207] and that the "[d]isparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere;"[208] thus the remedy had to be limited to the Detroit system. If, however, an urban district and one or more adjoining suburban districts are all in constitutional violation, an interdistrict remedy would not go "beyond the boundaries of the district where the constitutional violation was found."[209] I would submit, therefore, that

204. 418 U.S. at 755 (Stewart, J., concurring).

205. *See generally* Kushner & Werner, *supra* note 2; Taylor, *supra* note 2; Comment, *Comprehensive Metropolitan Planning: A Reinterpretation of Equal Educational Opportunity*, 67 NW. U.L. REV. 388, 403-12 (1972).

206. *See, e.g.*, Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 96 S. Ct. 381 (1975).

207. 418 U.S. at 721; *e.g., id.* at 730, 735-36, 744-45, 746, 748. *See also* 418 U.S. at 754 (Stewart, J., concurring).

208. 418 U.S. at 746.

209. 418 U.S. at 755 (Stewart, J., concurring).

whenever all of the districts sought to be included within a desegregation plan are themselves in constitutional violation and when the district court concludes that an interdistrict remedy is necessary for effective desegregation of the urban district, there has necessarily been a "constitutional violation calling for interdistrict relief."

The suburban districts would in turn argue from *Milliken* that "the scope of the remedy is determined by the nature and extent of the constitutional violation"[210] and that the court's decree must be limited to eradicating the segregation found within each district. But there should be no notion of a district's being a "little bit" in violation. White students residing in suburban districts have no "right" to attend school in their home district. If all of the districts within a given area are in constitutional violation, the court must enter a decree that will effectively eliminate the constitutional violation. Certainly, it is not unreasonable to allow the court for this purpose to treat the area as a whole and to disregard the boundary lines of the "violation" districts. Because *Milliken* involved the situation in which a court had imposed "a multidistrict, areawide remedy to a single-district *de jure* segregation problem,"[211] the case arguably does not restrict a court's power to impose a multidistrict remedy on a multidistrict de jure segregation problem. The argument should certainly be made where applicable.

The second "basic" ground would arise in cases in which there has been an "historic and continuing interrelationship" between the urban district and the suburban districts sought to be included in the desegregation plan. Experience indicates that adjacent school districts, although autonomous, often do not operate in isolation from each other. Frequently there will be state laws authorizing interdistrict cooperation. This cooperation may have helped some districts minimize the burdens of conforming to state-required segregation—for example, when the black students of one district were able to attend the other district's "black school"—and it may also have produced an interdistrict segregatory effect.[212] The theory, however, is not based on the interrelation-

210. 418 U.S. at 744.

211. *Id.* at 721.

212. If this circumstance exists, it should be treated as the situation where "racially discriminatory acts of . . . local school districts . . . have been a substantial cause of interdistrict segregation." *Id.* at 745. For an excellent state by state compilation of segregation laws in force at the time of *Brown*, see SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE UNITED STATES (B. Reams & P. Wilson eds. 1975).

ship of the districts in achieving a segregatory purpose or producing a segregatory effect, but rather on the interrelationship itself. If the interrelationship has existed and the school district lines have been disregarded by the districts themselves for various other purposes, the argument follows that it is within the district court's equitable power to disregard the district lines for purposes of school desegregation as well. Of course, the argument's impact is greater when the district lines have been disregarded for segregatory purposes, and still greater when they have been disregarded with continuing segregatory effect,[213] but the rationale is the same: Because state law recognizes that school district lines can be crossed[214] and because the districts have themselves actually crossed the particular school district lines, the historic and continuing interrelationship between the districts justifies crossing the lines and imposing an interdistrict remedy in order to eliminate effectively the constitutional violation found to exist within the urban district.

To summarize, the strategy for metropolitan desegregation in the wake of *Milliken* must be to concentrate on winning small wars by showing that in the circumstances of the particular case interdistrict relief is appropriate. To the extent that they are available, the major grounds that can be relied upon are: (1) all of the districts sought to be included in the metropolitan desegregation plan are themselves in constitutional violation; (2) there has been an historic and continuing interrelationship between the districts; (3) school district lines have been drawn in a racially discriminatory manner, for example, along racial lines to facilitate state-imposed segregation in pre-*Brown* days or as part of school district consolidations that have concentrated black students within a particular district or districts; (4) other discriminatory acts of state officials or of one or more school districts have substantially caused interdistrict segregation, for example, the school districts have cooperated in enabling one or both to maintain segregation, or urban school districts with a large percentage of blacks have been excluded

213. In the Louisville-Jefferson County litigation, the attendance of the Jefferson County black high school students at Louisville's Central High School on a tuition basis in pre-*Brown* days did not have a continuing segregatory effect, but the location of Louisville's Atherton High School within the boundaries of the county school district far from the centers of Louisville's black population did. The Sixth Circuit gave substantial weight to this latter instance of cooperation. Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358, 1360 (6th Cir. 1974).

214. The argument could be made even if the school district lines have not in fact been crossed, since they could potentially be crossed under state law. It is not improper for a federal court to recognize this potential and to cross the lines if necessary.

from school consolidation or governmental reorganization plans; and (5) the racial disparity in urban-suburban residential areas was caused "by purposeful racially discriminatory use of state housing or zoning laws."[215] All of the above grounds that are available in the particular case, as well as any other grounds for an interdistrict remedy that the particular circumstances suggest, should be emphasized. The essential argument is that in the special circumstances of *this* case, the court should order an interdistrict remedy. I will now proceed to illustrate this approach "from within" by a discussion of the Louisville-Jefferson County litigation.[216]

VI. METROPOLITAN DESEGREGATION IN LOUISVILLE-JEFFERSON COUNTY: THE VIEW FROM WITHIN

A. *The Louisville-Jefferson County Situation*

Louisville-Jefferson County is the largest metropolitan area in Kentucky with a county-wide population of close to 700,000, about half of whom live within the city of Louisville.[217] Although the basic unit of public education under Kentucky law is the county and each county constitutes a separate school district,[218] there are provisions for independent school districts within the county districts.[219] School districts are entities distinct from municipalities, and the annexation of unincorporated territory to a municipality does not have the effect of annexing that territory to an independent school district within the municipality.[220] This distinct entity status, in addition to the widespread tendency of families with school-age children to reside in suburban areas rather than core-city areas, had the effect of making the Jefferson County School District about twice the size of the Louisville School District and substantially all-white. At the time the litigation was commenced in 1972, the Jefferson County School District had approximately 96,000 students, about four percent of whom were black, while the Louisville School District had approximately 45,000 students, roughly 50 percent of whom were black. On a countywide basis, the white-black ratio was 80 percent to 20 percent. There was also a tiny independent school

215. 418 U.S. at 755 (Stewart, J., dissenting).
216. *See* case cited note 8 *supra*.
217. The standard statistical metropolitan area includes part of southern Indiana.
218. KY. REV. STAT. ANN. § 160.010 (Baldwin 1973).
219. *Id.* § 160.020 (Baldwin Supp. 1974).
220. *See* Thomas v. Spragens, 308 Ky. 97, 213 S.W.2d 452 (1948).

district in Jefferson County, Anchorage, which operated one eight-grade elementary school for 350 very affluent white students.[221]

Under Kentucky law an independent school district may merge with the county school district, and if the school boards are unable to agree upon the terms of merger, merger may be ordered by the state board of education.[222] There are also statutory provisions authorizing transfers of territory and cooperative arrangements between school districts.[223] Finally, because Jefferson County is the only county in Kentucky containing a first-class city, legislation applicable only to the Jefferson County and Louisville school districts has been enacted,[224] and such legislation has been sustained by the Kentucky Court of Appeals against charges of "special legislation."[225]

In racial matters, Kentucky has always been a "southern state," and prior to *Brown*, state law required racial segregation in the schools.[226] In compliance with this law, the Jefferson County School District operated a number of small one- to four-room black elementary schools and one eight-grade black elementary school, Newburg, which was located in the only area in the county having any substantial black population. All of the black high school students living in the county district were bused to Louisville's black high school, Central, which they attended on a tuition basis, as authorized under Kentucky law. After *Brown*, the black high school students from the county were permitted to attend the county's high schools, and the one- to four-room black elementary schools were gradually closed. Newburg was rezoned along with the other elementary schools on a purportedly neutral basis, but because its attendance zone encompassed much of the Newburg area, it remained an all-black school. Within a three-mile radius of Newburg were nine all-white or virtually all-white elementary schools. As is ordinarily the case

221. These facts, as well as those following, are taken largely from the Sixth Circuit's opinion the first time the case was before the court, Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925 (6th Cir. 1973), but are supplemented from my own knowledge of the case when necessary.

222. KY. REV. STAT. ANN. § 160.041 (Baldwin 1973).

223. *E.g.*, *id.* § 158.130; *id.* § 160.045 (Baldwin Supp. 1974).

224. *E.g.*, *id.* § 160.048 (Baldwin 1973) (transfer of territory); *id.* §§ 160.402, .160, .200, .210 (Baldwin Supp. 1974) (election of board members in the event of merger between the county and independent school districts); *id.* §§ 160.607-.609 (additional taxing authority).

225. *E.g.*, Board of Educ. v. Board of Educ., 522 S.W.2d 854 (Ky. 1975).

226. Law of Mar. 22, 1904, ch. 85, [1904] Ky. Acts 181 (repealed 1966); *see* Berea College v. Kentucky, 211 U.S. 45 (1908) (upholding statute).

in a suburban district, there were a substantial number of students in Jefferson County who were being bused to the schools they attended.[227] Newburg, however, was an all walk-in school, although a number of the nine white schools surrounding it were heavy busing schools.

As is common in many urban districts, the Louisville School District was an all walk-in district using the neighborhood school method of geographic attendance zoning. During the 1956-1957 school year, the city district embarked upon a much-heralded desegregation program in which all students were assigned to their neighborhood schools without regard to race. Because in pre-*Brown* days black schools had naturally enough been located in black residential areas and white schools in white residential areas, geographic attendance zoning could produce little actual desegregation. This failure was further aggravated by the transfers permitted students who had been assigned to schools formerly attended by members of the other race. Eighty-five percent of the white children who were assigned to pre-*Brown* black schools transferred to pre-*Brown* white schools, while 45 percent of the black children who were assigned to pre-*Brown* white schools transferred to pre-*Brown* black schools. The result was that during the "banner year" of desegregation, 80 percent of all white students were attending schools that were at least 90 percent white and 76 percent of the black students were attending schools that were at least 90 percent black.[228] This degree of racial concentration fluctuated somewhat over the years as population patterns changed and the system became "blacker" with the movement of white families to the county school district,[229] but at no time were less than 50 percent of the white students attending schools 90 percent or more white or less than 50 percent of the black students attending

227. At the time of litigation, approximately 65 percent of these children were being bused.

228. As we pointed out in our brief before the Sixth Circuit: "It is understandable why there was so little opposition to desegregation in Louisville; so little of it actually occurred." Brief for Appellant at 27, Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925 (6th Cir. 1973).

