DEVELOPING LITIGATION STRATEGIES FOR MULTIDISTRICT RELIEF: THE LEGAL IMPLICATIONS OF *MILLIKEN v. BRADLEY* ON METROPOLITAN SCHOOL DESEGREGATION

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Recently, the federal courts have entertained a series of attacks[1] on the composition of racially segregated metropolitan school systems comprised of independent districts. In order to resolve these disputes the courts must grapple with the extent to which remedial desegregation orders may be imposed beyond the boundaries of a single school district whose discriminatory practices are shown to violate the fourteenth amendment. The geographical scope of a violation arising from any particular school or group of schools has been difficult to assess because the racial polarization presently existing between predominately black inner city schools and surrounding white suburban school systems[2] is

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1. *See* Milliken v. Bradley, 418 U.S. 717 (1974); United States v. Missouri, 515 F.2d 1365 (8th Cir.), *cert. denied*, 96 S. Ct. 374 (1975); 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 (1974), *cert. denied*, 421 U.S. 931 (1975); United States v. Board of School Comm'rs, 474 F.2d 81 (7th Cir.) (Indianapolis I), *cert. denied*, 413 U.S. 920 (1973); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd*, 96 S. Ct. 381 (1975).

The focus of this Note is on suits brought in federal courts alleging a denial of equal protection under the fourteenth amendment. For a comparison of treatment of desegregation cases by the District of Columbia courts under the fifth amendment see Baratz, *Court Decisions and Education Change: A Case History of the D.C. Public Schools, 1954-1974*, 4 J.L. & EDUC. 63 (1975). For an analysis of the federal statutory approach to school desegregation see Slippen, *Administrative Enforcement of Civil Rights in Public Education: Title VI, HEW, and the Civil Rights Reviewing Authority*, 21 WAYNE L. REV. 931 (1975). Plaintiffs may also bring suit in the state courts. *See, e.g.*, People v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (Ct. App. 1971), *cert. denied*, 405 U.S. 1016 (1972); Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965); Addabbo v. Donovan, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68, *cert. denied*, 382 U.S. 905 (1965); Pennsylvania Human Relations Comm'n v. Chester School Dist., 427 Pa. 157, 233 A.2d 290 (1967).

2. The black student population in city schools is now over 60% in Chicago, Cleveland, Detroit, and St. Louis; over 70% in Baltimore and Richmond; and over 80% in Atlanta and Wilmington. U. S. OFFICE OF CIVIL RIGHTS, DIRECTORY OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS IN SELECTED DISTRICTS (1972). As reported by the 1970 census, more than 50% of all black citizens lived in urban core areas, and 37% resided in the central cities of the 25 largest metropolitan areas. U. S. BUREAU OF CENSUS, SOCIAL & ECONOMIC

often tied to alleged "de facto"[3] causes.

In *Milliken v. Bradley*[4] the United States Supreme Court held that plaintiffs had not established sufficient state imposed racial discrimination outside Detroit's city schools to warrant the imposition of a proposed metropolitan desegregation plan. The *Milliken* court clearly retreated from precedent which had allowed the imposition of remedial decrees extending far beyond the initial locus of discriminatory activity. Consequently, the decision represents a major setback for proponents of integrated school systems. These proponents had hoped to obviate the evidentiary and financial burdens of proving constitutional violations in each of a metropolitan area's independent districts by merely invoking theories that had previously proved successful in expanding the remedial consequences of an intradistrict violation.

Milliken, however, has not proved to be an impenetrable barrier to plaintiffs seeking remedial orders that encompass more than one adjoining district. In a series of post-*Milliken* appeals, the Supreme Court has refused to overturn interdistrict desegregation plans imposed by lower courts in Wilmington (Delaware),[5] Louisville (Kentucky),[6] suburban St. Louis (Missouri),[7] and Indianapolis (Indiana).[8] This Note will examine the impact of the *Milliken* decision on the analytical framework previously developed by the Court to determine the geographical component of a violation in intradistrict litigation. Following a discussion of some conceptual problems raised by the *Milliken* approach to alleged multidistrict violations, the post-*Milliken* cases will be used to illustrate litigation strategies designed to achieve multidistrict relief.

CHARACTERISTICS OF THE POPULATION IN METROPOLITAN & NONMETROPOLITAN AREAS: 1960 & 1970, at 23 (1971). Projections indicate that if present trends continue to the year 2000, blacks will comprise 75% of the nation's central city population. U. S. COMM'N ON CIVIL RIGHTS, 1961 REPORT: HOUSING (1961).

3. The legal consequence of a "de facto" finding is that the state has no responsibility to desegregate under the fourteenth amendment. *See* note 33 *infra*.

4. 418 U.S. 717 (1974).

5. Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975).

6. 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 (1974), *cert. denied*, 421 U.S. 931 (1975).

7. United States v. Missouri, 515 F.2d 1365 (8th Cir. 1975), *cert. denied*, 423 U.S. 951 (1975).

8. 503 F.2d 68 (7th Cir.), *cert. denied*, 421 U.S. 929 (1975).

I. A SYNOPSIS OF THE *MILLIKEN* DECISION

In 1970, plaintiffs instituted a class action suit[9] against certain state officials and the Board of Education of Detroit,[10] seeking to desegregate the Detroit Public School System.[11] The district court found that for two decades the board of education had employed or sanctioned racially discriminatory policies regarding the creation and maintenance of racially selective attendance areas or dual overlapping zones,[12] the operation of transportation systems that bused black students past or away from closer white schools,[13] and racially segregative site selection practices.[14] The district judge ruled that such practices evinced an intent to create and perpetuate racially segregated schools in violation of the fourteenth amendment.[15] In addition, the lower court found that under Michigan law[16] the state was derivatively responsible for the racially

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9. The original action was brought by the Detroit branch of the N.A.A.C.P. on behalf of all school children attending Detroit City Schools and all Detroit resident parents with school-age children. Milliken v. Bradley, 418 U.S. at 722.

10. Plaintiffs sought declaratory and injunctive relief against the Governor of Michigan, the Attorney General, the State Board of Education, the State Superintendent of Public Instruction and the Board of Education of the city of Detroit, its members and its former Superintendent of Schools. The State of Michigan as such was not a party to the suit. *See* Bradley v. Milliken, 484 F.2d 215, 220 (6th Cir. 1973).

11. The suit was initiated shortly after the Michigan State Legislature's repeal of a proposed desegregation plan for the city of Detroit's public high schools. The plan was repealed by Act. No. 48, § 12 [1970] Public and Local Acts of Michigan 139-40, MICHIGAN STAT. ANN. § 15.2298(12) (1975), which sought to delay implementation of the desegregation plan and to prescribe criteria for "free choice" and "neighborhood schools." *See* Bradley v. Milliken, 338 F. Supp. 582, 589 (E.D. Mich. 1971). Plaintiffs sued for a preliminary injunction to reinstate the desegregation plan which was initially denied by the district court and by the Sixth Circuit on appeal. 433 F.2d 897, 901 (6th Cir. 1970). The Sixth Circuit, however, held Act No. 48 unconstitutional to the extent that it was designed to obstruct measures designed to protect rights guaranteed by the fourteenth amendment, and remanded for a trial on the merits. *Id.* at 902. Following extensive proceedings the district court ruled on the issue of discrimination within the Detroit schools. 338 F. Supp. 582 (E.D. Mich. 1971).

12. Bradley v. Milliken, 338 F. Supp. 582, 587-88 (E.D. Mich. 1971). This was accomplished, in part, by racial gerrymandering of attendance zones, feeder patterns and grade structures to incorporate existing residential patterns of segregation into the schools. *Id.* at 588.

13. *Id.* at 588.

14. *Id.* at 589.

15. *Id.* at 592. The standard for intent used by the district court was whether these actions had the "natural, probable, foreseeable and actual effect" of fostering the exodus of white families from identifiably black schools. *Id.* at 587.

16. *See* Attorney General v. Lowrey, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902), *aff'd*, 199 U.S. 233 (1905); MICH. CONST. art. VIII, § 2.

discriminatory actions of its school districts.[17] Finally, the court found that certain actions of the Michigan legislature and the state board of education had been taken with the purpose and effect of limiting the Detroit school board's options for reducing racial imbalance.[18]

The lower court then ordered the city defendants to submit a desegregation plan which was to encompass "Detroit only," and directed the state to devise a plan involving school districts throughout the three county metropolitan area.[19] The suburban districts had not been parties to the action,[20] and consequently, there was no specific allegation that activities originating within or radiating from their jurisdictions had violated plaintiff's rights. The court, however, concluded that it had the power to impose a multidistrict remedy.[21] Further, it held that since "Detroit only" relief would be constitutionally inadequate its duty was to look beyond the "corporate geographical limits of the city"[22] for a solution. The Sixth Circuit found substantial evidence to support the lower court's finding of a violation[23] and its conclusion that a constitutionally adequate system of desegregated

17. 338 F. Supp. at 589. The district court characterized the state's power over local school districts as plenary. *Id.*

18. *Id.* The state was found to have violated plaintiff's right to equal protection by failing to supervise local school board site selection policies fostering segregated attendance zones, by discriminating in the funding of student transportation programs, and by enacting Act No. 48 to "impede, delay and minimize racial integration in the Detroit schools." *Id.*

19. Bradley v. Milliken, 345 F. Supp. 914, 917-19 (E.D. Mich. 1972). The court stated that its objective was to find a plan "designed to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Id.* at 916.

20. Some of the suburban districts were permitted to intervene for the limited purpose of advising the court as to the propriety and form of proposed interdistrict desegregation plans. For a summary of the district court's treatment of the intervention issue see 418 U.S. at 730-32.

21. 345 F. Supp. at 916. Stating that "school district lines are simply matters of political convenience and may not be used to deny constitutional rights," the court concluded that the state "cannot escape its constitutional duty to desegregate the public schools of the City of Detroit by pleading local authority." 484 F.2d at 244 (quoting district court's conclusions of law).

22. 345 F. Supp. at 916. The plan eventually adopted by the district judge directed a consolidation of 54 of the tri-county's 86 districts, and ordered pupil transfers from both races as well as a ten percent minimum quota of black faculty and staff in each school. It was to be based on 15 clusters, each containing part of the Detroit system and two or more suburban districts. *Id.* at 928-29.

23. Bradley v. Milliken, 484 F.2d 215, 241-45 (6th Cir. 1973).

schools could not be achieved solely within the city of Detroit.[24] The Supreme Court, however, reversed and remanded the case for the formulation of a desegregation plan restricted to the city of Detroit.

Chief Justice Burger,[25] considering plaintiff's right to equal protection in the context of a specific geographic area, found that the violation had occurred[26] solely within the confines of the city school district. Having thus characterized the geographical extent of the condition offending the constitution, the Chief Justice proceeded to consider the proper scope of the court's equitable powers by invoking the maxim that "the nature of the violation determines the scope of the remedy."[27] Accordingly, the majority held that federal courts lack the constitutional power to remedy interdistrict segregation absent a finding that discriminatory acts of one or more districts have substantially caused a significant "segregative effect" in neighboring districts, or that the state itself has created or fostered segregation among adjoining districts.[28]

The Court declared that the multidistrict remedy imposed by the lower courts was based on a "wholly impermissible" standard[29] which could be supported "only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent."[30] A closer analysis of existing case law, however, reveals that there was ample support for the approach taken by the lower courts.

