10-1973

Milliken v. Bradley

Lewis F. Powell Jr.

STATEMENT OF OLIVER W. HILL, ESQUIRE, BEFORE THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE IN SUPPORT OF THE CONFIRMATION OF LEWIS F. POWELL, JR., AS A JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Mr. Chairman and members of the Committee, I am Oliver W. Hill, an attorney at law practicing in Richmond, Virginia, as a member of the law firm of Hill, Tucker and Marsh. I thank the Committee for affording me this opportunity to express my views on the question of the confirmation of the nomination of Lewis F. Powell, Jr, as a Justice of the Supreme Court of the United States.

My acquaintanceship with Mr. Powell began in the late Forties when we were engaged in a common cause to remodel the form and system of government for the City of Richmond, Virginia.

From time to time from that period in the late Forties until March, 1968, the name and activities of Lewis Powell came to my attention by reason of his various activities relating to the legal profession or in the performance of some public function. Whenever the discussion concerned his legal ability, it reflected him to be a lawyer of the highest competence. He was also reflected as being a person of excellent character, a highly motivated, public-spirited citizen and a progressive moderate on racial questions.

In 1966, Governor Mills E. Godwin appointed Mr. Powell, nine other distinguished Virginians and me to a Commission on Constitutional Revision. The Commission had been authorized under a joint resolution passed by the Virginia General Assembly. Mr. Justice Albertis S. Harrison, Jr., of the Supreme Court of Virginia was its chairman. We were charged to formulate and submit our report within one calendar year and, in order to meet this requirement, it necessitated frequent meetings of the full Commission and its subcommittees. Mr. Powell and I served as the subcommittee for Taxation and Finance.

It is principally upon this background of my close association with the nominee during this period that I rely as the basis for my conclusion as to his fitness to serve on the Supreme Court of the United States.

The measure of a man can be determined as well from what he is for, as from what he is against.

By virtue of his experience acquired while on the School Board of the City of Richmond and the State Board of Education, Mr. Powell realized the need of a high quality of education in the schools throughout the Commonwealth. He was an ardent supporter of the new

education article in our constitution which, incidentally, is one of the strongest education articles in any state constitution in the country. This article provides for the legal support which will bring us closer to a realization of equal educational opportunities for every school child in Virginia, regardless of his race, geography or other circumstances.

Mr. Powell supported the provision which puts education for the first time into Virginia's Bill of Rights on the same plane with such other fundamental values as freedom of speech and free exercise of religion.

For the first time in its history, Virginia's Constitution now contains a prohibition against state discrimination against any person on the basis of race, color or religious conviction. This puts in the Virginia Constitution a solemn declaration of policy for the Commonwealth comparable to that which the 14th Amendment lays down in the Federal Constitution. Mr. Powell gave his whole-hearted support to the adoption of this clause.

Several years ago, in "Southern Politics in State and Nation", V. O. Key and Alexander Heard in writing about the members of Virginia's conservative ruling establishment stated that they demonstrated a sense of honor, an aversion to

open venality, a degree of sensitivity to public opinion, a concern for efficiency in administration, and, so long as it does not cost much, a feeling of social responsibility.

Mr. Powell not only has all of the best qualities of a conservative Virginian, including a feeling of social responsibility, but he has also demonstrated an awareness that in order to fulfill this responsibility, the Commonwealth must incur costs and that adequate measures should be established through which the necessary finances can be provided.

In order to accomplish this objective he labored earnestly for the abolition of some of Virginia's traditional concepts with respect to our revenues and debt management.

In other words, Gentlemen, although he is conservative in many respects, the fact that he exhibits a willingness to seek new solutions to problems where old methods have outworn their usefulness or demonstrated their inadequacy, has convinced me that he is a man whose heart is right; and I believe that this characteristic, coupled with his proven intellectual capacity, will impel him to reach the right decisions on most issues.

For these reasons I earnestly request that he be confirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 2, 1973

MEMORANDUM TO THE CONFERENCE

Re: Bradley v. Milliken (Detroit School Case)

I have been advised that a petition for rehearing en banc was filed in this case on December 22, and that the petition has not yet been acted upon. The Clerk of the Court of Appeals for the Sixth Circuit will promptly advise me as soon as an order is entered on the rehearing petition, which he anticipates will be by January 10.

P.S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 16, 1973

MEMORANDUM TO THE CONFERENCE

Re: Detroit School Case

The United States Court of Appeals for the Sixth Circuit entered an order this morning setting this case for reargument en banc on February 8. As the order recites, its effect under the court's rules is to vacate the judgment and opinion heretofore rendered by the panel of three judges.