229. As the black population increased in Louisville, it moved westward from the central part of the city, with the result that a number of pre-*Brown* white schools located in the west end of Louisville became virtually all-black along with the pre-*Brown* white schools located in the central part of the city. The pattern in Louisville then was pre-*Brown* white schools that had remained white, pre-*Brown* black schools that had remained black, and pre-*Brown* white schools, often located in close proximity to a pre-*Brown* black school or to a pre-*Brown* black school that had been closed, that were now black schools.

schools 90 percent or more black.[230]

The Louisville-Jefferson County case is a classic example of litigation generated by the Supreme Court's decision in *Swann*. Prior to *Swann*, the Sixth Circuit had held that geographic attendance zoning was an adequate means of desegregation even though it did not result in much actual desegregation.[231] In order to achieve desegregation in Louisville, or of the Newburg school in the Jefferson County district, it appeared that a "policy of segregation" would have to be shown.[232] After *Swann*, it was sufficient to proceed on a "vestiges" approach, and we[233] were fairly confident that under this approach, we could achieve desegregation within the Louisville and Jefferson County school districts.

In Jefferson County, everything hinged on Newburg, which was the one pre-*Brown* black elementary school that had remained in existence and had retained its racial identity to the present time. Because it was surrounded by nine all-white or virtually all-white elementary schools, it could easily be desegregated by busing some of the white children to Newburg and some of the Newburg children to the white schools. At the time of the litigation, however, there were two other elementary schools, Price and Cane Run, which were rapidly becoming racially identifiable black schools. Price, named after a long-time black principal of Newburg, was constructed in 1969 within a mile of Newburg. When Price opened, it was 33 percent black, but by 1972-1973 had increased to 54 percent black. Like Newburg, it was a virtually all walk-in school with only three percent of its students being bused, and it too had a black principal, the only other black principal in the system. When the case came to trial, there was also evidence of a policy of

230. During the 1971-1972 school year, when the litigation was commenced, 67 percent of the white students were attending schools 90 percent or more white while 72 percent of the black students were attending schools 90 percent or more black.

231. *See* Goss v. Board of Educ., 406 F.2d 1183 (6th Cir. 1969).

232. Once litigation was commenced, there was evidence that would show a policy of segregation on the part of both districts, such as Louisville's location of the relatively few post-*Brown* schools that it built in areas of racial concentration and its racially discriminatory pattern of teacher and faculty assignment. With respect to Jefferson County, see text following note 234 *infra*.

233. By "we," I am referring to the groups sponsoring the Louisville-Jefferson County litigation: the Kentucky Civil Liberties Union, the Louisville Branch of the N.A.A.C.P., and the Kentucky Commission on Human Rights. It should be recognized today that litigation such as this is a group effort or what may be called a "public action," in which the identity of the named plaintiffs is not important.

segregation[234] —namely that Price and Newburg were being under utilized, Newburg grossly so, at a time when several of the surrounding white schools were operating well beyond capacity, and using split shifts and temporary mobile classrooms.

Cane Run, the third school with which we were concerned, was located in a different part of the district. Blacks had begun to move into that area in 1968, and all the black children living there were assigned to Cane Run, the black percentage of which increased from 1.2 percent in 1966-1967 to 49 percent in 1972-1973. During 1972 Cane Run was rebuilt at the same site. The school was surrounded by a number of all-white or virtually all-white schools, and all of the schools, including Cane Run, were heavy busing schools.

Of the black elementary students in the Jefferson County district, 56 percent were confined to these three elementary schools. Because Newburg was not desegregated, the Jefferson County School District had not eliminated all vestiges of state-imposed segregation. We argued that since this circumstance existed, any actions the district took with respect to other schools "must be judged according to whether they hinder or further the process of school desegregation."[235] The Jefferson County district could effectively desegregate within its own boundaries by clustering Newburg, Price, and Cane Run with the surrounding all-white schools, and this action would have brought it into constitutional compliance.[236]

The Louisville district was a prime example of an urban school district using geographic zoning and the hallowed neighborhood school system to practice "educational apartheid." Beginning with a pre-

234. The second largest urban area in Kentucky, Lexington-Fayette County, had merged its schools in 1967. Using geographic attendance zoning, it too had maintained a large number of racially identifiable schools on the elementary and junior high school levels, and we brought suit to desegregate it. *See* Jefferson v. Board of Educ., 344 F. Supp. 688 (E.D. Ky. 1972), *aff'd*, 486 F.2d 1405 (6th Cir. 1973). In that case too, once the suit was brought, there was sufficient evidence to establish a policy of segregation.

235. Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925, 929 (6th Cir. 1973).

236. We first filed a separate suit, Newburg Area Council, Inc. v. Board of Educ., Civil No. 73-1403 (E.D. Ky., filed Aug. 1971), challenging only the segregation that existed within the Jefferson County district. When we decided to file the "boundary-crossing" suit, Haycraft v. Board of Educ., Civil No. 73-1408 (E.D. Ky., filed May 1972), we let the Newburg suit "sit," and the cases were subsequently consolidated for trial and decision.

Brown racially monolithic structure, the district built upon this structure by locating the relatively few schools constructed after *Brown* in areas of racial concentration.[237] At the time of trial, it was operating a system in which five of its six senior high schools, nine of its 13 junior high schools, and 40 of its 46 elementary schools were racially identifiable in student composition.[238]

Having watched the district change in the last 15 years from a system 25 percent black to one that was 50 percent black and growing blacker and poorer, the Louisville School Board was acutely conscious of the problem of white flight and of the general movement of whites toward the suburbs. In an effort to stem this tide, the board had in effect "struck a deal" between the black and the white communities in Louisville: Racial segregation would be maintained, but at the same time "quality education" would be provided for the district's black and lower-income white children. Led by a very progressive and able superintendent, the school board established a number of special programs aimed at improving the educational performance of black and lower-income white children.[239] To provide some degree of community control, mini-boards were organized in the various areas of the district and were given a "say" in the appointment of principals and teachers. This "say" was reflected in the pattern of teacher and principal assignment, with practically all of the black schools having black principals and a proportionately higher number of black teachers than the white schools. Because of the large number of racially identifiable schools, which could easily be eliminated by busing, Louisville was an easy target for desegregation after *Swann*.

The Louisville School Board and its officials insisted—and I believe sincerely—that they were not opposed to desegregation, but that

237. The district had built nine new schools: one racially identifiable white high school, one racially identifiable white junior high school, and seven elementary schools. Four of the seven elementary schools were racially identifiable black schools upon opening, and one became over 80 percent black shortly thereafter.

238. It is not necessary to get into a "numbers argument" about what makes a school racially identifiable. Uually the school will be virtually all-white or all-black, and almost always 90 percent or more one race. This 90 percent ratio was true of practically all of the schools involved in our complaint but we included a few elementary schools that were 80 percent or more black in the category of racially identifiable schools.

239. Such improvement as had occurred was minimal, and the Louisville officials admitted that the best way of improving the academic performance of black and lower-income white students would be to place them in predominantly middle-class white schools.

because of the problem of white flight, desegregation within the limits of the Louisville district alone would be counterproductive. Middle-class whites could flee to the adjoining Jefferson County district, and the Louisville district would then become blacker and poorer. The situation was complicated by the question of a possible merger between the Louisville and Jefferson County districts. The Louisville Board appeared to believe that its "quality education" program would work if given enough time and money and took the position that the county board and its officials would not be responsive to the special needs of black and lower-income white children. There was also a marked difference in the educational philosophies of the two boards. The Louisville Board did not want to be absorbed into the county system, and when push came to shove, it opted for continued segregation and "quality education" and resisted our suit. At the same time, however, the Louisville Board consistently maintained the position that if desegregation were to be ordered, it could only be effective on a metropolitan-wide basis.

B. *The Pre-*Milliken *Litigation*

Our theory of metropolitan desegregation essentially ignored the involvement of the state, either in the segregation that existed within the school districts or in regard to its control over education generally. In May 1972, when we filed suit, both the Richmond and Detroit cases had been decided by the district courts and were on appeal, and we were aware of the approach taken in those cases. But since our case was so different—particularly in that both our districts were still in constitutional violation and in that there had been an historic and continuing relationship between the two districts for segregatory and other purposes —"state involvement" seemed to add little to our case. Moreover, we wanted to proceed on a different theory precisely because it could not be known at that time whether the state involvement approach would work. Indeed, while the case was awaiting trial, the Fourth Circuit decided *Bradley*, which persuaded the district judge in our case that he could not cross school district boundaries in *any* case.[240]

Our argument was that the court had the power to cross the boundary lines between the Louisville and Jefferson County school districts to

240. *See* Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925, 932 (6th Cir. 1973).

achieve effective desegregation within both districts because: (1) the relief would be limited to a single county, the basic unit of education in Kentucky, and therefore could be administered in a manner consistent with the state laws relating to independent and county schools districts; (2) both districts were in constitutional violation; (3) school district lines consistent with state law had been disregarded by the school districts in the past for segregatory and other purposes; (4) the boundaries of the school districts were not coterminous with political boundaries, and a substantial number of white children were located in an area within the political boundaries of the city of Louisville but not within the Louisville School District.

There was some disagreement among the groups sponsoring the litigation[241] about whether the ultimate remedy should be a merger of the Louisville and Jefferson County districts or whether it should be limited to attaching the "annexation area" with its 10,000 white students to the Louisville district. This disagreement resulted in a suit seeking annexation, coupled with an intervention seeking merger and the inclusion of the Anchorage School District in the desegregation plan.[242] The precise form of relief was irrelevant, however, until we established that the school district lines could be crossed in this case. In fact, by the time the case reached the Sixth Circuit, all of the sponsoring groups agreed that merger and county-wide desegregation was the only feasible solution.