II. The Impact of *Milliken* on the Geographical Treatment of an Equal Protection Violation

It is true that *Milliken* represents the first attempt by the Supreme Court to examine the propriety of an interdistrict remedy. Nevertheless,

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24. *Id.* at 242. The appellate court remanded, however, for a joinder of all suburban districts that might be affected by the plan. *Id.* at 251-52.

25. The Chief Justice was joined by Justices Blackmun, Powell and Rehnquist. Justice Stewart filed a concurring opinion to form a majority.

26. 418 U.S. at 738 & n.18. There was no dispute among the Justices that the Detroit school system had been illegally segregated. All agreed that on the basis of Keyes v. School District No. 1, 413 U.S. 189 (1973), the lower courts' findings were supported by the evidence. For further explanation of *Keyes* see note 63 and accompanying text *infra*.

27. 418 U.S. at 738, *quoting* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

28. *Id.* at 745.

29. *Id.*

30. *Id.* at 747.

the clear implication of decisions prior to *Milliken* had been that metropolitan-wide remedial decrees would, under certain circumstances, be permissible to combat interdistrict segregation. Following the historic decision in *Brown v. Board of Education (Brown I)*,[31] the courts developed an anlytical framework for the resolution of school desegregation issues arising within a single school district.[32] The underlying concept used to determine the circumstances in which the existence or operation of racially segregated public schools violates the fourteenth amendment focuses on whether policies or practices of the state or its agencies have been causal factors in the creation or fostering

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31. 347 U.S. 483 (1954).

32. Much of the early debate over the *Brown I* decision centered on the proper limits of judicial intervention. *Compare* Wechsler, *Toward Neutral Principles*, 73 HARV. L. REV. 1 (1959) (no basis for judicial review of school segregation issues on "neutral grounds" since underlying question is one of association), *with* Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). *See also* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (general purpose of the fourteenth amendment supports judicial intervention). While *Brown I* held that state-imposed segregation of public schools violates the equal protection clause, it provided only minimal guidance concerning the nature of the constitutional right being upheld. Two elements appeared essential to the *Brown I* holding: overt government classification by race and psychological or educational harm to minority school children resulting from racial isolation. For nearly two decades after *Brown I* the Supreme Court refrained from ruling on the relative importance of these two elements to cases arising outside the context of state imposed dual schools.

Between 1954 and 1973 the Supreme Court denied certiorari in several cases that presented the issue whether states that had not required dual schools prior to *Brown* could be ordered to desegregate. *See, e.g.*, Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); Sealy v. Department of Pub. Instruction, 252 F.2d 898 (3d Cir.), *cert. denied*, 356 U.S. 975 (1958). During this period, the lower courts and their critics developed at least three views of *Brown I*, each of which approaches the issue of constitutional rights by discussing the conditions of segregated schools whose existence violates equal protection.

Under one approach, the condition of racially imbalanced schools, per se, is presumed to have a detrimental effect on minority school children. Consequently, the existence of segregated schools resulting from any state act, or any failure to act where the segregated result was reasonably foreseeable, raises an affirmative duty to desegregate. This approach is grounded in the attention given by the *Brown* court to the psychological impact of racial separation. 347 U.S. at 494. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189, 217 (1973) (Powell, J., concurring in part, dissenting in part); Fiss, *The Charlotte-Mecklenburg Case — Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971); Goodman, *DeFacto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972) [hereinafter cited as Goodman]; Kaplan, *Segregation Litigation and the Schools*, 58 NW. U.L. REV. 1, 57 (1964); Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285, 291-92 (1965). For an empirical evaluation of this view compare the social science evidence cited in *Brown*, 347 U.S. at 494-95 n. 11, with Epps, *The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality*, 39 LAW & CONTEMP. PROB. 300 (1975). The

of segregated schools. This distinction[33] is based upon the assumption that racial polarization may arise from and be perpetuated by "unknown and perhaps unknowable factors such as in-migration, birthrates, economic changes, or cumulative acts of private racial fears."[34] Accepting this premise it follows that the constitution simply does not allow federal courts to attempt to change the operation of segregated school systems unless and until it is shown that the state, or its political subdivisions, have contributed to cause the situation to exist."[35]

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majority of cases have rejected this approach. *Accord,* 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); *see* Spencer v. Kugler, 404 U.S. 1027 (1972), *aff'g mem.* 326 F. Supp. 1235 (D.N.J. 1971); Bell v. School City, 213 F. Supp. 819 (N.D. Ind.), *aff'd,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964).

Under a second approach, the violation depends upon state responsibility for segregated schools which provide minority children unequal or inferior educational opportunities. Although the equal educational opportunity approach has been subject to varied interpretations, the elements determinative of a violation are: a condition of segregated school attendance patterns; state responsibility for the condition; resulting inequality or inferiority of the minority facilities; and no nonracial justification for state actions which caused the segregation. These elements also provide the basis for distinguishing between de jure and de facto segregation. *See* Spencer v. Kugler, 404 U.S. 1027, 1028 (1972) (Douglas, J., dissenting), *aff'g mem.,* 326 F. Supp. 1235 (D.N.J. 1971); Wright, *supra,* at 299. *Compare* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564 (1965) (analyzing variations of the "equal educational" approach), *with* Kaplan, *supra* at 157. For a discussion of whether equal educational opportunity should be treated as a fundamental right and hence whether the nonracial state interest would be judged by strict scrutiny rather than the rational basis test see Goodman, *supra,* at 343-73 (1972). *But cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). The third approach was that adopted in *Keyes. See* text at notes 63-66 *infra.*

33. The terms de facto and de jure have been used as legal conclusions to distinguish between those segregated conditions that the state is found to have caused and is therefore obligated to relieve (de jure), and those that are held to be the product of "natural forces" (de facto). It is ironic that these terms which have come to play such an important role in the terminology of school desegregation cases, were incorporated into school desegregation analysis by a court which held that "it is of no moment whether the segregation is labelled by the defendant as 'de jure' or 'de facto'. . . . Constitutional rights are determined by realities, not by labels or semantics." Taylor v. Board of Educ., 191 F. Supp. 181, 194 (S.D.N.Y.), *aff'd,* 294 F.2d 36 (2d Cir. 1961). The court went on to state that "if these terms must be used, 'de jure' should refer to segregation created or maintained by official act, regardless of its form. 'De facto' should be limited to segregation resulting from fortuitous residential patterns." *Id.* at 194 n.12. *See generally* Moses v. Washington Parish School Bd., 456 F.2d 1285 (5th Cir.), *cert. denied,* 409 U.S. 1013 (1972); Hobson v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

34. 418 U.S. at 756 n.2 (Stewart, J., concurring).

35. *Id. But cf.* Taylor, *The Supreme Court and Urban Reality: A Tactical Analysis of* Milliken v. Bradley, 21 WAYNE L. REV. 751, 760-63 (1975) (challenging the court's assumptions regarding the causes of racially segregated school systems) [hereinafter cited as Taylor].

Prior to *Milliken,* the Court had fostered two major expansions of the underlying de facto/de jure distinction. First, in the immediate aftermath of *Brown,* the Court expanded the state's remedial duty to eradicate the effects of racial segregation previously imposed by state law.[36] As litigation pressing for the desegregation of northern and western urban centers intensified,[37] the Court permitted a second expansion, this time allowing a broad characterization of the geographical scope of an initial de jure violation.[38] The following sections will examine these expansions and the extent to which they may be applied to achieve multidistrict desegregation orders after *Milliken.*

A. *Derivation and Analysis of the "Affirmative Duty" Remedial Standard*

Following *Brown I* it became clear that the Court was determined to use its remedial powers to achieve more than the simple repeal of state legislation requiring segregated schools. In *Brown II*[39] the Supreme Court imposed upon local school authorities the "primary responsibility" for transforming their statutorily created dual schools into a "racially non-discriminatory school system."[40] The district courts assumed the primary responsibility of supervising this process. *Brown II* directed the lower courts to invoke traditional equitable principles to effectuate the "interest of the plaintiffs in admission to public schools as soon as practicable on a non-discriminatory basis," and to facilitate the adjustment and reconciliation of public and private needs.[41]

Although *Brown II* charged the lower courts with supervising the remedial process and equipped them with equitable powers, the

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36. *See* text at notes 39-60 *infra.*

37. *See, e.g.,* Milliken v. Bradley, 418 U.S. 717 (1974) (Detroit); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (Denver); Oliver v. Board of Educ., 508 F.2d 178 (6th Cir.), *cert. denied,* 421 U.S. 963 (1974) (Kalamazoo); Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974) (Dayton); United States v. Board of School Comm'rs; 474 F.2d 81 (7th Cir.), *cert. denied,* 413 U.S. 920 (1973) (Indianapolis); Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973) (Las Vegas); Spangler v. Board of Educ., 311 F. Supp. 501 (C.D. Cal. 1970), *aff'd,* 427 F.2d 1352 (9th Cir. 1970) (Pasadena).

38. *See* text at notes 61-70 *infra.*

39. 349 U.S. 294 (1955).

40. *Id.* at 301. Where school authorities fail to present an "effective" desegregation plan, the federal courts are free to devise their own or to grant injunctive or declarative relief. 28 U.S.C. §§ 1343 (3)-(4), 2201-02 (1970).

41. 349 U.S. at 300.

decision left uncertainty concerning the extent to which a court could use equitable powers to achieve a "racially non-discriminatory school system." Clearly, the mandate of the district courts extended to the prevention of acts by legislatures and public officials that were deliberately designed to perpetuate existing racial imbalance.[42] It was not clear, however, whether remedial plans that employed racially neutral transfer options and "freedom of choice" provisions in conjunction with existing racially segregated residential patterns constituted adequate compliance.[43]

In a trilogy of cases[44] the Supreme Court clarified the remedial goal. In each of these cases the Court invalidated facially neutral pupil assignment plans that failed "to produce a unitary nonracial school system."[45] Accordingly, the Court charged any state that had formerly imposed a dual system at the time of *Brown I* with an affirmative duty "to take whatever steps that might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[46] By rejecting the use of "freedom of

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12. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958).

13. Immediately following *Brown II*, most courts adopted the oft-quoted dictum in Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955), to the effect that state-imposed segregation was prohibited, while integration was not required. United States v. Board of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385, *cert. denied sub nom.* Cado Parish School Bd. v. United States, 389 U.S. 840 (1967), marked a significant departure from earlier desegregation law, holding that there is an affirmative duty to integrate schools that were formerly segregated by state action asserting "*Brown*, requires public school systems to integrate students, faculties, facilities, and activities." 372 F.2d at 846 & n.5. Following the *Jefferson* decision the courts of appeals were split on the notion of an "affirmative obligation" to bring desegregation. For a summary of these cases see Read, *Judicial Evolution of the Law of School Integration Since* Brown v. Board of Education, 39 LAW & CONTEMP. PROB. 7, 10-28 (1975).

14. Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968); Green v. New Kent County, 391 U.S. 430 (1968).