P. S.

[c. 5/3/73 ?]

File

No. 72-549 - School Board of the City of Richmond v. State Board of Education of the Commonwealth of Virginia

No. 72-550 - Bradley v. State Board of Education of the Commonwealth of Virginia

From: White, J.

Before us for review is the judgment of the Court of Appeals for the Fourth Circuit which reviewed the judgment of the District Court, vacated the Order of the District Court entered on January 10, 1972, and dismissed the suit as against named state officials and the school boards and supervisors of Henrico and Chesterfield Counties. I would in turn vacate the judgment of the Court of Appeals and remand the case for further proceedings. As Harry Blackmun suggested in his note of April 25th, I am stating in summary form the reasons for my vote.

The District Court had ordered the creation of a single school division composed of the City of

opinion as resting on a desire to achieve a "viable" racial mix and the plan as a whole to be "the equivalent . . . of the imposition of a fixed racial quota." (Appx. 570a) This was thought to be error because"[t]he Constitution imposes no such requirement and imposition as a matter of substantive constitutional right of any particular degree of racial balance is beyond the power of a District Court." (Appx. 570a)

Had the Court of Appeals stopped there, the district judge presumably would have been free to correct his error, but still within the boundaries of the expanded, consolidated area of the three districts. The Court of Appeals, however, went on to rule that the three school districts could not be consolidated and treated as a unit. Richmond, Henrico, and Chesterfield have been separate school districts for over 100 years, co-terminous with the political boundaries of the City

past, but there was no evidence that they had in any way cooperated in this respect or in resisting desegregation. Resistance, though massive, had been individual. The 1902 Constitution and applicable legislation permitted the State Board of Education to designate two or more counties or counties and cities as a single school division. But the separate school boards in the combined units remained separate operating entities. The Court of Appeals also pointed out that school boards in Virginia had no power to tax and must depend on the county or other local governing body for their financing. Finally, under the new Constitution of the Commonwealth, a school division can be composed of more than one school district only on request of the school boards and the concurrence of the governing body of the county or city. The forced consolidation of the three districts ordered by the District Court was thus contrary to Virginia

consolidation involved "practicalities of budgeting and finance that boggled the mind." (Appx. 578a) Because the creation and operation of the three school districts was not intended to circumvent any federally protected right and because there was no evidence that the consequence of maintaining separate districts had impaired federally protected rights . . . "for there is no right to racial balance within even a single school district" . . . the Court concluded that "it was not within the district judge's authority to order the consolidation of these three separate political subdivisions of the Commonwealth of Virginia." (Appx. 580a-581a) Once it became clear that imposed segregation had been completely removed within the school district of the City of Richmond, "further intervention by the district court was neither necessary nor justifiable." (Appx. 581a) The three school districts were to be viewed separately and the necessary remedies imposed district by district.

or even as a matter of remedy for an adjudicated violation, strict racial quotas are not obligatory and very likely erroneous. In this sense, achieving racial balance would be no excuse whatsoever for a remedy crossing district lines; for, as the Court of Appeals said, "there is no right to racial balance within even a single school district." (Appx. 580a)

The district judge was not at liberty to impose racial quotas, within or without Richmond. But if he was free to merge school districts, to cross school district lines, or to consolidate Richmond, Henrico, and Chesterfield into one school district, would a desegregation plan for the entire area be adequate if it merely followed, exactly, the desegregation plans of individual districts -- that is, Richmond students would attend Richmond schools in accordance with the Richmond plan, Henrico students in accordance with the Henrico plan, and so on? I doubt that such a plan for the entire area would satisfy our cases: and.

plans would not be adequate for the consolidated area, for on that basis there would be identifiable white and black schools coexisting within relatively short distances of one another and the dual system would not have been eliminated root and branch.

But I would rather not rely on my view of this record in this respect nor on that of Mr. Kurland either. I would prefer that the Court of Appeals look at the case in this light, which it surely did not do. The Court conceded that the State's near plenary power over its political subdivisions could not be used as an instrument for circumenting the Fourteenth Amendment right "to attend a unitary school system"; the Tenth Amendment would then be in conflict with the Fourteenth and "it [is] settled that the latter will prevail." (Appx. 580a) Strangely, the Court of Appeals' only discoverable response to its own sally was that there was no right to a racial balance within a school district and so no right, for

to be explored. There should have been further inquiry: first, considering the three counties as a unit, whether the separate county plans fell short as an adequate federal remedy for past constitutional violations; and, second, if the answer to that question was in the affirmative, whether the shortcomings of the individual county plans provided a sufficient federal foundation for merging the three districts or in any other way crossing district lines so as to eliminate, to the extent reasonable and practicable, racially identifiable schools and hence disestablishing what had been dual school systems in each of the three Counties.