The case came to trial in December 1972. Although the district judge had ruled that he did not have the power to cross school district lines, he allowed us to introduce evidence showing the historic and continuing interrelationship between the Louisville and Jefferson County districts. We showed that in pre-*Brown* days the black high school

241. *See* note 233 *supra.*

242. The inclusion of the Anchorage district has created serious theoretical problems, far beyond the practical importance (to us) of including its 350 very affluent white students in the desegregation plan. On the first "go around," its inclusion could be justified under the Sixth Circuit's decision in *Milliken.* On remand, however, we shifted ground and argued that the all-white Anchorage district was itself a vestige of state-imposed segregation because it was established under a statute that authorized the establishment of an independent district if it contained 200 or more *white* children, thus encouraging the formation of small all-white enclaves. *See* KY. REV. STAT. § 160.020 (1948), *as amended,* KY. REV. STAT. ANN. § 160.020 (Baldwin Supp. 1974). The Sixth Circuit left this question for the district court to decide, and it was somewhat less than impressed with our argument on this score. On February 4, 1976, the district court entered an order denying relief we sought. We are likely to appeal.

students residing in Jefferson County had attended Louisville's Central High School on a tuition basis and that the Louisville Board had located the virtually all-white Atherton High School within the boundaries of the Jefferson County School District, far from the centers of black population in the Louisville School District,[243] and had permitted some Jefferson County students to attend Atherton. We also placed in the record examples of legislative recognition of the interrelationship between the two districts, such as legislation dealing specifically with the transfer of property between the two districts[244] and legislation giving special taxing powers to the two districts alone pursuant to a financial arrangement that the districts themselves had worked out.[245]

In March 1973, the district court ruled, quite inexplicably, that both districts were in constitutional compliance because we had not shown that the existing segregation was due to anything other than the neighborhood school system resulting from geographic attendance zoning. The court noted, however, that if the Louisville School District were required to desegregate within its boundaries, white flight would make the desegregation counterproductive.[246] On December 28, 1973, the Sixth Circuit reversed the district court on the question whether the districts were in constitutional compliance and, in light of its decision in *Milliken*, held that the district court had the power to impose an interdistrict remedy here.[247] On July 24, 1974, after a four-day evidentiary hearing, the district court entered an order approving a desegregation plan under which the Louisville and Jefferson County school

243. If the school had remained at the former site, it would presumably have been desegregated, as was a junior high school located there.

244. KY. REV. STAT. ANN. § 160.048 (Baldwin 1973).

245. *Id.* § 160.607, *as amended, id.* §§ 160.607-.609 (Baldwin Supp. 1974). The first $600,000 was to go to "any school district within the county operating with a financial deficit prior to July 1, 1971," which was the Louisville School District.

246. Haycraft v. Board of Educ., Civil No. 73-1408 (E.D. Ky., Mar. 8, 1973); Newburg Area Council v. Board of Educ., Civil No. 73-1403 (E.D. Ky., Mar. 8, 1973). If the power to cross school district lines did exist, no one ever seriously questioned the proposition that the power would have to be exercised to eliminate effectively the segregation found to exist within both districts.

247. Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925 (6th Cir. 1973). We had argued before the Sixth Circuit that the court should not rest its holding on the power to cross school district lines on its decision in *Milliken*; our case was a stronger one and no one could then know how the Supreme Court would decide *Milliken*. Although the court did discuss the differences between our case and *Milliken*, it did not expressly develop a different rationale for holding that the power to cross boundary lines existed in our case.

districts would be merged[248] and all of the schools within the county would be desegregated, with no school less than 16 percent nor more than 24 percent black in composition.

C. *The Post-*Milliken *Litigation*

1. *Our Arguments on Remand*

The district court order remained in effect for exactly two days. The school boards had petitioned the Supreme Court for certiorari after the Sixth Circuit had ruled in our favor, and on July 26, 1974, when the Supreme Court decided *Milliken*, the Supreme Court entered the following order in our case:

> Petitions for writs of certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Milliken v. Bradley* . . . . Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall would grant certiorari and without further briefing or oral argument affirm the judgments.[249]

We were unsuccessful in our efforts to persuade the Sixth Circuit to hear the case immediately, but the court ordered an expedited appeal, and the case was argued in October 1974. Our basic approach remained the same as before, but we expanded our arguments and tried to relate them to the "interdistrict violation" test of *Milliken*. First, of course, we emphasized the factual differences between our case and *Milliken*. Second, in what may be called our "*Milliken* argument," we argued that in the circumstances of our case an interdistrict remedy was proper and possibly even required under *Milliken*. And third, we argued that because our case involved two districts located in a single county, both of which were in constitutional violation, the case was controlled by *Wright* and *Scotland Neck* rather than by *Milliken*.[250]

In our first argument, we distinguished *Milliken* in every way possible: (1) The major difference, of course, was that here both

248. The district court incorporated in its decree all the provisions of state law relating to school district merger, including the provisions specifically applicable to a merger within Jefferson County. Anchorage's one elementary school was also included in the plan, but the court did not order the merger of Anchorage with the Jefferson County district.

249. Board of Educ. v. Newburg Area Council, Inc., 418 U.S. 918 (1974).

250. We did not pay much attention to Anchorage, although, as pointed out previously, we argued that it should be included in the desegregation plan because the district itself was a vestige of state-imposed segregation.

districts were found to be in constitutional violation.[251] (2) Unlike *Milliken*, the present suit was brought to end segregation existing in both districts and from the outset had sought to impose an interdistrict remedy. (3) In *Milliken* the segregation existing within the Detroit district was violative of state law, while in the Louisville and Jefferson County districts, the segregation was required by state law prior to *Brown*. (4) Because desegregation in our case involved the basic state educational unit—the county—school district lines could be crossed in a manner fully consistent with state law, whether by merger or otherwise, and thus the serious administrative problems that concerned the Court in *Milliken* could be avoided. (5) Here, unlike *Milliken*, school district lines did not follow political boundaries, and including the 10,000 white children who lived in the "annexation area" in the Louisville School District would have facilitated desegregation within the Louisville district. (6) In *Milliken*, there was no history of interaction between the Detroit and suburban school districts included in the metropolitan desegregation plan, whereas in our case there was a continuous history of interaction between the districts, as evidenced by the sending of county black students to Central, the location of Atherton in the county school district and the attendance of county students there, and the special legislation involving the two districts. Thus, we argued that the very significant differences between the situation presented in *Milliken* and that presented in our case clearly demonstrated that *Milliken* in no way precluded the imposition of an interdistrict remedy in our case.

Our second argument, our "*Milliken*" argument, had three parts. First, we argued that crossing school district lines was justified in metropolitan Louisville because both districts were in constitutional violation, particularly since they were located in a single county, the basic educational unit in the state, and the interdistrict remedy could be imposed in accordance with the provisions of state law.[252] Second, we developed the historic and continuing interrelationship argument fully,[253] empha-

251. The substantive issue of constitutional violation on the part of the boards was not before the court on remand. Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358, 1359 (6th Cir. 1974).

252. The rationale for arguing that an interdistrict remedy can be imposed when all of the districts sought to be included in a metropolitan desegregation plan are in constitutional violation has been set forth above. *See* text accompanying notes 207-11 *supra*. We made essentially the same argument here, limiting it, however, to two districts located within the same county.

253. This argument proceeds on the assumption that only the urban district is in

sizing that the school district lines did not have independent significance,[254] that they had been disregarded in the past in conforming to state-imposed segregation,[255] and that they were still being disregarded for various nonsegregatory purposes in accordance with state law.[256] Therefore, we argued that if a federal district court disregarded school district lines on these facts it would be doing nothing more than that which the school boards themselves had done and that which was recognized by state law. Third, we combined these first two arguments and attempted to show that there was a "demonstrated relationship" between the segregation existing in the county district and that existing in the Louisville district.

This "demonstrated relationship" was our effort to bring the case squarely within the "interdistrict violation and interdistrict effect" language of *Milliken*. First, there was the matter of the 10,000 white students residing in the "annexation area." If school district lines had not been drawn the way they were, that is, if the boundaries of the Louisville School District did expand coterminously with the boundaries of the City of Louisville, it would have been possible to achieve greater desegregation within the Louisville School District alone.

Of more significance to showing an interdistrict violation and effect was our argument that in Jefferson County as a whole, it was the separation of the school districts, coupled with the requirement of state-imposed segregation, that was responsible for the patterns of segregation existing in both districts. This argument was based squarely on the

---

violation, and that since the school district lines have already been disregarded by the districts themselves and/or by the state, there is no reason why a federal court should not be able to disregard them in order to insure effective desegregation of the urban district. *See* text accompanying notes 212-14 *supra*. I argued that this rationale applied with even greater force in our case because both districts were in violation and both were located within a single county, the basic educational unit in the state.

254. It was helpful to note that when the legislature enacted a statute authorizing the transfer of territory between the Louisville and Jefferson County school districts, it referred to the boundary lines of the districts as being "artificially drawn." KY. REV. STAT. ANN. § 160.048(1) (Baldwin 1973).

255. We emphasized, of course, the attendance of county black students at Central and the location of Atherton within the boundaries of the county school districts.

256. The legislature recognized this interrelationship by authorizing the transfer of school territory between the districts, *see* statute cited note 244 *supra*, by granting special taxing powers reflecting an arrangement made between the boards themselves, *see* note 245 *supra*, and by providing for the election of board members in the event of a merger between the two districts, *see* KY. REV. STAT. ANN. §§ 160.042, .160, .200, .210 (Baldwin Supp. 1974).

problem of white flight, a problem relied on both by Louisville to explain why it could not desegregate within its boundaries and, interestingly enough, by Jefferson County to explain the racially identifiable character of its three black or relatively black elementary schools. Our argument was a simple one. Although the great majority of black children living in Jefferson County lived within the Louisville School District, prior to *Brown* this pattern was irrelevant because both districts were operating segregated school systems. After *Brown*, any attempt to desegregate within the Louisville district alone would create problems of white flight to the adjoining Jefferson County School District, as the district court had recognized;[257] therefore, the Louisville School District felt it could not desegregate by cross-busing. If there had not been separate districts, all of the schools within the county could have been desegregated below the "tip ratio,"[258] because the countywide black student population was only 20 percent. This being so, the separation of school districts in Jefferson County had the same *effect* as if the district boundaries had been deliberately drawn on racial lines,[259] and the separation had operated to prevent the desegregation of the Louisville School District.[260] We concluded in this vein:

> Even though school segregation was required by law, if Jefferson County had not been divided into two separate school districts whose boundary lines were drawn as they were, when school segregation was no longer constitutionally permissible, desegregation could have occurred in Jefferson County, unencumbered by any problem of white flight, and all the schools located within what is now the Louisville school district and what is now the Jefferson County school district could fully and effectively be desegregated.[261]

Our third basic argument—our "area" argument—was that *Milliken* did not even apply here, and that the case was instead controlled by *Wright* and *Scotland Neck*.[262] This argument began as follows: When

257. *See* note 246 *supra* and accompanying text.

258. In its original opinion the district court had found that "the tip ratio theory has proven itself in the Louisville District as we regrettably believe it has elsewhere."

259. In dealing with claims of racial discrimination, the primary emphasis has been on discriminatory effect. *See* note 46 *supra* and accompanying text.

260. We argued that as long as Louisville would not desegregate its schools, Jefferson County had tried to make its schools attractive to whites and thus had confined 56 percent of its black elementary school students to three black or relatively black schools.