15. Green v. New Kent County, 391 U.S. 430, 440-41 (1968) (citations omitted).

16. *Id.* at 437-38. The Court then went on to say:

> The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.
> . . . The matter must be assessed *in the light of the circumstances present and the options available in each instance.* It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness.

Id. at 439.

Prior to *Green* affirmative duties did not "naturally" flow from the fourteenth amendment. *See* Cassell v. Texas, 339 U.S. 282, 286 (1950); Akins v. Texas, 325 U.S. 398, 403

choice"[47] and "free transfer" plans,[48] neither of which made use of racial criteria on their face, the Court disregarded the de facto/dejure standards. Absent a prior violation, these methods of pupil assignment would not have evinced an intent to discriminate on the basis of race and thus would not have constituted de jure violations. Due to the imposition of an affirmative duty, however, the Court's analysis of de jure segregation at the violation stage. While the Court continued to determine the existence of a violation according to the presence or absence of racial discrimination, it began looking to actual integration as the target of desegregation at the remedial stage.[49]

(1945); McAuliffe, *School Desegregation: The Problem of Compensatory Discrimination*, 57 VA. L. REV. 65 (1971). *But see* Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65 (1969).

The Court in *Green* cites from Louisiana v. United States, 380 U.S. 145, 154 (1965), to support its theory of affirmative duty. "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." The basis of the suit in *Louisiana* was discrimination against black applicants for voting registration according to an "interpretation test." The Court, after holding the test to be in violation of the fourteenth and fifteenth amendments, not only threw out the test as a means of voting registration but further held that any new test devised by the state was to be applied to *all voters*, not just to those who were unregistered at the time when the test was thrown out.

Other cases cited as support for the imposition of an affirmative duty in *Green* were cases which used equitable powers to remedy commercial "conditions" that could not adequately be remedied by a simple injunction. *See* NLRB v. Express Publishing Co., 312 U.S. 426, 436-37 (1941); NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 250 (1939); Standard Oil v. United States, 221 U.S. 1, 77-78 (1911). The Court in *Standard Oil*, after finding a violation of the federal anti-monopoly laws, stated:

> It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, the adequate measure of relief would result from restraining the doing of such acts in the future. But in a case like this, *where the condition which has been brought about in violation of the statute, in and of itself is not only a continued attempt to monopolize, but also a monopolization*, the duty to enforce the statute requires the application of broader and more controlling remedies.

Id. at 77 (emphasis added). Whether and to what degree these principles apply to make school desegregation cases into school integration cases will depend upon how the "condition" which violates the statute is interpreted. *See* notes 60-62 and accompanying text *infra*.

47. Raney v. Board of Educ., 391 U.S. 443 (1968); Green v. New Kent County, 391 U.S. 430 (1968).

48. Monroe v. Board of Comm'rs, 391 U.S. 450 (1968).

49. After the decisions in *Green*, *Raney* and *Monroe*, the Fifth Circuit indicated increasing impatience with desegregation plans, whether free-choice, zoning or other, which failed to produce results. School attendance zone plans that followed natural or historical boundary lines but resulted in little desegregation were condemned in three

Three years later, the Court in *Swann v. Charlotte-Mecklenburg Board of Education*[50] substantially widened the gap. The violation in *Swann* was based upon the defendants' operation of segregated schools prior to *Brown I*. The district court in *Swann* found the school board's "freedom of choice plans"[51] inadequate, and after ordering the submission of new desegregation plans, adopted a proposal designed to reflect the community's overall racial balance.[52] The proposal required the limited use of racial quotas, pairing and clustering of neighborhood schools, and the busing of students to alleviate the "vestiges" of former discrimination. The Supreme Court reversed the Fourth Circuit and accepted the district court order in its entirety. Chief Justice Burger, writing for a unanimous Court, made it clear that neither the responsible state education officials nor the district courts could rely on plans that "may fail to counteract the continuing effects of past school segregation."[53]

Without defining many key terms, the Chief Justice directed the lower courts to consider substance over form in adopting plans that are "workable," "effective" and "realistic" to transform "dual schools" into "unitary systems."[54] The Court then said that the very existence of

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important opinions issued in early 1969. United States v. Indianola Municipal Separate School Dist., 410 F.2d 626 (5th Cir. 1969), *cert. denied*, 396 U.S. 1011 (1970); Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); United States v. Greenwood Municipal Separate School Dist., 406 F.2d 1086 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969). Similar rulings were forthcoming from other circuits. *See, e.g.*, Monroe v. Board of Comm'rs, 427 F.2d 1005 (6th Cir. 1970); Clark v. Board of Educ., 426 F.2d 1035 (8th Cir.), *cert. denied*, 402 U.S. 952 (1971); Brewer v. School Bd., 397 F.2d 37 (4th Cir. 1968).

50. 402 U.S. 1 (1971).

51. This plan had been approved by the district court prior to the *Green* decision. Following *Green*, plaintiffs moved for further relief. 243 F. Supp. 667 (W.D.N.C. 1965), *aff'd*, 369 F.2d 29 (4th Cir. 1966).

52. The school board's plan, which would have left the racial composition of the elementary schools unchanged, was rejected. The district court adopted instead a plan submitted by a local school expert. 311 F. Supp. 265 (W.D.N.C. 1970).

53. 402 U.S. at 28.

54. *Id.* at 31. The extent of the state's affirmative duty was further refined in North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971). The Court in *North Carolina* declared unconstitutional a portion of the North Carolina statutes known as the Anti-Busing Law that flatly forbade assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The Court ruled that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *Id.* at 45.

racially identifiable schools, at the remedial stage, leads to a presumption that existing segregation is the product of an impermissible cause.[55] Thus, the Court shifted to the defendants the burden of distinguishing between the residual effects of the initial "de jure" violation and the intervening effects of subsequent "de facto" segregation.[56] In addition to questioning segregation per se at the remedial stage, *Swann* reemphasized the broad powers of equity to vindicate constitutional violations even when "[t]he remedy . . . may be administratively awkward, inconvenient, and . . . bizarre."[57] The Court sanctioned the use of remedial decrees that employ racial quotas as well as provisions for majority to minority transfer options, redrawing of attendance zones, and student busing.[58]

It is not surprising that the *Swann* Court devoted much attention to the discussion of equity's powers and very little to its proper limits, given the extreme resistence engendered by the *Brown* holdings[59] and the clarity of the violation in states that had required dual schools by law. Nevertheless, the Court did recognize some limitations on the use of equitable power: "[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, *by a balancing of the individual and collective interest, the condition that offends the Constitution.*"[60] The opinion, however, was unclear concerning how these limitations were to be invoked. This shortcoming in the Court's analysis proved to be problematic as the cause of school desegregation moved into the metropolitan context.

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55. 402 U.S. at 25-26.

56. 402 U.S. at 26. This shift has been labeled "contrived." The Court in *Swann* neither attempted to determine the presence or the degree of post-1954 contribution to the segregated condition, and led one author to conclude: "The existence of past discrimination was thus used as a 'trigger' — and not for a pistol, but for a cannon." Fiss, *The Charlotte-Mecklenburg* Case, supra note 32. For a discussion of whether attaching an affirmative duty is justified see Goodman, *supra* note 32, at 292-95; Comment, *Civil Rights v. Individual Liberty: Swann, and Other Monsters of Impetuous Justice*, 5 IND. L. F. 368 (1972).

57. 402 U.S. at 28.

58. *Id.* at 22-31.

59. For a detailed history of state attempts to frustrate the *Brown II* mandate see U.S. COMM'N ON CIVIL RIGHTS, 1961 REPORT 65-77, 101-04; U. S. COMM'N ON CIVIL RIGHTS, 1959 REPORT 196-234.

60. 402 U.S. at 15-16 (emphasis added).

B. *Defining the "Condition that Offends" the Constitution*

The continuing impact of racially discriminatory acts on school attendance patterns will vary with the circumstances of each case.[61] Conceptually, the effects of de jure segregation may be confined to a particular school or may extend to an entire neighborhood, district or metropolitan system. According to the analysis in *Swann*, once the Court has found initial de jure segregation, the scope of the offending condition[62] will determine the limits of the Court's power to impose an affirmative duty on the state.

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61. There are two important considerations regarding the timing of state action as it relates to a present condition of segregated schools. The first consideration relates to finding a violation in schools that were operating as dual systems at the time of *Brown I*. At what point in time after 1954 can it be said that, in the absence of additional de jure acts, the "vestiges" of pre-*Brown* discrimination no longer can be related to the present segregated condition? *See, e.g.*, United States v. Missouri, 515 F.2d 1365 (8th Cir.) *cert. denied*, 423 U.S. 951 (1975) (vestiges rationale for violation in 1975 based on a pre-1954 action). The second temporal consideration relates to the remedial stage. At what point in time can a state, having been found in violation,be said to have discharged its affirmative duty? *See, e.g.*, Spangler v. Pasadena City Bd. of Educ., 519 F.2d 430, 431 & n.1 (9th Cir. 1975). The *Swann* standard is based upon the achievement of "unitary" schools, 402 U.S. 1, 15(1971). This term has never been defined although there is some indication of its meaning in *Swann*. "The existence of some small number of one-race, or virtually one-race schools within a district, is not in and of itself the mark of a system which still practices segregation by law." *Id.* at 26. Further.

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

Id. at 31-32. *But cf.* Kelley v. Metropolitan County Bd. of Educ., 463 F.2d 732, 744 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972) (population shifts in the metropolitan school district changing the racial composition of some schools during the course of the litigation does not eliminate the duty of the school board to present a plan for a unitary school system).

62. A geographical element is necessary to define the "condition that offends" and to provide some frame of reference within which to ascertain the "unitary" nature of the schools. *See* Milliken v. Bradley, 418 U.S. 717, 746 (1974). In Bulluck v. Washington, 468 F.2d 1096 (D.C. Cir. 1972), the circuit court refused to invalidate a congressional statute that was designed to remove funds from a program that had paid for black student busing from all black District of Columbia schools to white Maryland districts that had voluntary desegregation programs. *Id.* at 1108. The court reasoned that since the equal protection clause refers to the states, no right to equal protection exists *beyond* the borders of each state. *Id.* at 1105. *Query* whether interstate cooperation could produce state responsibility beyond its own boundaries?

Courts have found a violation based on classroom segregation within an otherwise "integrated" school building. Jackson v. Marvell School Dist. No. 22, 425 F.2d 211 (8th Cir. 1970). Segregation within groups of "neighborhood" schools has been held to be actionable when the segregation is imposed by law, *e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), or is the result of nationally standardized test scores used as

The Supreme Court in *Keyes v. School District No. 1*[63] facilitated the ability of plaintiffs to expand the geographical scope of a particular de jure violation by adopting a system of shifting presumptions. Justice Brennan, writing for the majority, recognized a "purpose or intent to discriminate" on the part of the Denver school authorities, and devised a three-tiered analytical test to determine the discrimination's geographical component.[64] In applying this test, the Court held that a finding of intentional segregative action by authorities in one portion of a school district "establishes . . . a prima facie case of unlawful segregation design on the part of the school authorities, and shifts to [them] the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions."[65] To overcome this evidentiary presumption, school authorities are required

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the basis of assigning students to a particular school building. *E.g.*, Moses v. Washington Parish School Bd., 456 F.2d 1285 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972); Lemon v. Bossier Parish School Bd., 444 F.2d 1400 (5th Cir. 1971); *cf.* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. cir. 1969).