Historically, Virginia has not found it impossible to merge school districts even though individual districts retain their identity and remain dependent on their local governing entities for financial support. As the Court of Appeals recognized, the State School Board ordered such consolidation on

the same results may be achieved with the proper local consents. Consolidations of school districts do not appear to be the impossible undertaking the Court of Appeals envisaged. Judge Winter wrote in dissent below, but he was unchallenged when he pointed out the following:

> "The Virginia Constitution was revised in 1970, the revisions becoming effective July 1, 1971. A consolidation of school districts of political subdivisions may now be effected only at the request (and with the consent) of the school boards and governing bodies of the affected political subdivisions. Va. Const. Art. VIII, § 5(a), as revised (1970); Va. Code Ann. § 22-30 (Cum. Supp. 1971). With the exception of this present requirement of consent, it is correct to say that under Virginia statutes enacted pursuant to both the former and the current State Constitutions, there were and are specific provisions governing (1) the composition, appointment and terms of members of a school board of a division composed of two or more political subdivisions, (2) the qualifications and duties of the consolidated

> rules and regulations for the financial formula for the allocation of operating costs, capital outlay, and incurring of indebtedness for school construction, (8) the fiscal agent for the consolidated division, and (9) the effective date for formation of the Board and its assumption of the supervision and operation of all schools within the consolidated division. Va. Code Ann. §§ 22-100.3 to 22-100.11 (Cum. Supp. 1971). It may be added that in all respects the order of the district court complied with the provisions of existing state law, save only that of the requirement of consent and the school boards and governing bodies of all of the affected political subdivisions." (Appx. 586a-587a, n. 3)

The Fourteenth Amendment addresses itself to the States, as well as to their subdivisions. Local governmental lines did not suffice to frustrate proper remedial steps in Emporia or Scotland Neck, nor have they stood in the way of otherwise necessary or desirable remedies for other constitutional violations.

disregard of city or county boundaries, are obvious examples of this truism, particularly where a racial discrimination lies at the heart of the violation adjudicated. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

Conceding that achieving racial balance or racial quotas in Richmond, Chesterfield, and Henrico County schools was neither required nor permissible, and surely no excuse for emasculating otherwise proper school district boundaries, I nevertheless would remand for the benefit of the Court of Appeals' view of what the profile of a proper plan would be if the three districts were to be treated as a unit and, in light of its opinion in this respect, to have its considered judgment as to whether the boundaries of each of the three districts must be adhered to in all respects. If not, a remand to the District Court for preparation of a new plan would probably eventuate.

I may have misread the opinion of the Court

be observed in fashioning remedies for invidious discriminations under the Fourteenth Amendment. If that was its ruling, in my view it was error; and I would in that event remand the case for reconsideration by the Court of Appeals, freed of its misconception of the controlling federal law.

Detroit School Case
File

5/3/73

No. 72-549 - School Board of the City of Richmond v. State Board of Education of the Commonwealth of Virginia

No. 72-550 - Bradley v. State Board of Education of the Commonwealth of Virginia

From: Rehnquist, J.

I had thought following Conference discussion of these cases and the exchange of memoranda afterward that I might be able to join a remand of these cases, which would basically disavow the Court of Appeals' reliance on the Tenth Amendment but otherwise articulate pretty much the views that Potter expressed at Conference, with which I found myself in agreement. The view which Byron expresses in his memorandum seems to me a good deal broader than what I had in mind, and so I thought some purpose might be served in setting forth my view in rough form. I think my approach would support either affirmance or a limited remand.

Insofar as the Court of Appeals, in reversing the judgment of the District Court, relied upon the Tenth Amendment, I disagree. Plaintiffs are asserting claims which arise under the Fourteenth Amendment, and certainly the Tenth Amendment does not override the Fourteenth. Taking the Court of Appeals' opinion as a whole, I do not actually think that the majority placed primary reliance on the Tenth Amendment,

but if it would serve any useful purpose, I would join in voting to remand in order that they could consider the appeal unencumbered by whatever reliance they may have placed on it. I don't, however, think I could agree on an opinion simply stating that and no more, since the case has been argued and is here for decision.

Insofar as Byron's memorandum rejects the notion that a district court may never fashion relief in school cases which would result in the crossing of school district boundaries, I agree.*/ But I think I would say that it may hardly ever do this, and I guess he wouldn't. I would think that sort of remedy for a Fourteenth Amendment right would be available only where the drawing of the boundary lines or use of the boundary lines were themselves a substantial element in the violation of the right, or where the boundary lines were observed largely in the breach. Examples which occur are manipulative use of lines by school authorities to enforce or preserve segregation, repeated disregard of the lines by school authorities with the result that substantial parts of the pupil population were in fact interchanged, or some sort of joint action by the three school districts of a similar nature.