261. Reply Supplemental Brief for Appellant at 14, Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974).

262. I saw this analysis as an important backup argument if the Sixth Circuit on remand were disposed toward reading *Milliken* too broadly.

two school districts are located in a single county, which is the basic educational unit of the state, and these districts can be merged into a single district under state law, the applicable *area* for desegregation purposes is the county; when all vestiges of state-imposed segregation have not been eliminated in either district, a federal court *must* impose a remedy on a county-wide basis if the failure to do so would not effectively eliminate all vestiges of state-imposed segregation in both of the separate districts. Then, because both *Wright* and *Scotland Neck* were based on the adverse effect that "secession" would have on the desegregation of the remaining district, we argued:

> There is no functional difference between holding that a single district not yet fully desegregated cannot split into separate districts, even though this is authorized by state law, and holding that separate districts forming part of a potential single district under state law, both of which are not yet desegregated, cannot remain separate where this would impede desegregation of one of the separate districts, or more accurately, of the potential single district as a whole.[263]

I believed that the oral argument would give a good indication of the "behavioral dynamic" of the lower federal courts after *Milliken*, and it was clear that the Sixth Circuit—or at least the panel that decided our case[264] —was not "reading" *Milliken* broadly and did not see *Milliken* as effectively precluding metropolitan desegregation in most cases. The questioning from the bench focused on the differences between *Milliken* and our case, including the fact of our case's arising in a state where segregation was formerly required by law. The court was not awed by *Milliken*; rather it seemed to be trying to justify imposing an interdistrict remedy, *Milliken* notwithstanding.

2. *The Sixth Circuit Decision*

On December 11, 1974, the court handed down its decision. As I expected after the oral argument, the court reaffirmed its prior holding that the school district lines between the Louisville and Jefferson County school districts could be crossed.[265] The core of the court's opinion was directed toward distinguishing *Milliken*, and the court did so on a number of grounds. The "vital distinction," of course, was that both

263. Supplemental Brief for Appellant at 31, Newburg Area Council, Inc., v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974).

264. The same panel that heard the case originally heard it on remand.

265. Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974).

districts were in constitutional violation,[266] and I continue to believe that whenever this can be shown, a court will be disposed to find that an interdistrict remedy is proper. Second, since the interdistrict remedy would involve only two districts in a single county,[267] the remedy

> would not be likely extensively to disrupt and alter the structure of public education in Kentucky, or even in Jefferson County, nor require the creation of a vast new super school district, as may have resulted from the broad metropolitan remedy considered in *Milliken*.[268]

Third, the court noted that in Kentucky the county was the basic educational unit by statute and that the legislature had referred in a statute to the boundaries of school districts as "artificially drawn school district lines."[269] In contrast, "[s]tatutes of this character were not in effect in Michigan and consequently were not considered by the Supreme Court in *Milliken*."[270] Fourth, unlike the situation that caused the Supreme Court concern in *Milliken*, any administrative problems in the Louisville case could be obviated by the merger or consolidation of the districts under the express provisions of Kentucky law. And finally, there was the "crucial difference" that in our case school district lines

> have been ignored in the past for the purposes of aiding and implementing continued segregation. Such disregarding of school district lines continues to have an effect on racial imbalance in the county's schools, particularly in the location of Atherton High School in the county and away from the core city of Louisville.[271]

The court noted in this connection that while the busing of county black high school students to Louisville's Central High School in pre-*Brown* days might not have by itself been sufficient to justify an interdistrict remedy,[272] the Atherton situation continued to have a segregatory effect, resulting from the cooperation between the two school districts that were to be included in the interdistrict remedy. An additional factor "materially aggravat[ing] the difficulties in disestablishing the dual city school system"[273] was the residence in the annexation area of 10,000

266. *Id.* at 1359.
267. At most three districts would be involved if Anchorage were included.
268. 510 F.2d at 1360.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* The court here was referring to the "Carver District situation" in *Milliken*. *See* note 148 *supra*.
273. 510 F.2d at 1361.

white children. Based on all these factors, the court concluded "that the school district lines in Jefferson County, Kentucky, have been crossed for the purpose and with the actual effect of segregating school children among the public schools of the county on the basis of race."[274]

The court also accepted our "area" argument, based on the applicability of *Wright* and *Scotland Neck*. The court stated:

> We are not confronted here with the problem in *Milliken* in which the remedy approved by the Court of Appeals was broader than the constitutional violation. Rather, the situation presented is that of two districts in the same county of the state being equally guilty in failing to eliminate all vestiges of segregation mandated by the same Kentucky statute. . . .
>
> In [*Wright* and *Scotland Neck*] the Supreme Court refused to permit the establishment of separate school districts within a single county, even though authorized by state law, where it was found that this would impede the process of dismantling a segregated school system. By analogy no justification appears for permitting the city and county school districts in Jefferson County to remain completely autonomous if the effect is to impede the process of desegregating the schools of the county as a whole.[275]

The court then reinstated its opinion of December 28, 1973, and authorized the district court to impose an interdistrict remedy if necessary to eliminate effectively all vestiges of state-imposed segregation existing in the Louisville and Jefferson County school districts.[276]

Shortly thereafter, the Louisville School District initiated a petition for unconditional merger with the Jefferson County School District, which was approved by the State Board of Education, and thus effectively insulated from Supreme Court review the issue of crossing school district lines in Jefferson County.[277] Then on July 30, 1975, the district court ordered the implementation of a county-wide desegregation plan pre-

274. *Id.*

275. *Id.*

276. *Id.* at 1359, 1361. The court directed, however, that any plan providing for an interdistrict remedy was to be postponed until all appeals, if any, in connection with the plan were exhausted. Although the court did not cite the statute, this requirement was in accord with the so-called "Equal Educational Opportunity Act of 1974." *See* 20 U.S.C.A. § 1752 (Supp. 1975).

277. The Jefferson County district sought certiorari only on the question whether it and the Louisville board (to whose "liabilities" it had succeeded on merger) were in constitutional violation, and the petition was denied. 421 U.S. 931 (1975).

pared by the court.[278] Thus, despite *Milliken*, metropolitan desegregation has occurred in Louisville-Jefferson County, Kentucky.

D. *In Summary*

The Sixth Circuit decision on remand can be said to be based on the following factors: (1) both districts were in constitutional violation; (2) the interrelationship between the districts resulted in a disregarding of school district lines, which had a continuing segregatory effect; (3) the way in which the boundary lines were drawn under state law—that is, that the boundaries of the independent school district did not expand with the boundaries of the city—had the effect of aggravating the difficulties of disestablishing the dual city system; and (4) there would be no significant administrative problems in implementing the interdistrict remedy. Any of these factors can be relied on by analogy in another case and can be related to other factors that may be present. The court also held that when both districts in the same county are in constitutional violation, the principles of *Wright* and *Scotland Neck* apply: The districts will not be permitted to remain separate "if the effect is to impede the process of desegregating the schools of the county as a whole."[279] Confronted with the problem of metropolitan desegregation and the imposition of an interdistrict remedy in the wake of *Milliken*, the Sixth Circuit in the Louisville-Jefferson County litigation has exhibited an "institutional behavior" similar to that of other courts confronted with metropolitan desegregation or interdistrict remedies. It

278. Newburg Area Council, Inc. v. Board of Educ., Civil Nos. 7045 & 7291 (W.D. Ky., July 30, 1975). Under the court's plan, any elementary school with a black population not less than 12 percent nor more than 40 percent and any secondary school with a black population of not less than 12 1/2 percent nor more than 35 percent would be considered already sufficiently desegregated. Most of the high schools would range from 14 to 23 percent black in composition. In devising its plan, the court stated that it had "meticulously followed the priorities and remedies set forth in the Equal Educational Opportunity Act of 1974"—"to the extent that the Court believes that the Act complies with the Constitution as interpreted by the current decisions of the federal courts." *Id.* at 4, 2. In addition, a Special Master would "continually monitor the implementation" of the desegregation plan by attending all of the Board meetings "to express the view of the Court in regard to all matters before the Board which relate to desegregation" and by receiving from the superintendant annual reports of the racial percentages in each school and other relevant matters. *Id.* at 20. The court specifically ordered that "if any individual school ratio or population changes in a material fashion, appropriate steps [would] be taken to include the individual school and its students in the general transportation plan." *Id.* at 3.

279. 510 F.2d at 1361.

is this "institutional behavior" which persuades me of the soundness of the strategy of concentrating on "winning small wars."

VII. THE "CONTEMPORARY *Milliken*" CASES

Several cases involving metropolitan desegregation or the crossing of school district lines have either arisen after *Milliken* was decided or have been reconsidered in the light of *Milliken*. These cases will be discussed in this section along with other "contemporary" cases whose results would not appear to be affected by *Milliken*. Although relatively few in number, these cases, considered in conjunction with the Sixth Circuit's decision in the Louisville-Jefferson County case on remand,[280] indicate to me a clear behavioral trend and an institutional behavior of federal courts that in no way reflects a drawing back after *Milliken* or a reluctance to consider the appropriateness of an interdistrict remedy.

The clearest ground for imposing an interdistrict remedy, specifically recognized in *Milliken*, is the situation in which school district lines have been drawn in a racially discriminatory manner. This ground is available when the existence of an all black or predominantly black school district can be shown to be related to pre-*Brown* state-imposed segregation,[281] as was the case in *United States v. Missouri*.[282] Until 1937, the Kinloch district in St. Louis County had operated separate, segregated schools for blacks and whites, as required by Missouri law. In 1937, however, Kinloch was left as a small, virtually all black district when the city of Berkeley, which was located within the Kinloch district, incorporated itself as a city and thus became a separate school system. By agreement, the few whites remaining in the Kinloch district attended school in the adjoining Berkeley district, and the few blacks residing in Berkeley attended school in Kinloch. Over the years a number of school district reorganization plans had been proposed for St. Louis County, but Kinloch was generally excluded from these plans, even though its small number of students and low assessed valuation made "it a prime candidate for reorganization under the standards employed by

280. This was the only "interdistrict remedy" case pending at the time of *Milliken* and thus the only case specifically remanded for further consideration in light of it.

281. *E.g.*, Haney v. Board of Educ., 410 F.2d 920 (8th Cir. 1969); United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *aff'd*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); *see* text accompanying notes 90-96 *supra*.