63. 413 U.S. 189 (1973). School District No. 1 includes the entire city and county of Denver. Neither the city of Denver nor the state of Colorado had ever explicitly required racial segregation in the public schools. Segregatory conditions did exist, however, in the Denver school system and were particularly severe in the area known as Park Hill. Resolutions passed by the school board would have altered the attendance zones in the Park Hill area but were subsequently rescinded. The district court decision to prevent the rescission was upheld by the Supreme Court. The basis for the Court's decision was that for over a decade, the school board had gerrymandered attendance zones, used "optional zones" and excessively employed mobile classrooms to foster segregation in the Park Hill area. Further, the assignment of teachers and staff on the basis of race was found to have occurred throughout the system. The initial finding of intent was based on these facts. 413 U.S. at 191-98.

64. The first stage requires a showing that the area initially found to be in violation, constitutes a "substantial" portion of the entire district. 413 U.S. at 201. At the second stage, the school board must prove that their "racially inspired . . . actions [did not] have an impact beyond the particular schools that are the subject of those actions." *Id.* at 203. This could be accomplished by showing either that no segregative conditions exist outside the initial "substantial" portion, or, that the portion in violation is a "separate, identifiable and unrelated" section of the school district that should be treated as isolated from the rest of the district. *Id.* The third stage, *see* text at note 65 *infra*, operates "even if it is determined that different areas of the school district should be viewed independently [at the second stage]." *Id.* at 208. *See generally* Comment, *Keyes v. School District No. 1: Unlocking The Northern Schoolhouse Doors*, 9 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 124 (1974) [hereinafter cited as *Unlocking The Northern Schoolhouse*]; 45 U. COLO. L. REV. 457, 474-85 (1974) (analysis and criticism of Justice Brennan's test).

65. 413 U.S. at 208. As a rationale for this third stage, Justice Brennan explained that "a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system." *Id.* at 207.

to prove a lack of any causal connection between their discriminatory act and the segregative attendance patterns existing throughout the remainder of the school district. Unless the authorities are able to overcome this heavy burden, the entire district will be deemed to have been infected by the initial de jure act. The Court's justification for this shift in the burden of proof was that discriminatory acts in one portion of a school district are likely to have a "substantial reciprocal effect on the racial composition of other nearby schools [and] of residential neighborhoods within a metropolitan area."[66]

The decisions in both *Swann* and *Keyes* used shifting burdens of proof to expand the possibility that state or local defendants would be held responsible for desegregating schools. A plaintiff may rely on these decisions to achieve district-wide relief even though he has only met the strict evidentiary standards to establish a de jure violation at some previous point in time, or for some particular area within the district. This result is achieved because the Court is willing to treat the initial de jure showing as a trigger for expanded judicial intervention in situations that otherwise would have been viewed as de facto.[67] Conceptually, these decisions diminish the importance of the de facto/de jure distinction in single district litigation by expanding the state's responsibility to eradicate racially segregated schools, whether or not plaintiff can prove that the state was immediately and directly responsible for the segregation.[68]

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66. *Id.* at 202. *But see Unlocking The Northern Schoolhouse, supra* note 64, at 132-33, concluding that:

> [T]he reciprocal effects which do emanate from a de jure practice in one portion of a school district are likely to be minor in impact and limited in range. . . . The Court's conclusion that a finding of meaningful de jure segregation will support desegregation of the entire district therefore derives little support from the realities of urban demographic patterns. It permits a remedy which may far exceed the actual extent of state-induced school segregation.

67. 413 U.S. at 202. The *Keyes* decision, especially when read together with the denied certiorari four days later in Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973), seems to reject arguments for less-than-district-wide relief, based upon claims that not all of the segregation within a district is de jure.

68. Justice Powell criticised the court for maintaining the de facto/de jure distinction at all and argued instead that the fourteenth amendment gives rise to "the right. . . to expect that once the state has assumed responsibility for education, local school boards will operate *integrated school systems* within their respective districts." 413 U.S. at 225-26 n.11 (Powell, J., concurring). In addition to expanding the notion of plaintiff's rights, *see* note 32 *supra*, Justice Powell would severely restrict the court's use of remedial tools to redress equal protection violations. 413 U.S. at 236-52.

As a practical matter, *Swann* adopted the presumption that all racially identifiable schools within formerly dual systems are historical vestiges of former discrimination to insure the complete eradication of state imposed segregation. *Swann* was directed to those states that imposed segregation by law prior to *Brown I* and consequently caused a shift away from the de facto/de jure standards that affected litigants primarily in the southern states.[69] *Keyes* reduced this differential sectional impact by providing northern and western plaintiffs with a new procedural advantage. In combination, *Swann* and *Keyes* enabled the courts to reduce the complex analysis of segregative cause to an initial threshold inquiry and no doubt have contributed to the large scale desegregation of school districts that has occurred across the country.[70]

C. *How Far Does* Milliken *Limit Expansive Geographical Treatment of an Initial De Jure Finding?*

With the benefit of the recent *Keyes* decision,[71] the Supreme Court in *Milliken* could have upheld the lower court decisions by adopting either of two available alternatives. Under the *Keyes* rationale, proof of a de jure violation within Detroit could have been used to shift to the state defendants the burden of disproving their purpose to discriminate throughout the remainder of the metropolitan area.[72] Alternatively, a remedial approach could have been adopted — charging the state with an affirmative duty to take "whatever steps necessary" to eliminate the effects of racially discriminatory acts committed within Detroit.[73] While

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69. *See generally* Diamond, *School Segregation in the North: There Is But One Constitution*, 7 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 1 (1972); Karst, *The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383. State imposed segregation was not unknown in the North. Statutes authorizing racially segregated public schools appeared at various times prior to *Brown* in Illinois Indiana, New Jersey, New Mexico, New York, Ohio and Wyoming. U.S. COMM'N on CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 42 (1967).

70. *See* Pettigrew, *A Sociological View of the Post-Bradley Era*, 21 WAYNE L. REV. 813, 818 (1975) (empirical analysis of desegregation "progress" since 1954).

71. The *Keyes* decision was delivered shortly after the Sixth Circuit had decided *Milliken*.

72. *See Unlocking The Northern Schoolhouse*, *supra* note 64, at 151-53.

73. The lower courts had concluded that a "Detroit only" remedy would be constitutionally inadequate and that only a metropolitan remedy could protect the rights of Detroit school children. *See* notes 22-24 and accompanying text *supra*. Both the Burger and Stewart opinions clearly rejected this remedial approach, the Chief Justice stating that the purpose of desegregation remedies is "to restore the victims of discriminatory conduct

the affirmative duty in prior cases had most frequently been applied to remedy intradistrict violations, arguably there was ample precedent to support an order to cross school district lines if this were necessary to achieve desegregation of the city schools. An affirmative duty has been invoked in this manner when the lines themselves had initially been drawn with a discriminatory purpose.[74] A multidistrict remedy had also been deemed appropriate to prevent some portions of formerly unified school systems from reforming boundary lines in order to evade judicially ordered desegregation.[75] Thus, the Sixth Circuit in *Milliken*

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to the position they would have occupied in the absence of such conduct." 418 U.S. at 746. The Chief Justice went on to criticize the argument accepted by the dissent that the affirmative duty standard should apply across school district lines. *Id.* at 747 & n.22.

74. *See* Haney v. County Bd. of Educ., 410 F.2d 920 (8th Cir. 1969). In *Haney* an injunction against the continued maintenance of racially segregated systems of public education in Sevier County, Ark., was upheld. The districts had been formed in response to a 1948 legislative enactment calling for the consolidation of all districts within any county where the districts served fewer than 350 students. *Id.* at 923-24. The consolidation was directed to occur in accord with existing law which required segregated schools within each district. Since the resulting district lines reflected a discriminatory pattern the Eighth Circuit ruled that de jure segregation had been established. *Id.* The court thus defined the "condition that offends" by extending state accountability for the initial discriminatory acts — first in terms of the time of their occurrence and then in terms of their geography.

In support of its result the court employed the rationale of Gomillion v. Lightfoot, 364 U.S. 339 (1960), stating that "the creation, maintenance and perpetuation of racially discriminatory district lines — whether for the purpose of elections or school attendance — is Constitutionally improper." 410 F.2d at 924-25. The *Haney* court stated that "political subdivisions are mere lines of convenience for exercising divided governmental responsibilities." *Id.* at 925. *See also* 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). There are, however, some basic problems with this analogy: (1) since the right to an equal educational opportunity (unlike the right to vote) is not a fundamental right, the existence of segregated schools may be supported by justifications that would fail to support a dilution of voting rights; (2) the "condition that offends" in the school context may be limited to school district or political subdivision boundaries whereas voting rights violations by nature transverse such boundaries; (3) finally, even where the degrees of state responsibility for segregated schools extends beyond a single political subdivision, there may be special policy or administrative reasons for limiting the affirmative duty imposed at the remedial stage to a single political subdivision. *See* text at notes 82-85 *infra*.

75. *See* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); Lee v. Macon County Bd. of Educ., 448 F.2d 746 (5th Cir. 1971); Turner v. Littleton-Lake Gaston School Dist., 442 F.2d 584 (4th 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. 1970). The Supreme Court in *Wright* and *Scotland Neck* held the secessions invalid. In *Wright*, Justice Stewart, writing for a majority of five found that if the area attempting to secede was part of the system which was ordered to desegregate, there is no need for a showing of an independent constitutional violation. 407 U.S. at 459. Rather, the court's remedial powers would be invoked on the basis of

was not without precedent when it reasoned, "[I]f school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose."[76]

Chief Justice Burger chose neither course. The Burger opinion accepted the lower court's finding of a de jure violation within Detroit

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segregation in the system as a unit. *Id.* at 459-60. Further, the validity of the action would be judged by its effects on the process of desegregation — "not the purpose or motivation" — of a school board's action in determining whether it is a permissible method of dismantling a dual system. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Id.* at 462. In terms of racial percentages, however, the effect according to Chief Justice Burger seemed to be too slight to be labeled impermissible. The county as a whole consisted of 34% white and 66% black students. Emporia's newly created district would have consisted of 48% white and 52% black students and would leave the surrounding county public schools with 28% whites and 72% blacks. *Id.* at 464. In his dissent the Chief Justice argued:

> Since the goal is to dismantle dual school systems rather than to reproduce in each classroom a microcosmic reflection of the racial proportions of a given geographic area, there is no basis for saying that a plan providing a uniform racial balance is more effective or constitutionally preferred.