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*/ I think the majority of the Court of Appeals would agree, too. The discussion in Part III of the majority opinion, 572a refuting any idea of joint action by the three boards, indicates rather clearly that had that court thought there

My understanding of the record in this case leads me to believe that it doesn't afford a basis for any such finding. The school district boundaries here were drawn a century ago, and the only occasion on which they had been significantly changed have been as a result of the annexation of parts of the two counties to the City of Richmond. As I understand Virginia law, the change in the school district boundary would be an expected concomitant of the annexation, and since the effect of the most recent change in 1970 was to increase the ratio of whites to Negroes in the one of the three school systems which has the highest percentage of Negro students, it certainly cannot be said to have been done with any invidious intent.

I don't see, either, how the fact that schools close to the common border of two districts are close to each other really advances the constitutional argument. It is difficult to imagine two metropolitan school districts having a common border in which this would not be the case to some degree. The case of the Kennedy School, a part of the Richmond system but located within Henrico County, strikes me the same way; it is attended only by students from the Richmond district, and unless its location is shown to be part and parcel of some manipulative scheme, I do not see how this fact bears on the constitutional argument.

Petitioners in their brief, pages 16-18, contend inter alia that the school officials involved did not give adequate consideration to the effect of new construction in "perpetuating segregation or retarding desegregation". If such failure were established and found to have resulted in a failure on the part of one of the school districts to operate a unitary school system, that could be grounds for relief on an intra district basis; but I do not see how it could establish a constitutional basis for consolidating three otherwise separate districts.

Petitioners' treatment of the subject of interchange of students among districts is contained at pages 22-24 of their brief. It consists of references to other school districts in Virginia which have operated multi-county school systems for Negro students, and reference to a practice followed immediately after annexation changed the district boundaries whereby students temporarily attended classes in school districts in which they did not reside. I do not see how these facts would support the finding, even had one been made, that the three counties involved here either disregarded district lines or used them manipulatively to perpetuate segregation. In this connection, the Court of Appeals held (572a):

> "But neither the record nor the opinion of the District Court even suggests that there was ever joint interaction between any of the two units

purpose of keeping one unit relatively white by confining blacks to another."

The only evidence that seems to me arguably substantial that school district boundaries have been disregarded in the past is the State statute enacted in 1960 in furtherance of a "freedom of choice" program. The Virginia General Assembly authorized tuition grants to students for education "in nonsectarian private schools in or outside, and in public schools located outside, the locality where the children reside . . ." Va. Code Ann. § 22-115.29. This legislation was held unconstitutional in Griffin v. State Board of Education, 296 F. Supp. 1178 (E.D. Va. 1969), and the scholarship program was terminated in June, 1970.

It seems to me that there is a significant difference between the State authorizing individual pupils to attend public schools outside of the district in which they reside if the pupil chooses to do so, and action by the State or by the districts which would assign pupils across district lines on the initiative of the governmental body. Had plaintiffs sought relief in the form of court authorization for individual pupils, on their initiative, to attend schools in one of the other two districts, it could have been fairly argued that this was only the converse of what the State had previously sanctioned in the form of tuition grants, and the State having been willing

could not constitutionally refuse them the right to cross district lines on their own initiative. But this is not the relief sought or granted by the District Court; that relief consisted of a consolidation of the three districts, with mandatory cross-district assignments to be made on the authority of the court quite apart from pupil choice. I do not think the earlier ten year operation of the tuition grant program can be said to have countenanced the same kind or extent of district boundary crossing which the District Court has mandated. */

The District Court and the petitioners also rely on the fact that the State for a period of years after the Brown decision fostered and encouraged segregated school systems in the various school districts. There is no doubt that it did, but I do not see what this adds to the conceded fact that the three districts in question each maintained a dual school system until recently. But the fact that the State

*/ I had had some difficulty finding the underlying documents upon which the District Court appears to have relied in making his finding that substantial amounts of these tuition grants were paid to students in Richmond, Henrico, and Chesterfield Counties, and that a substantial number of the recipients of these counties attended school outside of the district in which they lived. The District Court undoubtedly so found, at pages 329-30, Pet. A. Both he at those pages, and the two petitioners in their brief, referred to a series of exhibits presumably introduced at the trial which support this finding (PX 101, 112, 117, 118, 120), but my examination of the volume containing the exhibits indicates that these are not contained in it. At any rate, for purposes of discussion in the text I have assumed that the District Court's findings are supported by these exhibits.

encouraged this sort of segregation does not offer a basis for lumping these three particular districts together, unless the State had lumped them together in its effort to maintain segregation. Putting these difficulties to one side, the logical consequence of petitioners' argument must be that by reason of State involvement, the entire State is to be treated as one school district, a position which neither they nor the District Court are willing to adopt.