282. 363 F. Supp. 739 (E.D. Mo. 1973).

the county board."[283] The single time, in 1949, that Kinloch was included in a reorganization plan with Berkeley and Ferguson-Florissant (Ferguson), another white school district in the area, the plan was defeated in a referendum. As of 1971-1972, Kinloch remained virtually all-black, Berkeley had become about 20 percent black, and Ferguson remained virtually all-white.[284]

The district court concluded that Kinloch was created as a part of Missouri's dual system of public education and remained "as a vestige of that system."[285] In addition,

> the factual circumstances here, which show that, because of the race of its resident students, Kinloch district was created and maintained through state action as a small, racially segregated and inadequately funded school district, establish a violation of the Equal Protection Clause that requires affirmative, corrective action by the State of Missouri and its instrumentalities.[286]

Subsequently, in 1975, the district court approved a desegregation plan consolidating the Kinloch, Berkeley, and Ferguson school districts into a single new district.[287] Quoting from *Milliken* that " 'an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district or where district lines have been deliberately drawn on the basis of race,' "[288] the district court asserted:

> This latter statement accurately describes what the evidence in this case shows and what this Court has previously found, i.e., an arrangement of school districts which has caused substantial segregation and which is both a vestige of the previously imposed dual school system and a continuing effect of racially discriminatory state actions on the part of the defendants in this case.[289]

---

283. *Id.* at 745.

284. *Id.*

285. *Id.* at 747.

286. *Id.*

287. United States v. Missouri, 388 F. Supp. 1058 (E.D. Mo.), *aff'd in part and rev'd in part*, 515 F.2d 1365 (8th Cir.) (en banc), *cert. denied*, 96 S. Ct. 374 (1975).

288. *Id.* at 1059, *quoting* 418 U.S. at 745.

289. 388 F. Supp. at 1059. The Ferguson district argued that it should not be included in the consolidation because it "was not directly involved in the creation of Kinloch as an all black district." *Id.* The court rejected this argument, noting that in *Haney* and *United States v. Texas*, "specific acts of discriminatory conduct were not found to have been perpetuated by adjoining school districts" and that in a sense Ferguson was responsible for the maintenance of Kinloch as an all-black district since

On appeal, the Eighth Circuit, sitting en banc, upheld the interdistrict desegregation plan adopted by the district court,[290] despite the disapproval of all three of the districts concerned. The court emphasized first that no district seriously questioned "the district court's finding that Kinloch was racially segregated by discriminatory state action."[291] Although Ferguson had not been an active participant in creating the segregation existing in Kinloch, nevertheless the court of appeals found no error in the district court's conclusion that Ferguson, like Berkeley, was responsible for maintaining Kinloch in its segregative condition.[292] To remedy the constitutional violation, an interdistrict remedy was appropriate. Accepting the conclusions that a merger between Berkeley and Kinloch alone "offered little chance for meaningful desegregation"[293] and that a merger between Ferguson and Kinloch alone offered little chance for financial success, the court of appeals upheld the three-district plan submitted by state and county officials[294] and approved by the district court as "the least disruptive alternative which is educationally sound, administratively feasible, and which promises to achieve at least the minimum amount of desegregation that is constitutionally required."[295]

The rationale of the *United States v. Missouri* decision, particularly the connection between the Kinloch district's present racial composition and the past state-imposed segregation, as well as the racially discriminatory basis for failing to include the district in reorganization plans, can be applied to other cases in which a predominantly black urban district in a state previously requiring segregation is surrounded by white

---

the only reason that Kinloch had not been included in previous reorganization plans "was the opposition, based on racial consideration, of the surrounding districts to numerous proposals to alter that situation, including the rejection by the electorate of the 1949 reorganization plan." *Id.* at 1059-60.

290. 515 F.2d 1365 (8th Cir. 1975). The court of appeals modified the district court order, however, by reducing the maximum tax rate set by the district court. *Id.* at 1373.

291. *Id.* at 1369.

292. *See* note 288 *supra.*

293. 515 F.2d at 1371.

294. *Id.* The district court had emphasized that the interdistrict remedy was "substantially consistent" with Missouri law and would not "result in extensive disruption of public education in Missouri." *Id.* at 1370.

295. *Id.* at 1371, *quoting* 388 F. Supp. at 159. Certiorari was denied by the Supreme Court. 96 S. Ct. 374 (1975). Chief Justice Burger and Justice Powell favored a grant of certiorari limited to the question of whether the federal district court had the power "to fix and impose the school tax rate upon the residents of the consolidated school district without allowing the rate to be determined in accordance with Missouri law." *Id.*

suburban districts. By the same token, without regard to any history of state-imposed segregation, whenever the *effect* of a school district reorganization is the encirclement of a predominantly or disproportionately black school district by one or more virtually all white districts, a strong argument can be made that "school district lines were deliberately drawn on the basis of race."[296] Although the Court in *Milliken* used the language of "deliberately drawn," this language, like the "segregative intent" language of *Keyes*,[297] must be read in light of the principle that discriminatory effect rather than discriminatory purpose is the test in racial discrimination claims. Certainly, if after a reorganization of school districts, a predominantly or disproportionately black school district is surrounded by one or more virtually all white districts, there is at least a presumption that this resultant effect was not "accidental."[298]

A case exemplifying the importance of discriminatory effect is *Hoots v. Pennsylvania*,[299] decided the year before *Milliken*. The state board of education in 1971 had approved a school reorganization plan establishing six school districts in a portion of Allegheny County, east of the city of Pittsburgh. One of these districts, the General Braddock Area School District, included the only three school districts in the area having any substantial black population.[300] The district court found that the neighboring school districts had "continually sought to avoid being included in a school district with"[301] these districts because of the latters' high concentration of black students. It also found that there were a number of other ways in which the school districts in the area could have been reorganized, that reorganization plans including these three districts with other districts had been proposed, but were rejected, and that the present reorganization plan disregarded the promulgated state board standards for school reorganization as well as recognized

296. Milliken v. Bradley, 418 U.S. 717, 745 (1974).

297. *See* text accompanying notes 47-50 *supra*.

298. By analogy to *Keyes*, the burden to rebut "segregative intent" should be on the state. *See* note 48 *supra* and accompanying text.

299. 359 F. Supp. 807 (W.D. Pa. 1973), *appeal dismissed*, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974).

300. *Id.* at 819. The General Braddock Area School District was 45 percent black. The other five districts had from less than 1 percent to a maximum of 9.6 percent black enrollment. Of the 46 districts in Allegheny County outside the City of Pittsburgh, only 15 had a black enrollment in excess of 5 percent, only four had a black enrollment in excess of 30 percent, and only one district other than General Braddock had a black enrollment in excess of 40 percent. *Id.* at 816.

301. *Id.*

educational standards.[302] Concluding that the actions of the state and county boards in establishing the boundary lines for the General Braddock Area School District were unconstitutional as the equivalent of drawing of school district lines on the basis of race,[303] the court directed the state and county officials to present a comprehensive desegregation plan for the entire area to remedy the constitutional violations.[304]

The same result, in my view, would clearly prevail after *Milliken.* Whenever there has been a reorganization of school districts and the effect has been to create one or more districts that are disproportionately black in student composition, it can generally be shown, as *Hoots* indicates, that school district lines were "deliberately drawn on the basis of race."[305] The district court may make a specific finding to that effect, as in *Hoots,* but even if it does not, the resulting discriminatory effect should be sufficient to establish a constitutional violation and to require the redrawing of school district lines. Similarly, whenever adjoining school districts have refused to merge or consolidate pursuant to the provisions of state law, and it can be shown that the refusal to do so was based on considerations of race, the failure to merge or consolidate may itself constitute an act of racial discrimination that can be remedied only by court-ordered merger or consolidation.

For example, in *Clark v. Board of Education,*[306] a pre-*Milliken* case in which I was counsel for the plaintiffs, suit was brought to require the

---

302. *Id.* at 820.

303. In so holding, the court noted that: (1) public school authorities had made "educational policy decisions which were based wholly or in part on considerations of the race of students and which contributed to increasing racial segregation in the public schools;" (2) the boards were "accountable for the natural, probable and foreseeable consequences of their policies and practices," and had built upon existing patterns of residential segregation to preserve segregation in the schools; and (3) the "natural, foreseeable and actual effect of combining [the three school districts] into a single school district was to perpetuate, exacerbate and maximize segregation of school pupils." *Id.* at 822-23.

304. The state and county defendants filed a proposed desegregation plan that included additional districts and did not appeal the district court's order. When two affected districts sought to intervene as defendants to take an appeal, their petitions were denied as untimely; they had been notified of the litigation before the original trial and had been urged by the Attorney-General of Pennsylvania to intervene at that time. On appeal, the denial of the petitions to intervene was affirmed, thus dismissing the attempted appeal on the merits. Hoots v. Pennsylvania, 495 F.2d 1095 (3d Cir.), *cert. denied,* 419 U.S. 986 (1974).

305. Milliken v. Bradley, 418 U.S. 717, 745 (1974).

306. 350 F. Supp. 149 (E.D. Ky. 1972).

merger of the Shelbyville and Shelby County school districts. Both districts were relatively small Kentucky districts, the Shelbyville district having about 1800 students, 30 percent of whom were black, and the Shelby County district having about 2800 students, only five percent of whom were black.[307] We contended that the refusal of the county district to merge with the Shelbyville district was based upon explicitly racial reasons and thus constituted racial discrimination against the black plaintiffs.[308] In overruling the school boards' motion to dismiss, the district court summarized our position as follows:

> That the Kentucky Department of Education has for some time recommended that the two school districts merge, but that they have refused to do so because the Shelbyville School "District has a substantially larger proportion of black students so that in the event of merger the County Board would have the responsibility of educating those black students, which responsibility it (the Shelby County District) (does) not wish to assume."[309]

The district court held that it had the power to order the districts to merge if a merger was necessary to protect federal constitutional rights and that it would order a merger if, as alleged, separate districts were maintained for purposes of racial discrimination.[310]

In cases of this kind, the plaintiffs must prove discriminatory intent, for without a showing of such intent, the failure to merge would not constitute racial discrimination. Although we thought that we could put together a fairly strong showing of discriminatory intent, it became unnecessary. Having lost the motion to dismiss, the Shelbyville board reassessed its position[311] and, following the election of a new board

---

307. *Id.* at 150. In this case, as in the Louisville-Jefferson County litigation, the school district lines did not follow political boundaries. Some of the essentially rural parts of the county were included within the Shelbyville School District, and white parents residing in these areas wanted a merger with the Shelbyville County district because the district offered agricultural courses and its schedule was geared to farming operations. These parents, the "silent plaintiffs" in the case, had brought suit in state court to challenge a bond issue for a new, much-needed high school in Shelbyville.

308. We also contended that because the Shelby County district had substantially greater taxable wealth than the Shelbyville district, the students in Shelbyville were being denied equality of educational opportunity. *Rodriguez* had not been decided.

309. 350 F. Supp. at 150.

310. In this part of our argument we had relied primarily on Gomillion v. Lightfoot, 364 U.S. 339 (1960), and the district court accepted our position. *See* 350 F. Supp. at 152.