Id. at 474. This shift to an effects test is supportable on the basis of the affirmative duty to integrate at the remedial stage. Chief Justice Burger, dissenting, apparently retreated from the affirmative duty standard. He proposed limiting the discretion of the district court's remedial powers where separate political entities are involved, due to the importance of local control over the schools and the questionable nature of the evidence regarding the segregatory effects that would come from allowing the severance. The Chief Justice, however, joined the majority in invalidating a similar attempt to create a separate school district in *Scotland Neck*. The rationale that underlies Chief Justice Burger's distinction of *Wright* in *Scotland Neck* further suggests his disparaging view of the affirmative duty remedial standard. *See* 407 U.S. at 492 (Burger, C.J., concurring). Arguably, the Chief Justice's opinion in *Milliken* reflects a similar backing away from the affirmative duty focus. *See* 418 U.S. at 746-47 & n.22.

76. 484 F.2d at 250. *But cf.* Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd*, 404 U.S. 1027 (1972). In *Spencer* the suit leveled an attack at all New Jersey districts and sought a general redrawing of school district lines. The suit alleged that if the presently existing lines were maintained it would be mathematically impossible in many districts to achieve racial balance. *Id.* at 1237. The district court concluded that reasonable school district lines which happen to separate black from white students cannot be invalidated in the absence of a showing of de jure segregation and, further, that Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c, creates no obligation to use racial pupil assignments to correct de facto segregation. *Id.* at 1242-43. Thus the court used the distinction between de facto and de jure segregation to support its conclusion that racially imbalanced district existing side by side does not per se constitute an equal protection violation.

Milliken represents a hybrid between the "splinter" cases and *Spencer*. While in *Milliken* there had been a violation of equal protection within the Detroit school system, it was not directly related to the creation or alteration of school district lines. Thus, the issue in *Milliken* is related to the extent of the "condition that offends" and the appropriate scope of the remedial duty, while *Spencer* is limited to the conditions under which the

under the *Keyes* rationale.[77] It refused, however, to employ shifting presumptions to the alleged de jure segregation extending beyond Detroit's city limits.[78] Although there was some evidence of interdistrict discrimination by the state, Chief Justice Burger treated it as de minimis[79] and limited the state's derivative responsibility for acts of its school districts to the confines of the district.[80] The Chief Justice concluded that "[t]he constitutional right of the Negro respondents residing in Detroit is *to attend a unitary school system in that district.*"[81]

Clearly the Burger opinion in *Milliken* refused to expand the geographical consequences of an initial de jure violation beyond the corporate limits of Detroit. It is not clear, however, why the Court rejected precedent which could have been used to support such an expansion in the Detroit case. Nor is it clear to what extent such precedent may have continuing influence in metropolitan litigation after *Milliken*. The *Milliken* plurality enlisted support for the "Detroit only" result by considering the potentially adverse effects of a multidistrict order on the autonomy of local districts, and the "deeply rooted" tradition of local control over public schools.[82] It further noted

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maintenance of district lines between segregated districts, without more, justifies an initial finding of a violation.

77. 418 U.S. at 738 & n.18.

78. *Id.* at 741-42 & n.19. The Court distinguished *Keyes* by stating "the use of significant racial imbalance in schools within an autonomous school district as a signal which operates simply to shift the burden of proof, is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy." *Id.* at 741 n.19. The lower court could have simply ordered the neighboring districts joined as defendants prior to its remedial consideration and focused on the scope of the violation rather than on the propriety of an interdistrict remedy. *Compare* Beer, *The Nature of the Violation and The Scope of the Remedy: An Analysis of Milliken v. Bradley in Terms of the Evolution of the Theory of the Violation*, 21 WAYNE L. REV. 903 (1975), *with* West, *Another View of the Bradley Violation: Would a Different Evolution Have Changed the Outcome?*, 21 WAYNE L. REV. 917 (1975).

79. 418 U.S. at 750-51.

80. *Id.* at 745.

81. *Id.* at 746 (emphasis added).

82. As to the autonomy of local districts, the court conceded that state law, including the creation and maintenance of political subdivisions, "are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies." *Id.* at 744. Nevertheless, Chief Justice Burger stated that for reasons of public policy a substantial showing must be made before the federal courts may justifiably interfere with the state's educational processes: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." *Id.* at 741-42.

the inability of the Court to effectively administer such plans.[83] Such considerations may be read as mere dicta in the Detroit case insofar as the decision turned on the failure of the district court to join the suburban districts[84] or to take evidence regarding the effect of suburban policies and practices on existing segregation within the Detroit schools.[85] Justice Stewart, concurring to form a majority, indicated support for this restrictive reading of *Milliken*. "In the present posture of the case . . ., the Court does not deal with questions of substantive constitutional law."[86] The district court's metropolitan desegregation plan must be reversed under Justice Stewart's view because "[t]he formulation of an interdistrict remedy was . . . *simply not responsive to the factual record before the District Court.*"[87] Taken from this perspective, *Milliken* represents the imposition of tolerable restraints on the Court's otherwise expansive treatment[88] of an initial de jure showing. Further, the decision represents a first attempt to articulate the limits of equitable remedial powers in terms of competing policy considerations.[89]

To the extent that the Burger result in *Milliken* depends upon defining the geographical scope of an initial de jure finding by an ad hoc evaluation of competing policy considerations, the opinion may indicate that analysis adopted in *Swann* and *Keyes* simply has no application to the resolution of multidistrict issues. Rather, a broad reading of *Milliken* suggests that a finding of an intent to discriminate within a single district acts only to trigger further inquiry. This inquiry would examine segregated conditions outside the district's jurisdictional boundaries, and would also examine the activities of the state that may have had substantial interdistrict effects. In light of the facts presented in each case, the court could evaluate the costs of achieving an

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83. The majority maintained that judicial imposition of an interdistrict remedy would raise a panoply of administrative, political and financial problems "which few, if any, judges are qualified to perform." *Id.* at 744.

84. *See* note 20 and accompanying text *supra*.

85. This reading is suggested upon a comparison of the Burger opinion with that of Justice Stewart and by the Court's failure to remand the case for further consideration of whether interdistrict violations had occurred.

86. 418 U.S. at 753 (Stewart, J., concurring).

87. *Id.* at 756 (emphasis added).

88. *See* note 56 and accompanying text *supra*.

89. *See* Dell'Ario, *Remedies for School Segregation: A Limit on the Equity Power of the Federal Courts?*, 2 HASTINGS CONST. L.Q. 113 (1975). For a sociological analysis of the costs and benefits of school desegregation see Hawley & Rist, *On the Future Implementation of School Desegregation: Some Considerations*, 39 LAW & CONTEMP. PROB. 412 (1975).

equal educational opportunity throughout the system. The Court might then accommodate competing values by defining the scope of the violation according to the results of a balancing process.[90] While neither the tradition of local schools nor the desirability of an equal educational opportunity alone would be determinative of de jure segregation, consideration of these and other factors peculiar to the case would precede a finding of its geographical extent.

III. Developing a Litigation Strategy to Achieve Multidistrict Relief

The dissenting Justices in *Milliken* severely criticized the result reached by the majority:

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90. This analysis is consistent with the Supreme Court's re-evaluation of *Milliken* in Hills v. Gautreaux, 96 S. Ct. 1538 (1976). Initially, the violation in *Gautreaux* was based upon racially discriminatory site selection and tenant assignment policies enforced by the Chicago Housing Authority (CHA) and the Department of Housing and Urban Development (HUD). *See* Rubinowitz & Dennis, *School Desegregation Versus Public Housing Desegregation: The Local School District and the Metropolitan Housing District*, 10 URBAN L. ANN. 145, 145-48 (1975) [hereinafter cited as Rubinowitz & Dennis]. *See also* Kushner & Werner, *Metropolitan Desegregation After* Milliken v. Bradley: *The Case for Land Use Litigation Strategies*, 24 CATH. U.L. REV. 187, 197-98 & n.47 [hereinafter cited as Kushner and Werner]; 8 URBAN L. ANN. 265 (1974). *Gautreaux* involved a consolidated action against the CHA and HUD. The district court imposed upon the CHA a duty to select sites for future public housing in predominantly white areas and ordered HUD to use its "best efforts" to assist the CHA within Chicago's city limits. 363 F. Supp. 690, 691 (N. D. Ill. 1973). On appeal to the Seventh Circuit, Justice Clark remanded for consideration of a "comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago . . . but will increase the supply of dwelling units as rapidly as possible." 503 F.2d at 939. Justice Clark emphasized that *Milliken* was concerned only with remedies for de jure school desegregation and that none of the competing values used by the majority in that case to limit equitable powers were present in the context of racially segregated public housing. *Id.* at 936. *See* Kushner & Werner, *supra*, at 200-06; Rubinowitz & Dennis, *supra*, at 147-48.

The Supreme Court in an opinion by Justice Stewart affirmed but criticized Justice Clark's reading of *Milliken*: "Since the *Milliken* decision was based on basic limitations on the exercise of the equity power of the Federal Court and not on a balancing of particular considerations presented by school desegregation cases, it is apparent that the Court of Appeals erred in finding *Milliken* inapplicable on that ground to this public housing case." 96 S. Ct. at 1544 & n.11. Justice Stewart's criticism represents a reassertion of his concurring opinion in *Milliken*, that the plaintiffs had simply failed to make a prima facie case of an interdistrict violation. Justice Stewart, however, approached the facts in *Gautreaux* by assuming a violation on the part of HUD and the CHA. *Gautreaux* indicates the Court's willingness to invoke metropolitan remedies in school desegregation cases when the multidistrict nature of a particular equal protection violation is clearly shown.

> When we rule against the metropolitan area remedy we take a step that will likely put the problems of the blacks and our society back to the period that antedated the "separate but equal" regime of *Plessy v. Ferguson*. . . . Today's decision . . . means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only "separate" but "inferior."[91]

While the *Milliken* result certainly represents a setback to proponents of integrated schools, it is not likely to alter single district litigation and it need not become an impenetrable barrier to multidistrict relief. Even the broadest reading of the Court's holding does not preclude the use of interdistrict remedial plans, but rather, simply refuses to ease plaintiff's burden through the unfettered use of shifting presumptions. The burden on plaintiffs after *Milliken* will be to develop litigation strategies in each particular multidistrict challenge that will expand to the greatest extent possible the geographical implications of some initial de jure showing. The remainder of this Note will focus on alternative theories that may be advanced in subsequent disputes over the imposition of a multidistrict remedy.[92]

A. *Undercutting the "Neighborhood Schools" Arguments*

Whether or not the Supreme Court eventually concludes that the use of shifting presumptions is inappropriate in multidistrict litigation, plaintiffs should recognize that *Milliken* will likely infuse some type of balancing into the courts' consideration of multidistrict relief. Consequently, plaintiffs should anticipate judicial concern over competing equitable and policy considerations in developing the theory of their particular case. More specifically, plaintiffs should attempt to distinguish *Milliken* on its facts by emphasizing the unique circumstances that have combined to create and foster racial polarization throughout their metropolitan area.

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91. 418 U.S. at 759, 761 (Douglas, J., dissenting).

92. *See generally* Sedler, *Metropolitan Desegregation in the Wake of* Milliken — *on Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U.L.Q. 535, 576-84. Additionally, the viability of *intradistrict relief* should be considered. A pre-occupation with the *Milliken* result "should not deter intradistrict desegregation suits in the largest cities from New York to Los Angeles, nor should focus upon the largest metropolitan centers deter action [in smaller urban districts where segregated schools may be entirely without need of metropolitan remedies]." Pettigrew, *supra* note 70, at 818-20 & n.14.