It is undisputed that each of these three school districts for a long period of time denied Negroes their constitutional right to attend desegregated schools. Certainly our cases made clear that the District Court had ample authority to require corrective action on the part of these districts to remedy the wrong. But the District Court did not stop with requiring each of the separate districts to operate a unitary school system; it went further and in effect required the consolidation of three genuinely separate districts. Given my understanding of the record, I do not think this is a permissible remedy, and I guess it is here that I part company with Byron.

Byron says at page 10 of his memorandum that he would "remand for the benefit of the Court of Appeals' view of what the profile of a proper plan would be if the three districts were to be treated as a unit and, in light of his opinion in this respect, to have its considered judgment as

considerations of the type that school boards customarily deal with which would lead one to decide that the three units would better be consolidated, but to me this is a far cry from the kinds of standards which can be derived from the Constitution or from the Court's previous decisions in this area.

I think the language which the Court of Appeals quoted from Swann, 402 U.S. 1, 16, tends to support this view:

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary."

The frequently quoted language from the Court's previous decisions -- "desegregated school system", "unitary school systems", absence of any "black schools" or "white schools" -- requires a reference to some governmentally defined system as a beginning point in the analysis. I do not see how, in the absence of the sort of exceptional circumstances which don't exist here, this starting point can be other than the school district in which the plaintiffs actually attend school.

If this limitation is to be disregarded solely because the command of the Fourteenth Amendment is addressed to the "State", there is no logical stopping place short of a State-

wide remedy which wholly disregarded district lines, and was limited only in terms of administrative factors such as the availability of school facilities, length of travel, and the like.

The fact that the State might voluntarily have authorized consolidation under State law does not, to my mind, have much bearing on the constitutional issue. Certainly the State had not authorized consolidation here. In Wright v. Council of City of Emporia, 407 U.S. 459, the Court did not consider it crucial that the State could have and probably would have authorized the splitting off of the Emporia city school system from the rest of the Greensville County district; it held that the Federal Constitution prevented the splitting of the district where the creation of the new district would have carved up an existing district, thereby at least partially frustrating the effect of a desegregation order to which the existing district was subject. If the possibility of State approval of a realignment of districts cannot be allowed to frustrate the enforcement of an otherwise established Fourteenth Amendment right in this area, it should likewise not be held to authorize a remedy which would not independently exist under the Constitution. I would suspect there are very few States which do not authorize school district consolidation under some provision of State law, whether by referendum,

consent of the governing bodies, or otherwise, so that this provision of Virginia law for purposes of Fourteenth Amendment analysis probably has a counterpart in every State of the union.

Under my line of reasoning, if I may call it that, I do not reach Swann-type issues as to whether the District Court was motivated by a desire to insure "racial balance" or a "viable racial mix", or whether he placed too much emphasis on bussing. These are questions which are reached only after the initial determination is made that the three districts are to be treated as a unit for school purposes. I think the basic thrust of Part III of the Court of Appeals' opinion, with which I substantially agree, was that on the facts of this case the District Court had no constitutional basis for making this initial determination.

WEW

Sally - We should have a file on Detroit school cases — no way here. Open temporary if you don't have one.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 8, 1973

MEMORANDUM FOR THE CONFERENCE

A word in reply to Bill Rehnquist's circulation in the Richmond school case.

The Fourteenth Amendment's proscription of denial of equal protection of the laws applies to the States, as well as to individual school boards as instrumentalities of the "state." Where essential to correct the maintenance of a dual school system, it is my position that the remedial power of a federal district court is not necessarily limited by political subdivision lines. This does not mean that district lines should not be respected where reasonably adequate remedies may otherwise be fashioned; nor does it mean at this point that district lines should be crossed in this case.