311. As a practical matter, everything depended on our winning the motion to dismiss. The pendency of our suit, coupled with the state court suit challenging the

member, voted to initiate merger proceedings, which the State Board ordered. Thus the case became moot. I think it is clear under *Milliken* that if the refusal of adjoining districts to merge or consolidate is shown to have been based on racial considerations—and the district court's factual finding on this point will be all-important—there will exist a case of school district lines "deliberately drawn on the basis of race,"[312] which can be remedied only by ordering the districts to merge or consolidate in accordance with the applicable provisions of state law.

Whenever a disproportionately black urban school district adjacent to virtually all white suburban districts has been specifically excluded by state law from a major school district reorganization effort, a strong argument can be made that the effect of such exclusion is that discriminatory acts of state officials have substantially caused interdistrict segregation.[313] This ground was one of those relied upon by the three-judge court in *Evans v. Buchanan*[314] in holding that metropolitan desegregation could be ordered and an interdistrict remedy imposed to eliminate the segregation existing within the Wilmington School District. In 1968 legislation was enacted[315] to "provide the framework for an effective and orderly reorganization of the existing school districts of this State."[316] It specifically provided that: "The proposed school district for the City of Wilmington shall be the City of Wilmington with the territory within its limits."[317] At the time the legislation was enacted, the New Castle County school enrollment, including Wilmington, was 83 percent white and 17 percent black, while the Wilmington school

---

legality of the bond issue, *see* note 307 *supra*, made the bonds unmarketable and prevented the building of the new high school that Shelbyville needed if it were to continue to operate as a separate district. In addition, the pendency of our suit and the prospect of an eventual trial heightened the political pressure being exerted on the Shelbyville board to merge. The merger was an issue in the upcoming Shelbyville board election, and when a "pro-merger" candidate was elected, there was a majority on the Shelbyville board favoring merger.

312. Milliken v. Bradley, 418 U.S. 717, 745 (1974).

313. *See* text accompanying notes 186-90 *supra*.

314. 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 96 S. Ct. 381 (1975).

315. Educational Advancement Act of 1968, ch. 292, § 6, 56 Del. Laws 977 (codified at DEL. CODE ANN. tit. 14, §§ 1001-94 (1974)).

316. DEL. CODE ANN. tit. 14, § 1001 (1974).

317. *Id.* § 1004(c)(4). Wilmington would also have been implicitly excluded by § 1004(c)(2), which limited the maximum enrollment in any proposed school district to 12,000. Newark, a virtually all white district in New Castle County with an enrollment of approximately 12,000 students, was the one other Delaware district affected by § 1004(c)(4). *See* 393 F. Supp. at 438-39.

enrollment alone was 66 percent black and 34 percent white.[318]

In a two-to-one decision, the court held that the specific exclusion of Wilmington from school district reorganizations constituted an act of racial discrimination. Because Wilmington had "historically been treated distinctively in Delaware education," because no reference to race appeared in either the legislation or the legislative debates, and because "all Wilmington legislators, black and white, voted for the legislation," the court was unwilling to find the legislature's action to be "purposefully racially discriminatory."[319] Nevertheless, the court looked to the racially discriminatory *effect* of the exclusion. The exclusion of the Wilmington district from possible school reorganization meant that 75 percent of all the black children in New Castle County—the ones who resided in the Wilmington School District, the only predominantly black school district in the state—could not be included in any reorganization plan.[320] The court likened this exclusion to a racial classification, to be treated as "inherently suspect" and to be tested against the compelling state interest standard. As a result of the legislative exclusion, the state board "could not have significantly reduced the growing racial isolation in New Castle County schools had it chosen to do so."[321] When the court considered the purportedly compelling interests advanced in favor of the exclusion, it found them wanting.[322] In considering the implications of *Milliken*, the court concluded that the unconstitutional exclusion

318. 393 F. Supp. at 439.

319. *Id.*

320. *Id.* at 439-40.

321. *Id.* at 442. At the time the statute was enacted, Wilmington had not eliminated the vestiges of state-imposed segregation and was still practicing de jure segregation. In the court's view, the effect of the statute was to make "consolidation promoting racial balance substantially less accessible than other education strategies," and therefore the fact that the Newark district was also excluded from school reorganizations did not "mitigate the racially specific effect of the Act." *Id.; see* note 317 *supra.*

322. The following interests were advanced: (1) a belief, which the court found to be erroneous, that the state constitution required a two-thirds majority of each house of the legislature in order to alter the Wilmington School District's boundaries and that excluding Wilmington was therefore necessary to secure passage of the general reorganization act; (2) the coterminous quality of the Wilmington city and school district boundaries, which the court discounted in terms of a "compelling state interest" because students from throughout New Castle County had for many years attended school in Wilmington and because there was no requirement that city boundaries be observed in regard to other consolidations; and (3) the size of the Wilmington district and the 12,000-student limitation on the size of reorganized districts, which the court found rational but not "compelling" because educational experts disagreed on the desirable maximum size of school districts. 393 F. Supp. at 443-45.

of Wilmington from possible school reorganization "plainly constitutes an 'inter-district violation.' "[323] Although, as will be discussed shortly, the majority in *Evans* advanced other grounds for imposing an interdistrict remedy, the majority also made it clear that the statutory exclusion alone would have been a sufficient basis.[324]

Closely related to the exclusion of a disproportionately black school district from possible school reorganization is the exclusion of school districts from metropolitan consolidation plans so that a disproportionately black urban school district will remain separate from the suburban districts while other governmental functions are consolidated on a metropolitan basis.[325] In *United States v. Board of School Commissioners*,[326] the Seventh Circuit had before it a metropolitan desegregation plan designed to remedy the de jure segregation existing within the Indianapolis School District. The plan included 19 school districts in and adjacent to Marion County, the county in which Indianapolis is located, although the Indianapolis School District was the only district shown to have committed any acts of de jure segregation.[327] Because the district court in approving the interdistrict plan had relied on essentially the same analysis as that used by the lower courts in *Milliken*,[328] after the Supreme Court decided *Milliken* the Seventh Circuit set aside the plan and reversed the district court with respect to

---

323. *Id.* at 445.

324. The dissenting judge took the position that the statute's exclusion of Wilmington from possible reorganization did not change "the status quo so as to have interdistrict effect" and that it did not constitute a "suspect racial classification." *Id.* at 450 (dissenting opinion).

325. Although school districts have traditionally not been included in metropolitan consolidation plans, it is difficult to see why this should be the case. As a practical matter, the school districts are not included today because when the effect of metropolitan consolidation would be to combine urban and suburban school districts, white middle-class surburbanites would overwhelmingly vote against merger. *See* United States v. Board of School Comm'rs, Civil No. 68-225, at 3-5 (S.D. Ind., Aug. 1, 1975) (memorandum of decision). As it is, urban blacks tend to lose in all aspects of metropolitan consolidations. They lose by consolidation whatever political power they have because of their greater concentration within the central city, without gaining the benefit of a broader tax base to be used for the education of their children, let alone the elimination of racially segregated schools within the urban school district. Recently the Supreme Court held that the dilution of black political power by metropolitan consolidation is not violative of the Voting Rights Act of 1965. City of Richmond v. United States, 422 U.S. 358 (1975).

326. 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

327. *Id.* at 79.

328. *See id.* at 78-80.

those school districts located outside Marion County. With respect to those districts located within Marion County, however, the court of appeals remanded the case for further proceedings. The importance of the county boundaries was due primarily to the legislature's enactment in 1969 of the Uni-Gov Act,[329] which consolidated the City of Indianapolis and Marion County into a unified metropolitan city government but expressly provided that the boundaries of the Indianapolis School District would not be affected by the expansion.[330] The Seventh Circuit directed the district court to determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of the boundaries of the Indianapolis School District "warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*."[331]

On remand, the district court resolved the issue in the affirmative, ordering an interdistrict remedy including all of Marion County.[332] In its opinion, the court expanded the findings of fact—obviously in light of *Milliken*—to form a broader basis for the remedy it imposed. First, drawing upon the concurrence of Justice Stewart that " 'purposeful, racially discriminatory use of state housing or zoning laws' "[333] by state officials might call for an interdistrict remedy, the court specifically found that the location of public housing projects by state instrumentalities had "obviously tended to cause and to perpetuate the segregation of black pupils in" the Indianapolis School District.[334] The court further

329. Act of March 13, 1969, ch. 173, [1969] Ind. Acts 357 (codified at IND. ANN. STAT. CODE §§ 18-4-1-1 to -4-15-2 (Burns 1974).

330. IND. ANN. STAT. CODE § 18-4-3-14 (Burns 1974).

331. 503 F.2d at 86. The court noted that in *Milliken* the coterminous boundaries of the city of Detroit and the Detroit School District were " 'established over a century ago by neutral legislation when the city was incorporated.' " *Id.* at 86 n.22, *quoting* Milliken v. Bradley, 418 U.S. 717, 748 (1974). The failure to include the Indianapolis School District within Uni-Gov might constitute the situation in which " 'racially discriminatory acts of the state . . . have been a substantial cause of inter-district segregation.' " *Id.* at 86 n.23, *quoting* Milliken v. Bradley, 418 U.S. 717, 745 (1974).

332. United States v. Board of School Comm'rs, Civil No. 68-225 (S.D. Ind., Aug. 1, 1975) (memorandum of decision and judgment). The remedy included two cities and one town that were excluded from the Indianapolis metropolitan consolidation plans under Uni-Gov.

333. Civil No. 68-225, at 2 (memorandum of decision), *quoting* Milliken v. Bradley, 418 U.S. 717, 755 (1974) (concurring opinion).

334. Civil No. 68-225, at 3 (memorandum of decision). All housing projects had been located within the Indianapolis School District boundaries and notably 98 percent of all project residents (excluding projects for the elderly) were black. The state instrumentalities to which the court referred were the Metropolitan Development Commission of Marion County, which had county-wide zoning authority, and The Housing

found that the suburban Marion County school districts had "consistently resisted the movement of black citizens or black pupils into their territory," resisted school consolidation, and resisted "erection of public housing projects outside" the Indianapolis School District.[335] Reemphasizing the state's affirmative duty to assist in desegregating the Indianapolis School District because the state had promoted segregation and inhibited desegregation in the past within the district,[336] the court noted that in 1974 the state legislature had taken certain steps facilitating interdistrict relief in recognition of this duty.[337] Taken in conjunction with the court's earlier findings that a unitary school system could not be implemented within the city district alone because the system would be unworkable, these new findings and developments led the court to conclude that the fourteenth amendment compelled the court to order transfers of black students from the Indianapolis School District to the surrounding suburban school districts to effect a constitutionally acceptable desegregation of the Indianapolis School District.[338]

In essence, the district court in the Indianapolis case demonstrated the same "institutional behavior" as the court of appeals in the Louisville-Jefferson County case—that is, it focused on the particular circumstances that were present and advanced as many grounds as possible to justify imposing an interdistrict remedy. The federal district court in *Evans v. Buchanan* exhibited a similar institutional behavior. In addition to the statutory exclusion from reorganization ground discussed

---

Authority of the City of Indianapolis, which had authority to locate housing projects up to five miles outside the city corporation limits. *Id.* As part of the relief ordered, the Housing Authority of the City of Indianapolis was enjoined from locating any additional public housing units within the boundaries of the Indianapolis School District. *Id.* at 11.