Chief Justice Burger's opinion in *Milliken* relied heavily upon the autonomy of local districts and the tradition of local control over schools. Alternative strategies should be advanced to undercut the impact of these considerations on the court's analysis. Presumably neither of these considerations would apply when each of the districts sought to be included within the remedial decree is shown to be in violation. This theory was successfully advanced in *Newburg Area Council, Inc. v. Board of Education.*[93]

The Sixth Circuit in *Newburg* ruled that the school district of both Louisville, Kentucky and surrounding Jefferson County had failed to desegregate their former de jure dual systems.[94] Finding that independent violations had occurred within each district[95] the court distinguished *Milliken* with regard to the geographical breadth of the violation. The court of appeals proceeded to remand with instructions that state created school district lines should impose no barrier to the elimination of "all vestiges of state-imposed segregation . . . within each school district in the county."[96]

In addition to its endorsement of an "independent violations" theory, the *Newburg* court also stressed the state statutory scheme in Kentucky to distinguish *Milliken* on the issue of local autonomy. The Louisville school district was "located within the City of Louisville, but its boundaries [were not] coterminous with the political boundaries of that city."[97] The reason for this is that in Kentucky the county is the "basic educational unit of the state"[98] and school district lines "do not [necessarily] expand with the boundaries of the city in which it is

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93. 489 F.2d 925 (6th Cir. 1973), *vacated for rehearing*, 418 U.S. 918 (1974), *aff'd on rehearing*, 510 F.2d 1358 (6th Cir.), *cert. denied*, 421 U.S. 931 (1975). For commentary on the Louisville litigation see Sedler, *supra* note 92 at 584-601.

94. Prior to *Brown* Kentucky law required racial segregation throughout the state. *See* 510 F.2d at 1361.

95. The two suits, *Newburg Area Council, Inc. v. Board of Educ.* and *Haycroft v. Board of Educ.*, had been consolidated but the district court ordered separate trials to determine the status of each district. 489 F.2d at 927. On appeal the Sixth Circuit reversed dismissals in each of the suits, finding that each district had been segregated prior to *Brown*. Neither had yet fully converted to a unitary system.

96. 489 F.2d at 932. Following the Sixth Circuit's decision, the Supreme Court vacated, 418 U.S. 717 (1974), and remanded, 418 U.S. 918 (1974), for reconsideration in light of *Milliken*. The circuit court reinstated its former opinion with minor modifications. 510 F.2d 1358, 1361 (1974), *cert. denied*, 421 U.S. 931 (1975).

97. 510 F.2d at 1361.

98. *Id.* at 1360; *see* KY. REV. STAT. ANN. § 160.010 (1973).

embraced."[99] Besides failing to create politically autonomous school districts, the Kentucky legislature had also specifically referred to the boundaries of school districts as "artificially drawn school district lines."[100] The validity of the local autonomy argument similarly becomes less persuasive whenever the districts themselves have become "integrally and uniquely related to one another."[101] This may occur either because the individual districts in fact serve a single student community[102] or because the district lines have been ignored previously for segregative purposes.[103]

Finally, plaintiffs should also attempt to distinguish *Milliken* on the related issue of local control over the administration of neighborhood schools.[104] Chief Justice Burger expressed great concern in *Milliken* that

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99. 510 F.2d at 1361.

100. KY. REV. STAT. ANN. § 160.048(1) (1973). As a factual matter it is difficult to support the proposition that Kentucky exercises any greater control over its school districts than Michigan does. The lower courts in *Milliken* characterized the state's control over its school districts as plenary. *See* notes 16-17 and accompanying text *supra*. While a majority of the Supreme Court rejected this contention, Justice Marshall observed: "The Majority's emphasis on local governmental control and local autonomy of school districts in Michigan will come as a surprise to those with any familiarity with that State's system of education." 418 U.S. at 794 (Marshall, J., dissenting). Justice Marshall pointed out that: (1) both Michigan's legislature and its supreme court considered education to be a state rather than a local concern; (2) there is in fact no relationship between school districts and local political units; (3) the state controls the district's financing; (4) "The State also establishes standards for teacher certification and teacher tenure; determines part of the required curriculum; sets the minimum school term; approves bus routes [and] procedures for student discipline;" and (5) the state has broad powers to consolidate and merge school districts without local district consent. *Id.* at 796.

101. Jenkins v. Township of Morris School Dist., 58 N.J. 483, 279 A.2d 619 (1971).

102. *See id.* at 501, 279 A.2d at 629. *Jenkins* involved a small New Jersey town that housed most of the blacks in the region. The surrounding township was a white suburban area. The two districts operated separate elementary schools, but the township sent its high school students to the town's high school. The court held that the State Commissioner of Education, under state law, had the authority to prevent the township from withdrawing its students from the high school because of the sharply increased proportion of black students that would have resulted. *Id.* at 503-08, 279 A.2d at 630-33. The court found that the town and the county were actually one community divided by arbitrary lines, and held that the State Commissioner of Education could further force a merger of the school districts to avoid racial imbalance. *Id.*

103. *Compare* Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358, 1360 (6th Cir. 1973), *cert. denied*, 421 U.S. 931 (1975), *with* Milliken v. Bradley, 418 U.S. 717, 749-50 (1974).

104. Prior to *Milliken* the Court was at best reluctant to recognize the neighborhood school policy in its formulation of a desegregation scheme. *See* notes 55, 66-70 and accompanying text *supra*. For example, the remedial plan adopted in *Swann* encompassed

an interdistrict decree would give rise to an array of complex administrative problems that would require either a complete restructuring of existing state law or complete district court control over a vast new super school district.[105] Given these concerns, plaintiffs in future litigation ought to consider ways to limit the number of districts that would be covered by a remedial decree.[106] In addition, plaintiffs should emphasize factors that would minimize potential administrative problems such as existing state control over consolidation procedures or the state's use of "umbrella" districts for the administration of other metropolitan services.[107]

B. *Using* Milliken *to Plaintiff's Advantage*

In addition to attempting to dilute the policy supports found to be persuasive in the Detroit litigation, plaintiffs ought to rely upon *Milliken* for the proposition that federal courts retain the *power* to impose interdistrict relief in appropriate situations. A majority in *Milliken* agreed that multidistrict remedies would be justified if: (1) "[T]here has been a constitutional violation within one district that produces a significant segregative effect in another district;"[108] or (2) "district lines have been deliberately drawn on the basis of race,"[109] or (3) state officials "had contributed to the separation of the races . . . by purposeful racially discriminatory use of state housing or zoning laws."[110] The first course of action, proving significant segregative effects, may be of little practical value to litigants without further guidance from the courts as to how the causal relationship between

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over 550 square miles which included the City of Charlotte and surrounding Mecklenburg County, North Carolina. Without regard to local control, the *Swann* Court ordered a "frank — and sometimes drastic — gerrymandering of school districts and attendance zones," as well as "pairing, 'clustering', or 'grouping' of schools," to achieve desegregation, even though the newly drawn zones might be "on opposite ends of the city." 418 U.S. at 775 (White, J., dissenting), *quoting* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27 (1971).

105. 418 U.S. at 743-44.

106. *See generally* Hain, *Techniques of Governmental Reorganization to Achieve School Desegregation*, 21 WAYNE L. REV. 779 (1975).

107. *Compare* United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975) (*Indianapolis II*), *with* Milliken v. Bradley, 418 U.S. 717, 796 (1974) (Marshall, J., dissenting).

108. 418 U.S. at 745.

109. *Id.*

110. *Id.* at 755 (Stewart, J., concurring).

activities of school authorities and resulting segregative effects are to be proved. This is particularly important if the theory of shifting presumptions developed in the intradistrict setting is rejected. The remaining two alternatives — boundary manipulation and discriminatory use of state housing laws — may prove to be more useful particularly in light of a recent trend in intradistrict litigation towards diluting the impact of the de jure/de facto distinction.

1. Using an Expanded Notion of Intent in "Boundary Manipulation" Disputes

Milliken apparently adopts the de jure standard announced in *Keyes:* "[T]he differentiating factor between de jure segregation and so called de facto segregation . . . is *purpose or intent to segregate.*"[111] While *Keyes* established an intent test, it failed to articulate the proper means of discerning segregatory intent.[112] The lower courts have responded by devising their own evidentiary standards. The trend has been towards allowing plaintiffs to demonstrate intent by producing evidence on the effects of racially neutral actions or of a failure to act.[113]

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111. 413 U.S. at 208; *see* note 32 *supra.*

112. For the relationship between purpose or intent to "motive" see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207 n.1 (1970), who argues that both "purpose" and "motive" have been given a definitional gloss by the commentators that does not bear logical analysis. Some commentators have attempted to distinguish "motive" from "purpose." *See Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1091-1101 (1969) ("purpose" derives from an "objective" inquiry into what the legislature sought to achieve whereas "motive" derives from the "subjective" reasons for legislative action). But the distinction has been persuasively criticized. *See* Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887, 1887-88 n.1("Any subjective reason for legislative action may be restated as an end which the action is intended to accomplish, and vice versa"). *See also* Kushner and Werner, *supra* note 90, at 208-12 (1975) (discussing concept of shared liability).

113. It is difficult either to prove or to disprove "motivation" particularly when a collective body such as the school board or state legislature is being examined. Keyes v. School District No. 1, 413 U.S. 189, 233-34 (1973) (Powell, J., concurring). Consequently, the result in any particular case will largely depend upon the extent to which evidentiary tests devised by the courts allow intent to be inferred from objective circumstances. The result will also be affected by the burden of proof rules under the court's formulation. An examination of lower court decisions since *Keyes* reveals that some jurisdictions have interpreted the decision to require that plaintiff establish affirmative actions of defendant which evince "segregative purpose or motivation." Husband v. Pennsylvania, 395 F. Supp. 1107, 1133 (E.D. Penn. 1975). *See* Johnson v. San Francisco United School Dist., 500 F.2d 349 (9th Cir. 1974); Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579 (9th Cir. 1973); Morales v. Shannon, 366 F. Supp. 813 (W.D. Tex. 1973).

Some courts have expanded the examination of intent to any acts or omissions whose

The extent to which such expanded notions of intent can be useful to plaintiffs in multidistrict litigation over alleged boundary manipulation was left unanswered by the *Milliken* majority. While Chief Justice Burger's statements seem to require some showing of deliberate discriminatory action by the state,[114] Justice Stewart indicated that something less may be acceptable. A metropolitan remedy is appropriate, according to Justice Stewart's formulation, when "state officials [have] *contributed to* the separation of the races by drawing or redrawing school district lines."[115] This statement arguably supports the imposition of an interdistrict remedy based "only [on] a showing of racial *effect*, not purpose."[116] This difference in approach may dictate different results in a situation when facially neutral state acts or omissions foster existing de facto segregation in the metropolitan setting. The Indianapolis litigation illustrates this potential for different results.