In the present case, the unreversed findings of the District Court were that political subdivision lines throughout the Commonwealth of Virginia have "been ignored when necessary to serve public education policies, including

segregation." 338 F. Supp., at 113. In these circumstances, it makes little difference if the fact is that the lines of these particular districts were not crossed to any great extent. The point is that the findings of the District Court call into question the State's whole argument with respect to the sanctity of district lines. In the words of the District Court: "[The district lines] have never been obstacles for the travel of pupils under various schemes, some of them centrally administered, some of them overtly intended to promote the dual system." 338 F. Supp., at 83. The lines, even if never manipulated by the subject districts in this lawsuit, were never sacrosanct as a matter of state policy when segregation was the goal and should not stand as an insuperable barrier to an effective remedy in any of these three districts, each of which had officially maintained dual school systems. At the very least, if the Court of Appeals is wrong in thinking that in fashioning an effective remedy it was legally barred by the Tenth Amendment or otherwise from crossing district lines, must not the Court of Appeals have to overturn the District Court's findings as to the lack of integrity of school district lines in

Virginia if it is to rely on those lines as a barrier to an interdistrict remedy?

JJB'gg 11-6-73

Circuit Discussion

Detroit School Case. **DISCUSS**

I am inclined to agree with J. Miller's OP (A-239a) that case should be remanded for full exhaustion after all interested parties are in the case. Furthermore we should grant in this case & hold on the other.

Grant for abstaining at this time - but in balancing let's grant

PRELIMINARY MEMORANDUM

November 16th Conference

List 1, Sheet 4

No. 73-434

MILLIKEN

v.

BRADLEY

Cert to CA 6

(Phillips, C.J., Edwards, Celebrezze, Peck, McCree, Lively; Weick, Miller, dissenting; Kent, concurring in part and dissenting in part)

Timely

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, et al.

v.

BRADLEY, et al

No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM

v.

BRADLEY, et al

1. Summary: This is a school desegregation case involving the school system of Detroit, Michigan, and the school districts in the surrounding metropolitan area. Petitioners seek review of the CA 6 en banc decision affirming certain findings of the district court relating to the racially discriminatory acts of the State defendants and the appropriateness of a desegregation plan involving the Detroit metropolitan area.

2. Facts: In 1970-71, 13.4% of the students enrolled in Michigan school districts were black and 84.8% were white. During the same period, 63.8% of the students enrolled in the City of Detroit school district were black and 34.8% were white.

In 1970, the plaintiffs, black and white students attending Detroit schools and their parents, filed the present action against the Detroit Board of Education and its members, the Detroit Superintendent of Schools, the Governor, the Attorney General, the Michigan State Superintendent of Public Education, and the Michigan State Board of Education. No school district other than Detroit was named as a defendant. The complaint alleged that the Detroit public school system was racially segregated as a result of the actions and policies of the

Detroit Board of Education and the State. It also alleged that a state statute, § 12 of 1970 PA 48, was unconstitutional because it had delayed implementation in 1970 of a racial balance plan adopted by the Detroit Board of Education.

The district court denied plaintiffs application for preliminary injunctive relief. CA 6 affirmed but held 1970 PA 48, § 12 unconstitutional.

On September 27, 1971, the district court issued its decision holding that the Detroit public school system was racially segregated as a result of actions of the Detroit Board and the State. The Detroit Board's actions related to segregative zoning, assignment, and school construction practices within the City. The State's actions related to the 1970 statutes previously held unconstitutional, the State's approval prior to 1962 of school site selection in Detroit, its denial of student transportation funds to Detroit while granting such funds to rural school districts, and its tacit approval of certain segregative cross-district transportation of students from one high school. The court also held that all school districts are instrumentalities of the State and that the State was thus legally responsible for the segregative actions of the Detroit Board. The court ordered submission of desegregation plans directed toward both the City of Detroit and the metropolitan area.

Later, 43 school districts within the surrounding counties of Wayne, Oakland, and Macomb filed motions to intervene. The court granted the motions but limited the districts' participation.

On March 24 and 28, 1972, the district court issued decisions rejecting desegregation plans involving only Detroit, stating in part: "Relief of

segregation cannot be accomplished within the corporate geographical limits of the city." The court noted that such a plan would make the Detroit system racially identifiable as black, involve excessive costs and transportation, would "not lend itself as a building block for a metropolitan plan", and would leave many schools 75 to 90% black.

On June 14, 1972, the court issued its decision establishing tentative boundaries for a metropolitan remedy and providing for a panel of 9 members to design plans for integrating Detroit schools and those of 53 metropolitan school districts with the three surrounding counties, Wayne, Oakland and Macomb.

On July 11, the court ordered the state defendants, including the state treasurer, to purchase or otherwise acquire 295 additional school buses to be used in the desegregation plan.

On July 20, 1972, the district court certified certain issues under 28 U.S.C. 1292(b). The issues relate to the following orders of the district court: (i) ruling on issue of segregation, Sept. 27, 1971; (ii) ruling on propriety of Metropolitan remedy, March 24, 1972; (iii) ruling rejecting Detroit-only desegregation plan, March 28, 1972; (iv) ruling on desegregation area and development of plan, June 14, 1972; (v) order for acquisition of transportation, July 11, 1972.