335. *Id.* at 3.

336. *Id.* at 4. The court of appeals had concurred with this finding. 503 F.2d at 80.

337. Civil No. 68-225, at 5 (memorandum of decision); *see* Act of Feb. 20, 1974, Pub. L. No. 94 § 1, [1974] Ind. Acts 345 (codified at IND. ANN. STAT. CODE § 20-8.1-6.5-1 to -10 (Burns 1975)). The statute provided the means for paying the costs of interdistrict transfers required by the fourteenth amendment and ordered by the courts.

338. Civil No. 68-225, at 7 (memorandum of decision). The court's conclusion matched the finding required by the Indiana legislature for applicability of the statutory interdistrict transfer regulations. *See* IND. ANN. STAT. CODE § 20-8.1-6.5-1(c) (Burns 1975). In determining the *particular* relief to be ordered, the court gave special attention to the probability of white flight. The court specifically declined to order desegregation within the Indianapolis School District alone because this "would immediately accelerate white flight and unbalance the entire system beyond saving." Civil No. 68-225, at 8, *supra.* During the 1974-75 school year, the city system was 42.43 percent black while the suburban school districts were virtually all white. *Id.*

above,[339] the *Evans* court relied on two other grounds as well: (1) the historic, if not continuing, interrelationship between Wilmington and the suburban districts in pre-*Brown* days, and (2) the actions of the state in producing racial residential segregation between the urban and suburban areas.

Wilmington, like many urban districts, had witnessed the movement of whites from the city to the suburbs.[340] While its population decreased in absolute terms, its proportionate black population had tripled since 1950. In 1973 the racial composition of the Wilmington schools was approximately 83 percent black while that of the surrounding suburban school districts in New Castle County[341] was only 6 percent black, resulting in an overall racial composition of 17 percent black and 83 percent white.[342] Clearly, this was a case in which a desegregation plan limited to the urban district alone would be ineffective, but in which metropolitan desegregation would be fully effective to end the constitutional violation existing within the Wilmington district.

As its first step, the court looked at the interrelationship between the Wilmington and suburban school districts and found that in pre-*Brown* days, all the black high school students in the county attended Howard High School in Wilmington. Moreover, black elementary and junior high students from the suburban areas often attended black schools in Wilmington so that, "to a significant extent, black schools in Wilmington under the *de jure* system were schools for black children from throughout New Castle County."[343] In addition, white children residing in the suburban districts often attended white schools in Wilmington. This interrelationship between Wilmington and the suburban districts, however, was not a continuing one as it was in Louisville-Jefferson County. After *Brown*, the suburban black students attended schools within their own districts, and as the suburban districts expanded, the districts were able to educate all their students in their own schools. Nevertheless, it was at least arguable that when there was an interrelationship between the districts for the purpose of facilitating

339. *See* text accompanying notes 313-24 *supra.*

340. By the 1970 census, 43 percent of Wilmington's residents were black, but only 4.5 percent of the suburban residents were black. *See* Evans v. Buchanan, 393 F. Supp. 428, 432 (D. Del.), *aff'd mem.*, 96 S. Ct. 381 (1975).

341. New Castle County included Wilmington.

342. 393 F. Supp. at 433.

343. *Id.*

state-imposed segregation, it is not beyond the power of the federal court to treat the districts as a single unit in order to effect the desegregation constitutionally required of the urban district.

The court then turned to governmental responsibility for racial residential segregation between the urban and suburban areas in an illustration of what Justice Stewart may have meant by "purposeful, racially discriminatory use of state housing or zoning laws":[344]

> The growth of identifiably black schools [within Wilmington] mirrored population shifts in New Castle County. To a significant extent these demographic changes, i.e., the net outmigration of white population and increase of city black population in the last two decades, resulted not exclusively from individual residential choice and economics, but also from assistance, encouragement, and authorization by governmental policies.[345]

The court then ticked off these governmental polices: (1) Federal Housing Administration policies, which until 1949 "advocated racially and economically homogeneous neighborhoods;"[346] (2) continued recording of racially restrictive covenants in New Castle County real estate deeds until 1973; (3) language in a Delaware Real Estate Commission publication "making racial discrimination a matter of realtor ethics," language which was not eliminated from the state publication until 1970;[347] (4) the minimal number of public housing units operated outside the City of Wilmington by the Wilmington Housing Authority despite its jurisdiction until 1972 to establish such units up to five miles beyond the city limits; (5) the complete failure of the New Castle County Housing Authority, created in 1972, to build any housing units in the suburbs or to obtain the necessary rezoning or site approval from the New Castle County Council;[348] (6) certain policies of the Wilming-

344. Milliken v. Bradley, 418 U.S. 717, 755 (1974) (concurring opinion).

345. 393 F. Supp. at 434.

346. *Id.*

347. *Id.* at 434-35. The language in question was contained in a document reprinting the Code of Ethics of the National Association of Real Estate Boards:

> A realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood.

393 F. Supp. at 434. A survey of the period from 1965 to 1967 indicated that while 51 percent of the housing listed for sale in Wilmington was "open" to blacks, only 7 percent of the housing listed for sale in the suburbs was similarly "open." *Id.* at 435.

348. *Id.*

ton School Board, such as optional attendance zoning, which resulted in a proportionately larger black population in the schools from which the whites transferred;[349] and (7) state-subsidized transportation of students to private and parochial schools outside the student's assigned public school district, which enabled whites living in Wilmington to attend parochial and private schools in New Castle County.[350] The court concluded:

> Governmental authorities condoned and encouraged discrimination in the private housing market and provided public housing almost exclusively within the confines of Wilmington. The specific effect of these policies was to restrict the availability of private and public housing to blacks in suburban New Castle County at a time when housing became increasingly available to them in Wilmington. . . . [G]overnmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades.[351]

In summary then, the three-judge district court held that an interdistrict remedy was justified in Wilmington-New Castle County because (1) at the time of *Brown*, de jure segregation in New Castle County was a cooperative venture involving both city and suburbs so that in 1954, a desegregation decree could properly have considered city and suburbs together for purposes of remedy;[352] (2) since that time, although the school districts had operated independently of one another, "governmental authorities [had] contributed to the racial isolation of city from suburbs [so that] the racial characteristics of city and suburban schools are still interrelated;"[353] and (3) the statutory exclusion of Wilmington from school reorganization had a racially discriminatory effect. Taken together, these three grounds justified imposing an interdistrict remedy in the case.[354]

---

349. *Id.* at 435-36. These policies may have been designed to minimize the movement of white families to the suburbs, but they seemed to have the opposite effect.

350. *Id.* at 436.

351. *Id.* at 438.

352. *Id.* at 437. In this connection, the court cited *Wright* and *Scotland Neck*, which I see as being similar to the area of desegregation approach that we used in the Louisville-Jefferson County litigation. *See* text accompanying notes 262-63 *supra.*

353. *Id.* at 438.

354. The court noted that the remedy would be limited to New Castle County and involve, at most, twelve school districts totalling less than 88,000 students. In addition, Delaware history and law provided for interdistrict arrangements short of consolidation. *Id.* at 446.

Because the three-judge district court had granted injunctive relief, the case was directly appealable to the Supreme Court.[355] If the Court had been disposed to expand on its holding in *Milliken*, or if it had been disposed at this time to consider placing further barriers in the path of metropolitan desegregation, it would have noted probable jurisdiction. Instead, it summarily affirmed the decision of the three-judge district court.[356] The summary affirmance is significant, both legally and behaviorally. In the view of many observers, a summary affirmance does not necessarily indicate agreement with the decision of the lower court and may not be significantly different from a denial of certiorari in the sense that it merely indicates that the Court does not wish to consider the question. Nevertheless, the *binding effect* of the decision on the lower federal courts is the same as if it had been handed down after plenary review.[357] To put it another way, unless and until the Supreme Court grants review in another case involving metropolitan desegregation and the crossing of school district lines, its summary affirmance of *Evans* constitutes, for precedential purposes, an *endorsement* of the grounds relied on by the district court in ordering interdis-

355. 28 U.S.C. § 1253 (1970).

356. 96 S. Ct. 381 (1975). Justice Rehnquist, joined by Justice Powell and Chief Justice Burger, dissented on jurisdictional and procedural grounds from the Court's summary affirmance of the district court decision. He first argued that the case was properly before a three-judge district court only on the basis that the plaintiffs sought to enjoin the operation of the 1968 school consolidation statute, which had excluded Wilmington from its provisions. The three-judge district court did in fact enjoin the Delaware State Board of Education from relying on the statute's provisions, but since the authority granted under that statute had expired by its own force on July 1, 1969, Justice Rehnquist contended that the issue of the statute's constitutionality was moot. Therefore, the three-judge district court should not have passed upon the statute, and should have dissolved itself. Since the court did not do so, the only proper action for the Supreme Court, according to Justice Rehnquist, was to reverse the granting of injunctive relief and to remand the case so that the case could proceed before a single-judge court. 96 S. Ct. at 387. Second, no matter how the court ruled on the granting of the injunction against the enforcement of the 1968 statute, Justice Rehnquist seriously doubted that the Court had jurisdiction to deal with the "*Milliken* issues" at all on the appeal and opined that the Court should have noted probable jurisdiction to resolve the question. *Id.* at 382, 384. He strongly lamented the fact that "[t]he Court's summary affirmance . . . not only wrongfully upholds an erroneous injunction issued by the District Court, but because of the difficult jurisdictional questions present in this case leaves totally beclouded and uncertain what is decided by that summary affirmance." *Id.* at 382.