In 1968 the United States brought suit to desegregate the Indianapolis schools (*Indianapolis I*).[117] The district court determined that the state

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natural, probable, foreseeable and actual consequences are to bring about or to maintain segregation. *See* Webb v. School Dist. of Omaha, No. 74-1964 & 74-1993 (8th Cir. June 12, 1975, *as amended*, July 7, 1975) (court found that segregated results had not only been foreseeable but that defendants had *conscious knowledge* of the likelihood of such results); Hart v. Community School Bd. of Educ., 512 F.2d 37 (2d Cir. 1975) (school authorities acted and failed to act *knowing* that segregation would be the result of their decisions); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 183 (6th Cir. 1974) ("Benevolence of motive does not excuse segregative acts."). *But cf.* Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974) (inference of intent is permissible, not mandatory, sustaining the district court's ruling for defendants). Under this view, the courts having found such evidence of intent, shift to defendants the burden of affirmatively establishing that their acts or omissions were not racially motivated. This use of shifting presumptions finds some support in Keyes. *See* notes 63-66 *supra*. *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See generally* Marshall, *The Standard of Intent: Two Recent Michigan Cases*, 4 J.L. & EDUC. 277 (1975).

Finally, other courts have taken the position that "it is not necessary to prove discriminatory motive, purpose or intent as a prerequisite to establishing an equal protection violation when discriminatory effect has been demonstrated. [The question] is whether defendant's official acts *resulted in* constitutionally impermissible dual school system." Berry v. School Dist., 505 F.2d 238, 243 (6th Cir. 1974) (emphasis added); *see* Pride v. Community School Bd., 488 F.2d 321 (2d Cir. 1973).

114. *See* text at note 109 *supra*.

115. 418 U.S. at 755 (Stewart, J., concurring) (emphasis added).

116. Taylor, *supra* note 35, at 759.

117. 332 F. Supp. 655 (D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

had failed to eradicate the vestiges of pre-*Brown* dual schools and began consideration of an appropriate remedy (*Indianapolis II*).[118] After this suit against the city had commenced, the civil governments of Indianapolis and those of the surrounding county were consolidated by the Indiana legislature into a unified, metropolitan government (Uni-Gov.).[119] The school system, however, was not included, but was restricted to the old central city — a situation unique among Indiana cities.[120] As a result the school district of Indianapolis was surrounded by ten independent districts within the otherwise unified city. To further compound the situation, the aggregate student population of the county schools are 97.4 percent white, in contrast to the central city's 41.1 percent nonwhite population.[121]

The district court in *Indianapolis II*, like the lower court in *Milliken*, found that an "Indianapolis only" plan could not eradiate the effects of former de jure acts.[122] The court conceded "that there was no evidence that any of the added defendant school corporations have committed acts of de jure segregation directed against Negro students living within their respective borders."[123] Nevertheless, it ordered the formulation of a plan covering the ten districts within Uni-Gov and nine surrounding districts. On appeal, the Seventh Circuit reversed the ruling as to the inclusion of the districts outside of Uni-Gov's boundaries.[124] The lower court's decision regarding relief within Uni-Gov, however, was

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118. 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). The equal protection violation was based on a finding that within Indianapolis there had been gerrymandering of attendance zones, faculty segregation and a pattern of decisionmaking that evidenced "a purposeful pattern of racial discrimination" including site selections, decisions and a drawing of attendance zones for neighborhood schools "with the knowledge of [underlying] residential patterns and housing discrimination." 332 F. Supp. at 666 (*Indianapolis I*). Regarding the segregated residential patterns, the Seventh Circuit held that "school policy has a substantial impact on residential patterns as well as vice versa. Thus, the appellants are not victims of the inevitable since their predecessors' actions have contributed in substantial part to the present pattern." 474 F.2d at 89.

119. 332 F. Supp. at 676.

120. *Id.*

121. 503 F.2d at 76-77.

122. 368 F. Supp. at 1197-99. The court concluded that an Indianapolis-only plan, "if put into effect, would have the effect of an immediate acceleration of white students into suburban white enclaves or private schools, so that [the Indianapolis Public School System] as a whole would predictably have a black majority within a matter of two or three years." *Id.* at 1198.

123. *Id.* at 1203.

124. 503 F.2d at 80, 86.

remanded to "determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of [the Indianapolis Public School System] boundaries warrants an interdistrict remedy within Uni-Gov *in accordance with Milliken.*"[125] The court of appeals then sidestepped the crucial issue of whether *Milliken* requires a showing of deliberate action or merely that state officials contributed to racial segregation by citing to both the Burger and the Stewart formulations.[126] Under the Stewart test courts would presumably be justified in ordering interdistrict relief if they find that the civic consolidation without school consolidation "contributes to the separation of the races." Nevertheless, a strict application of the Burger approach[127] would produce the contrary result.

Plaintiffs in other post-*Milliken* cases have successfully relied upon the more liberal Stewart formulation of "intent" to obtain interdistrict remedies. For example, in *United States v. Missouri,*[128] plaintiffs urged the segregative effects of a failure to act under the circumstances of the case. Prior to 1937 the Kinloch and Berkeley districts had been operated as a single racially segregated system under Missouri law. Because of a history of attempts prior to 1937 to split the district on racial grounds, the eventual incorporation of the city of Berkeley in 1937 was ultimately found to have been motivated solely by racial considerations.[129] Supporting this conclusion was evidence that minority students had been transferred from the Berkeley district after the incorporation to insure racially segregated districts.[130] The county school board was

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125. *Id.* at 86 (emphasis added).

126. *Id.* at 86 n.23. On the most recent remand, the district court expanded its factual findings and, citing the Stewart opinion in *Milliken,* ordered system wide relief within the boundaries of Uni-Gov. United States v. Board of School Comm'rs, Civil No. 68-225 (S.D. Ind., Aug. 1, 1975).

127. Strictly applied, the Burger test requires deliberate boundary manipulation. *See* text at note 109 *supra.* Yet if the Court were to apply a balancing test to the facts of the Indianapolis case, *see* text at note 90 *supra,* the result would probably be in favor of interdistrict relief because of the nature of the "district" involved.

128. 388 F. Supp. 1058 (E.D. Mo.), *aff'd,* 515 F.2d 1365 (8th Cir. 1975).

129. In 1937 two unsuccessful attempts were made to divide Kinloch No. 18 into separate black and white school districts. Shortly after the second unsuccessful attempt at division, a petition was filed to incorporate the city of Berkeley, the boundaries of which were almost identical to the boundary lines of the previously rejected white school district. 363 F. Supp. 739, 743.

130. *Id.* Although the new Berkeley and Kinloch school districts each included a minority of black and white resident students as compared with their otherwise virtually all-white and all-black student populations, interdistrict transfers were encouraged and thus the districts remained completely segregated. *Id.*

found to have maintained the district line dividing these two systems with the knowledge of their segregated condition and of the inferiority of the Kinloch system. This evidence was sufficient even under the Burger formulation to charge state and county officials with an affirmative duty to consolidate the districts. The duty attached directly to the interdistrict nature of the initial violation which had entrenched segregation into the existing school district structure. The presence of these "vestiges" shifted to the defendants the burden of justifying their continuation "of the present ineffective method of school district organization."[131]

The court also included Ferguson-Florissant (a third suburban district) in its consolidation order. Ferguson-Florissant had not been directly involved in the creation of the Kinloch District as an all black district. Nonetheless, the Eighth Circuit upheld its inclusion in the remedial decree. The court of appeals held that the segregative effects of opposition by the Ferguson-Florissant electorate to proposed reorganization plans and the effects of its failure to take affirmative actions designed to overcome Kinloch's de jure condition[132] constituted adequate grounds for an interdistrict decree under the circumstances.[133]

The district court in *Evans v. Buchanan*[134] utilized a similar approach — ordering submission of plans for consolidating the Wilmington school district with a neighboring county district.[135] Plaintiffs

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131. 363 F. Supp. at 749. Given the interdistrict nature of the violation regarding the Kinloch and Berkeley districts, this shifting of the burden with regard to their combined areas would arguably be justified under Justice Brennan's analysis in *Keyes*. *See* text at notes 63-66 *supra*.

132. 515 F.2d 1365, 1370 (8th Cir. 1975).

> [T]he [district] court found that Kinloch was excluded from numerous reorganization plans proposed by the county and state defendants; on the occasion in 1949 when Kinloch was included, the plan was defeated by the electorate; and even though virtually all the school districts in the North area near Kinloch have been enlarged through annexation since 1948, Kinloch has remained as a small segregated district.

Id. at 1370 (footnotes omitted).

133. The court distinguished the plan rejected in *Milliken* by noting that here the remedy would effect only three districts and that the administration of the plan "will not result in extensive disruption of public education in Missouri such as may have resulted in the broad metropolitian plan considered in *Milliken*." *Id.* The plan approved in *Missouri* called for a restructuring of the existing school board's membership and authorized the district court to impost a uniform tax levy throughout the consolidated district up to the highest rate previously imposed by any of the former districts. *Id.*

134. 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975).

135. *See* notes 159-63 and accompanying text *infra*.

challenged a general reorganization statute which excluded the Wilmington school district from consolidation eligibility. The Wilmington district, whose student population is over eighty percent black, was held to have engaged in de jure acts.[136] The district court based its consolidation order, in part, upon the *significant interdistrict segregative effects* of the General Assembly's denying the state board of education authority to redistrict Wilmington.[137]

The net result of the decisions in *Missouri*, and *Evans* appears to be that the federal courts are willing to take a liberal view of the segregatory intent requirement in the multidistrict context, allowing a showing of segregatory effect to suffice. This view of the intent requirement ought to be advanced by litigants in those states in which segregation was formerly required by law or where the effects of a recently completed district reorganization plan results in racially polarized schools. This approach has not thus far been challenged by the Supreme Court which affirmed the *Evans* decision without an opinion and denied certiorari in *Missouri*.[138]

2. Asserting Racially Discriminatory Use of State Housing or Zoning Laws

The de jure/de facto distinction is grounded in a finding of a causal relationship between state actions (or inactions) and resulting racial segregation. Despite the expansion of the de jure classification based on deriving intent from segregative effects, there is still no duty to integrate when school authorities have acted *without any purpose or intent* to discriminate.[139]

A number of suits, however, have successfully demonstrated

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136. 379 F. Supp. 1218 (D. Del. 1974).

137. 393 F. Supp. at 445, stating:

> But for this racial classification, the Board may have consolidated Wilmington with other New Castle County districts, with the result that the racial proportions of the districts would have been altered significantly. Even though the State Board may not have been required to alter the Wilmington District, this Court cannot find that the exclusion from the Board's powers was racially insignificant. On the contrary, the reorganization provisions of the Educational Advancement Act played a significant part in maintaining the racial identifiability of Wilmington and the suburban New Castle County school districts.

138. *See* note 1 *supra*.