CA 6 stayed all the court's orders, except those relating to planning. On December 8, 1972, a CA 6 panel affirmed the district court's rulings.

On June 12, 1973, CA 6 en banc issued its decision affirming in part,

vacating in part, and remanding for further consideration. The court affirmed all the district court's findings regarding the segregative practices of the Detroit Board and the State. It also affirmed the district court's finding that a Detroit-only desegregation plan was inappropriate. It stated: "The only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan." The court therefore held that the district court had authority to order preparation of a metropolitan plan for cross-district assignment and transportation of students.

As to the school districts in the three-county metropolitan area, the court noted that no proof had been taken with respect to the establishment of the county boundaries. Some of these affected school districts had intervened, others were not parties, and none had been given an opportunity to offer proof on any issue. Citing Rule 19, Fed. R. Civ. P., the court held that these districts should be made parties. In vacating the district court's March 28, 1972 order, the court stated:

> "On remand, any party against whom relief is sought, including school districts which heretofore have intervened and school districts which hereafter may become parties to this litigation, shall be afforded an opportunity to offer additional evidence, and to cross-examine available witnesses who previously have testified, on any issue raised by the pleadings, including amendments thereto, as may be relevant and admissible to such issues. The District Court may consider any evidence now on file and such additional competent evidence as may be introduced by any party. However, the District Court will not be required to receive any additional evidence as to the matters contained in its Ruling on the Issue of Segregation, dated September 27, 1971, and reported at 338 F. Supp. 582, or its Findings of Fact and Conclusions of Law on

the "Detroit-only" plans of desegregation, dated March 28, 1972." The court also permitted the parties on remand to amend their complaint to conform to the evidence.

Judges Weick and Miller filed dissenting opinions. Judge Kent dissented in part and concurred in part.

3. Contentions: (a) Petitioners present a detailed attack on the district court and CA 6 opinions. Petitioners first contend that the findings regarding the discriminatory actions of the state officers are erroneous. They argue that the State is not legally responsible for the actions of the Detroit Board, that transportation funds were not used in a discriminatory manner, that the State did not engage in discriminatory school site selection, and that 1970 PA 48, § 12 did not have a segregative effect. They point out that none of the state defendants were personally found to have committed acts resulting in de jure segregation.

(b) Petitioners argue that CA 6 erred in holding that a "Detroit-only" desegregation remedy is unfeasible. Petitioners assert that the CA 6 decision is in conflict with decisions of other circuits, including CA 4 in Bradley v. Richmond School Board, 462 F. 2d 1058, aff'd ___ U.S. ___ (1973).

(c) Petitioners also assert that the CA 6 erred in holding that a multi-district remedy, requiring cross-district reassignment and transportation of students, is constitutionally permissible. Petitioners contend that such a

remedy is not required to establish a "unitary" school system. Petitioners note that the plaintiffs' complaint alleged de jure segregation only within the confines of the Detroit School District and that no school district other than Detroit was made a party in the cause. Furthermore, the district court's finding of discrimination related only to the Detroit School System. There was no finding that the school district boundaries were drawn in a discriminatory manner or that the school districts in the tri-county metropolitan area committed acts of de jure segregation.

(d) Petitioners also argue that the CA 6 decision violates the due process rights of the affected school districts in the tri-county area since on remand they will not be allowed to litigate the decisive issues relating to the segregation of the Detroit school system, the feasibility of a "Detroit-only" plan, and the propriety of a multi-district remedy. They request this Court to vacate the district court's rulings on those issues.

(e) One of the Petitioners, a labor union representing the professional personnel of the Van Dyke School District, contend that they are unrepresented on the panel appointed by the district court. They contend that they should be permitted to participate in the panel's formulation of a desegregation plan.

Respondents, including the Detroit Board of Education, rely on the CA 6 opinion.

Respondents also contend that certiorari should be denied because a final school desegregation order has not been entered. Respondents list the

following issues still to be resolved by the district court: (1) the identities of the school districts to be included in a final desegregation plan, (2) the extent and type of transportation to be required, (3) the precise method of crossing school district boundaries to exchange pupils, (4) the number of pupils to be exchanged, and (5) the faculty involved. Respondents assert that a "factual vacuum" exists and that the issues cannot be properly evaluated at this point.