357. As the Court has recently stated: "the lower courts are bound by summary decisions of this Court 'until such time as the Court informs [them] that [they] are not.'" Hicks v. Miranda, 422 U.S. 332, 344-45 (1975). *See also* Thonen v. Jenkins, 517 F.2d 3, 7 (4th Cir. 1975); Doe v. Hodgson, 500 F.2d 1206 (2d Cir. 1974).

trict relief in *Evans*. This endorsement gives greater cogency both to those grounds when they are subsequently relied on in other cases and to the granting of interdistrict relief generally. Although lower courts recognize that the endorsement is a limited one,[358] nonetheless, from a behavioral standpoint, they can see that the Supreme Court is not disposed at this time to place further barriers in the way of metropolitan desegregation or to review decisions of lower federal courts granting such relief.[359] This awareness, coupled with the demonstrated "institutional behavior" of the lower courts that have dealt with metropolitan desegregation problems in the wake of *Milliken*, can only encourage other courts to follow in the path of *Evans*. Thus, the Supreme Court's summary affirmance of *Evans* must be viewed, at least at this time, as a strong plus in the struggle for metropolitan desegregation.

The only unsuccessful "contemporary *Milliken*" case that research has disclosed is *Wheeler v. Durham City Board of Education*,[360] which was decided by the district court shortly before *Milliken* and, in the court's view, reinforced by it.[361] In *Wheeler*, both the Durham City and Durham County school districts were operating under court-ordered desegregation plans when the suit was brought, and the district court essentially based its decision on the Fourth Circuit's decision in *Bradley v. School Board*.[362] Although the plaintiffs may have been proceeding primarily with a "state responsibility" approach in the hopes that the Supreme Court would accept this approach in *Milliken* and thus effec-

358. With respect to the limited weight that the Court itself gives to summary affirmances, see Edelman v. Jordan, 415 U.S. 651, 671 (1974).

359. The denial of certiorari in *United States v. Missouri*, *see* note 295 *supra*, lends some further credence to this observation.

360. 379 F. Supp. 1352 (M.D.N.C. 1974), *aff'd in part and rev'd in part on other grounds*, 521 F.2d 1136 (4th Cir. 1975). The denial of interdistrict relief was not appealed. 521 F.2d at 1138.

In Tasby v. Estes, 517 F.2d 92 (5th Cir. 1975), a desegregation case involving the Dallas Independent School District, a group of intervenors sought the joinder of other independent school districts in the Dallas metropolitan area and the formulation of a metropolitan desegregation plan. It did not appear that the intervenors had introduced any evidence on this issue, which was held in abeyance pending the Supreme Court's resolution of *Milliken*. In dismissing the intervenors' claim, the Fifth Circuit merely noted, "There is in this record no suggestion of violation by the outlying independent school districts in Dallas County of these [the *Milliken*] principles so as to warrant imposition of a multi-district plan." 517 F.2d at 109.

361. 379 F. Supp. at 1376 (unnumbered footnote added after the *Milliken* decision).

362. 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973). *See* text accompanying notes 123-26 *supra*.

tively overrule *Bradley*, there were other factors present in the case that might have supported an interdistrict remedy on grounds recognized in other "contemporary *Milliken*" cases.

If the Durham City and Durham County districts had been merged, the county-wide ratio would have been 58 percent white to 42 percent black. As separate districts, the city district was 71 percent black to 29 percent white and the county district was 75 percent white to 25 percent black.[363] In 1958 and again in 1971, the city and county boards of education voted to merge the two districts. Under state law, however, this decision was subject to public referendum, and both times the proposal was decisively and "overwhelmingly rejected."[364] Presumably, it is not possible to show discriminatory intent by a voter rejection of the merger. Nevertheless, the argument could be advanced that the voters' action, which constitutes state action for constitutional purposes,[365] has a racially discriminatory *effect* because it has caused the retention of two separate districts, one predominantly white and one predominantly black, in an area having a close balance between the races. In addition, the school district lines did not follow political boundaries; if they had, the Durham City district would have been "less black." Although the court held that there was "simply no showing that the purpose or effect of this practice was to perpetuate a dual school system,"[366] the fact remains that, as in Louisville-Jefferson County, this distinct districting practice contributed to the degree of racial segregation existing within the city system. It does not appear that the plaintiffs attempted to show an interrelationship between the two systems for segregatory or other purposes, but if they had, the district court, relying on *Bradley*, would have been unlikely to have considered the argument. Nor, finally, was there any effort to show governmental responsibility for the residential racial disparity between the city and county districts. If the case had been brought after *Milliken*, the plaintiffs might well have proceeded differently, and the court might have been more responsive to their arguments.

The "governmental responsibility for interdistrict residential segregation" argument that was recognized by the three-judge district court in *Evans* may receive further clarification from the Supreme Court's review

363. 379 F. Supp. at 1360.
364. *Id.* at 1364.
365. *See* Reitman v. Mulkey, 387 U.S. 369 (1967).
366. 379 F. Supp. at 1371.

of the Seventh Circuit's decision in *Gautreaux v. Chicago Housing Authority*.[367] In *Gautreaux*, the Seventh Circuit held that any plan to remedy the racially discriminatory public housing system found to exist within the City of Chicago[368] would have to be implemented on a metropolitan basis and that the district court had the power to impose such a plan. The court emphasized the limited nature of the *Milliken* holding, noting that "any application of the opinion to factual situations other than the one before the Court would be dictum"[369] and that public housing was a federally supervised program based on federal statutes and did not have a deeply rooted tradition of local control. More significantly for our purposes, there was evidence of discrimination by the suburban areas themselves in that most of the suburban housing projects were located in or adjacent to overwhelmingly black census tracts.[370] The court concluded: "The extra-city impact of defendants' intra-city discrimination appears to be profound and far-reaching and has affected the housing patterns of hundreds of thousands of people throughout the Chicago metropolitan region."[371] This impact, for the court, was the kind of showing required by *Milliken* for a metropolitan remedy—that is, " 'a constitutional violation within one district that produces a significant segregative effect in another district.' "[372] If the Supreme Court agrees that a metropolitan remedy may be imposed in the public housing situation, because discrimination in public housing has a metropolitan-wide effect, this decision will in turn give impetus to the argument that "governmental responsibility for interdistrict residential segregation" justifies imposing an interdistrict remedy to deal with the school segregation that follows in its path.[373]

367. 503 F.2d 930 (7th Cir. 1974), *cert. granted*, 421 U.S. 962 (1975).

368. For the history of this protracted litigation and the unconstitutional actions on the part of the Chicago Housing Authority, see 503 F.2d at 932-34.

369. *Id.* at 936.

370. *Id.* at 937.

371. *Id.* at 940.

372. *Id., quoting* Milliken v. Bradley, 418 U.S. 717, 745 (1974).

373. The metropolitan-wide effect of discrimination in public housing is an important part of the suit seeking metropolitan school desegregation in the Atlanta area. The suit is now pending before a three-judge court in the Northern District of Georgia. Armour v. Nix, Civil No. 16708 (N.D. Ga.). In Atlanta there has already been a finding of racial discrimination in public housing similar to that in *Gautreaux*. Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972). In the Atlanta case, reliance is also being placed on the history of "cooperation" between Atlanta and the surrounding suburban districts in pre-*Brown* days and thereafter and on state law authorizing "regional cooperation" between school districts.

What stands out most clearly in the "institutional behavior" of the lower federal courts in the wake of *Milliken* is that the courts have not viewed *Milliken* as precluding them from imposing interdistrict remedies. Quite to the contrary, they have delimited the negative parts of *Milliken* to a rejection of only the particular theory of metropolitan desegregation advanced in *Milliken* and have affirmatively used *Milliken* to justify imposing an interdistrict remedy in the case before them. The Supreme Court's summary affirmance of *Evans* can only serve to strengthen this view of *Milliken*. This "institutional behavior," it is submitted, clearly lends empirical support for the approach advocated in this Article.

VIII. Prognosis and Conclusion

The essential aim of this Article has been to demonstrate that although a "big battle" was lost in *Milliken*, "small wars" can still be won, and that, by emphasizing the circumstances of particular cases, it is still possible to achieve metropolitan desegregation and an interdistrict remedy in a number of areas. In *Milliken* the Supreme Court came to a "fork in the road," in which the Court's commitment to racial equality and equality of educational opportunity for black children clashed with the perceived class interest of white middle-class Americans in maintaining the educational advantages derived from racially and socially homogeneous suburban school districts for their own children. The Court was badly split, and its ambivalence is clearly reflected in the majority decision, as well as the concurrence of Justice Stewart. What the Court did was to reject the "easy route" to metropolitan desegregation, that of showing a constitutional violation on the part of the urban district and overall state responsibility for education. At the same time the Court affirmatively recognized that federal courts do have the power to cross school district lines and to order metropolitan desegregation in appropriate cases. The issue remaining after *Milliken* has been the identification of these appropriate circumstances. In this Article, I have delineated what I think they are, looking both to what the Court majority said in *Milliken* as an indication of its future behavior and to other grounds that have been advanced in post-*Milliken* cases.

It is obviously hazardous to venture a prediction about what the Supreme Court will do when the question comes before it again, and the Court's summary affirmance of *Evans* indicates some doubt about when, if ever in the near future, this issue will be before the Court. If I am

correct in my analysis of the majority's ambivalence, and particularly in light of the recent "institutional behavior" exhibited by the lower federal courts, I do not think it likely that a majority of the Court—and here I put great weight on Justice Stewart's "special ambivalence"—will try to extend *Milliken* to place further barriers in the path of metropolitan desegregation. Nor do I think that the Court will attempt to formulate broad principles to guide the course of future litigation, at least at this time. Rather the Court will treat *Milliken* as standing for the proposition that imposing an interdistrict remedy is proper in the circumstances of particular cases and improper if it is based solely on the grounds that one district is in violation and the state has overall responsibility for education. In the "special circumstances" of a particular case, the Court, if it should grant plenary review, is likely to find, as the lower federal courts have done in the wake of *Milliken*, that an interdistrict remedy is appropriate. In any event, the advocates of metropolitan desegregation certainly should proceed on this assumption unless and until the Supreme Court sends out a different "behavioral message."

In time, I believe *Milliken* may simply come to stand for the proposition that federal courts do have the power to impose an interdistrict remedy in appropriate cases, and what constitutes an appropriate case will be left largely for the lower federal courts to define.[374] If my analysis should turn out to be correct, it may yet be that black and white children in many of the major metropolitan areas will in fact go to school together, which "in the final analysis is what desegregation of the public schools is all about."[375]

---

374. In large part this approach has been adopted by the Court in cases involving the adequacy of desegregation plans designed after *Swann* to eliminate the vestiges of state-imposed segregation. The Court has consistently denied certiorari in such cases. *See, e.g.*, Northcross v. Board of Educ., 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974); Medley v. School Bd., 482 F.2d 1061 (4th Cir. 1973), *cert. denied*, 414 U.S. 1172 (1974); Goss v. Board of Educ., 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974). Similarly, the Court may consistently deny review in cases involving the imposition of an interdistrict remedy.

375. Milliken v. Bradley, 418 U.S. 717, 802 (1974) (Marshall, J., dissenting).