139. 418 U.S. at 756 n.2.

governmental responsibility for residential segregation itself[140] due to such practices as: racially motivated site selection and tenant assignment policies in public housing, discriminatory practices of the Federal Housing Administration or Veterans Administration insurance programs, or, zoning and annexation policies that foster racial segregation.[141] The results of most future metropolitan school desegregation cases may well depend upon the ability of plaintiffs to prove state responsibility for such discriminatory practices through empirical sociological data.[142] In addition, they will need to prove that such practices have had a significant impact on present metropolitan segregation, and convince the courts that such metropolitan residential discrimination, coupled with de jure discrimination within a single district, justifies multidistrict school desegregation. Plaintiffs in both *Milliken* and *Bradley v. Richmond*[143] were unable to prove that the effects of areawide residential discrimination justified a multidistrict remedy for a single district de jure school violation.[144]

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140. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (state action found in judicial enforcement of restrictive covenants); Buchanan v. Warley, 245 U.S. 60 (1917) (invalidating zoning ordinance which in effect segregated entire city by race); United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974). *But cf.* Lindsey v. Normat, 405 U.S. 56 (1972) (dicta that adequate housing is not a constitutional right); James v. Valtierra, 402 U.S. 137 (1971) (holding constitutional a referendum requirement for approval of low-income housing). *See also* English v. Town of Huntington, 448 F.2d 319, 323, 324 (2d Cir. 1971); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291, 295-296 (9th Cir. 1970).

141. *See generally* Taeuber, *Demographic Perspectives on Housing and School Segregation*, 21 WAYNE L. REV. 833, 840 (1975).

142. *See id.* at 846-850. Nevertheless, courts have recognized some interrelationship between residential and public school segregation. In Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971), the court said:

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. . . . People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> [School site selection policies] may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

See generally Goodman, *supra* note 32, at 320-35.

143. 462 F.2d 1058 (4th Cir.), *aff'd by an equally divided court*, 412 U.S. 92 (1972).

144. For a comprehensive summary of the major arguments that plaintiffs in the two cases sought to establish see Taylor, *supra* note 35, at 763-769. Professor Taylor discusses the following propositions: (1) federal and state policies helped to foster and maintain

The district court in *Richmond* made an extensive analysis of state action among the three local governmental units and found that viewed collectively, the discriminatory actions of these authorities had the effect of locking blacks into the city of Richmond.[145] Examples included selective school construction policies, racially motivated pupil transfer plans, and school attendance lines superimposed on segregated housing patterns.[146] Discussing the effects of residential segregation, the court stated: "The interdependency of housing and school segregation is fully established by the records. Schools were planned with an eye to separate racial occupancy and opened as such, with zone and division lines imposed upon segregated housing patterns."[147] Also contributing to residential segregation were the state's prior endorsements of restrictive covenants and prior discrimination in FHA loans.[148] The Fourth Circuit, reversing the district court, acknowledged the existence of minimal state action perpetuating housing segregation. It found, however, no "joint interaction" between any two of the school districts, or any Virginia state officials, for the purpose of promoting segregation.[149] The court concluded that: "The root causes of the concentration of blacks in the inner cities of America are simply not known and the district court could not realistically place on the counties the responsibility for the effect that inner city decay has had on the public schools of Richmond."[150] Since the Supreme Court was equally divided in *Richmond*, and thus rendered no opinion, the viability of the

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racially segregated neighborhoods; (2) government programs designed to foster fair housing have failed to overcome the effects of past discrimination; and (3) residential segregation has principally been caused by public and private discrimination, not by other factors. *See generally* Goodman, *supra* note 32.

145. Bradley v. School Bd., 338 F. Supp. 67, 102 (E.D. Va. 1972), *rev'd*, 462 F.2d 1058, *rehearing denied*, 414 U.S. 884 (1973).

146. *Id.* at 72-74. Judge Merhige also determined that "[e]mployment, education, and housing discrimination foster each other in the United States; the effects of one are causative of the others; they are interdependent phenomena." *Id.* at 195.

147. *Id.* at 89.

148. Discrimination was found to have played a part in the selection of urban renewal sites, the racial occupancy of public housing projects, and in the refusal by FHA to insure home loans in areas not racially homogenous. *Id.* at 72-73, 215-20.

149. 462 F.2d 1058, 1066 (4th Cir. 1972).

150. *Id.* The courts have, however, relied on various theories to impose an affirmative duty on suburban communities to help relieve the adverse effects of intercity housing discrimination. *See generally* Kushner & Werner, *supra* note 90. *See also* City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976).

plaintiff's approach for future litigants is unclear.[151]

Plaintiffs in *Milliken* likewise convinced the district court that state and federal governmental authorities had contributed to the segregated housing patterns of the Detroit metropolitan area. The district court concluded, "The affirmative obligation of the defendant board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential segregation."[152] The thrust of the plaintiffs' argument, however, was quashed by the appellate process. The court of appeals, "[i]n affirming the District Judge's findings [did not rely] at all upon testimony pertaining to segregated housing . . ."[153] causing Chief Justice Burger to conclude that the case "in its present posture . . . does not present any question concerning possible state housing violations."[154] Apparently, Justice Stewart did examine the housing record and found it inadequate. He stated: "No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and the surrounding areas were in any significant measure caused by governmental activity."[155] Nevertheless, it is Justice Stewart's approach to residential segregation that leaves the door open for future school desegregation plaintiffs. While joining the majority in its result, Justice Stewart added that a multidistrict remedy may be justified when state officials have "contributed to the separation of the races . . . by

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151. The denial of a metropolitan remedy in *Richmond*, given the factual circumstances, represents a more narrow approach to interdistrict relief than that taken by the *Milliken* court. First, the fact that Richmond, unlike Detroit, was operated as a pre-*Brown* state segregated dual system, seems to cut against the possibility of reliance on "vestiges" argument regarding based on the original drawing of district lines. Further, *Richmond* had formerly been under court ordered segregation so that apparently an argument based on an affirmative duty attaching at the remedial stage based on the segregatory effects of a city-suburban split would, by itself, be unsuccessful. Finally, in *Richmond* the court was attempting to deal with only three school districts, as compared to fifty-three in *Milliken*. Yet the court refused to extend an affirmative duty beyond the city's boundaries, thus suggesting that the scope of the remedial powers may be defined in fact by the "depth" of the violation rather than the type of administrative analysis undertaken by Justice Stewart. In any event, the precedential value of *Richmond* will hereinafter be obscured by *Milliken*.

152. 338 F. Supp. at 593.

153. 484 F.2d at 242.

154. 418 U.S. at 728 n.7. Concerning the propriety of the Chief Justice's conclusions see Taylor, *supra* note 35, at 764 n.48. (concluding that the failure to review evidence of segregated housing was "clearly at odds with long-standing Supreme Court practice").

155. 418 U.S. at 756 n.2 (Stewart, J., concurring).

purposeful racially discriminatory use of state housing or zoning laws."[156] Although the Supreme Court has never squarely faced this issue,[157] Justice Stewart's position has been adopted by several lower courts.[158]

Evans v. Buchanan[159] may represent a new wave of litigation attempting to force a re-examination of this issue in the metropolitan

156. *Id.* at 755.

157. This precise issue was reserved in Keyes v. School District No. 1, 413 U.S. 189, 211-212 (1973); Kelley v. Guinn, 456 F.2d 100, 106 n.7 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); and Johnson v. San Francisco Unified School Dist., 500 F.2d 349, 351 n.1 (9th Cir. 1974). *See also* Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682, 689 (5th Cir. 1969).

158. Mapp v. Board of Educ., 477 F.2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1973), was a pre-*Milliken* case holding that the school board carries the burden of establishing that any racial imbalance in the school population "was not the result of any present or past discrimination on the part of the board *or on the part of any other state agency*." *Accord*, Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579, 586 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974). *See also* Franklin v. Quitman County Bd. of Educ., 288 F. Supp. 509, 519 (N.D. Miss. 1968) (school construction case holding that all agencies of the state, not just local authorities, are to be charged with an affirmative duty to disestablish state-imposed segregation); Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833, 854 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968) ("the criterion is whether the state is so *significantly* involved in the private discrimination as to render the state action and the private action violative of the equal protection clause").

A recent Ninth Circuit decision, Ybarra v. City of San Jose, 503 F.2d 1041 (9th Cir. 1974), may have gone even further regarding the possibility of using non-school board activities as a basis for school desegregation remedies. Plaintiffs alleged that city officials had discriminated in the granting of variances, zoning and building permits to developers of land. This discrimination was alleged to have resulted in racially imbalanced neighborhoods which led to segregated schools. Thus the complaint specifically raised the issue whether discriminatory land use controls could form the basis for relief from school segregation. The court of appeals, citing Justice Stewart's concurrance in *Milliken*, reversed a motion to dismiss and remanded for a hearing on the merits. The remand was based on the theory that, even though the alleged discrimination was "one step removed from the cause," it was sufficient to state an actionable claim under the equal protection clause. *Id.* at 1043. *Cf.* Hart v. Community School Bd., 512 F.2d 37 (2d Cir. 1975), where a Brooklyn school board was charged with maintaining a local junior high school in an unconstitutionally racial manner. The school board arguing *"inter alia,* that if segregation exists, it is due to housing patterns fostered and maintained by [New York] City, state, and federal authorities," all of whom were amongst the host of defendants impleaded by the school board. *Id.* at 40. The district court's refusal to dismiss the third party defendants was reversed by the Second Circuit, stating:

> By filing this far-reaching third party complaint the local school board did far more than seek to set up segregative acts of other agencies as a defense for itself. . . . It succeeded initially in getting the District Judge to convert a narrow issue involving a single junior high school . . . into what could only become an issue so broad as to defy judicial competence . . . .

Id. at 41.

159. 393 F. Supp. 428 (D. Del. 1975); *aff'd*, 423 U.S. 963 (1975); *see* notes 133-36 and accompanying text *supra.*

setting.[160] In ordering defendants to draw up interdistrict desegregation plans, the *Evans* court found that state and federal governmental authorities, largely through their activities in the public and private housing markets, "elected to place their 'power, property, and prestige' behind the white exodus from Wilmington and the widespread housing discrimination patterns in New Castle County."[161] Concluding "that governmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs"[162] the Court held, *inter alia* that such conduct constituted "segregative action with interdistrict effects under *Milliken*."[163]

CONCLUSION

Milliken clearly restricted the availability of system wide relief for racially segregated school districts within a metropolitan area. Prior to *Milliken*, the courts had employed shifting presumptions to expand the geographical implications of an initial de jure violation and thereby dilute the import of the de jure/de facto distinction. Such expansions have no doubt contributed to the large scale desegregation of rural and urban districts throughout the nation. The only major condition of segregated schools that now relies upon a strict de facto/de jure distinction to evade the imposition of broad remedial desegregation decrees is that which exists among and between the independent districts of racially polarized metropolitan areas.

Plaintiffs in multidistrict desegregation suits should use the *Milliken* decision and particularly Justice Stewart's concurring opinion to develop litigation strategies that are designed to circumvent the *Milliken* result. The Detroit case itself relies heavily upon policy considerations that may be undermined in certain cases by an appropriate characterization of the initial de jure violation. Additionally, plaintiffs ought to rely upon *Milliken's* explicit recognition of the district court's power to invoke multidistrict relief, particularly when there is evidence of boundary manipulation that results in racial polarization or when the state's housing or zoning policies have fostered underlying segregation.

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160. *See* Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974); Board of School Comm'rs v. United States, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975); *cf.* Wheeler v. Daram, 379 F. Supp. 1352 (D.N.C. 1974).

161. 393 F. Supp. at 438.

162. *Id.*

163. *Id.*