Petitioners respond that review is appropriate since the CA 6 holding that a metropolitan remedy is appropriate is in conflict with decisions of other circuits. The details of the desegregation plan are irrelevant to review of this issue. Furthermore, the district court will not receive new evidence on the issues relating to the State's discriminatory conduct, the feasibility of the "Detroit-only" desegregation plan, and the appropriateness of the metropolitan remedy. Petitioners contend that these issues are sufficiently important to merit review at this time. Otherwise, considerable time and money will be expended in future litigation.

In reply, respondents assert that petitioner school districts had a full opportunity to participate in the hearings on the metropolitan plans and were represented on the court-appointed panel.

4. Discussion: The central question is whether there is a "final decision" for purposes of appeal. Traditionally, a final judgment is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Thus, in the strict sense, there is no final decision

in this case. As the petitioners point out, however, many of the important issues have been resolved. Thus, the Court must determine whether review should be granted at this time in the interests of judicial economy and further expenditure of time and resources by the parties.

There are responses.

November 6, 1973

Buckley

Ops in Jt Appx

JJB/gg 11-6-73

PRELIMINARY MEMORANDUM

November 16th Conference

List 1, Sheet 4

No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM

v.

BRADLEY, et al

Cert to CA 6

(Phillips, C.J., Edwards, Celebrezze, Peck, McCree, Lively; Weick, Miller, dissenting; Kent, concurring in part and dissenting in part)

See Preliminary Memorandum in No. 73-435.

JJB.gg 11-6-73

PRELIMINARY MEMORANDUM

November 16th Conference

List 1, Sheet 4

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, et al

v.

BRADLEY, et al.

Cert to CA 6

(Phillips, C.J., Edwards, Celebrezze, Peck, McCree, Lively, Weick, Miller, dissenting; Kent, concurring in part and dissenting in part)

See Preliminary memorandum in No. 73-434.

Conference 11-16-73

Court ....CA 6.... | Voted on ....., 19...

Argued ....., 19... | Assigned ....., 19... | No. 73-434

Submitted ....., 19... | Announced ....., 19... | (Vide 73-435-6)

WILLIAM J. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL., Petitioners

vs.

RONALD BRADLEY AND RICHARD BRADLEY, BY THEIR MOTHER AND NEXT FRIEND, VERDA BRADLEY, ET AL.

9/6/73 Cert. filed.

Petr argued that record and judgment should be reversed since

Grant
All Here

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	MOTION AR-GUMENT	NOT VOTING
Rehnquist, J.		✓											
Powell, J.		✓											
Blackmun, J.		✓											
Marshall, J.			✓										
White, J.		✓											
Stewart, J.		✓					All Here						
Brennan, J.			✓										
Douglas, J.			✓										
Burger, Ch. J.		✓											

Conference 11-16-73

Court CA - 6

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 73-435
(Vide 73-434 & 73-436)

ALLEN PARK PUBLIC SCHOOLS, ET AL., Petitioners

vs.

RONALD BRADLEY AND RICHARD BRADLEY, BY THEIR MOTHER AND NEXT FRIEND, VERDA BRADLEY, ET AL.

9/6/73 Cert. filed.

Grant.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Conference 11-16-73

Court ....CA 6.... | Voted on ....., 19...

Argued ....., 19... | Assigned ....., 19... | No. 73-436

Submitted ....., 19... | Announced ....., 19... | [Wade 73-434-5]

THE CROSSE POINTE PUBLIC SCHOOL SYSTEM, Petitioner

vs.

RONALD BRADLEY AND RICHARD BRADLEY, BY THEIR MOTHER AND NEXT FRIEND, VERDA BRADLEY, ET AL.

9/6/73 Cert. filed.

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS DIS	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Rehnquist, J.													
Powell J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Douglas, J.													
Burger, Ch. J.													

file

Detroit School Cases

Metropolitan New York

South from mid-town Manhattan to Williamsburg, Bedford-Stuyvesan, Flatbush, Kensington, Brooklyn, Kennedy Airport.

East to Queens, Long Island City, Queens, Jackson Heights, Jamaica, Bayside, Flushing.

North to Bronx, Bedford, Mount Vernon, Pelham, New Rochelle, Bronxville, Yonkers, Riverdale, Tuckahoe, Larchmont, Mamaroneck, Manussing, Harrison, Rye, White Plains.

Area - as crow flies - roughly 40 x 25 miles.

* * * *

New Jersey

Elizabeth, Newark, Jersey City, Passaic, Paterson

Area roughly 18/25 miles.

* * * *

Metropolitan Chicago

Chicago (Loop) - north to Evanston, Wilmette, Winnetka, Glencoe, Lake Forest to North Chicago is at least 35 miles.

West to Oak Park, Elmhurst, Hinsdale - 16 to 20 miles.

South - to Kenwood, Oak Lawn, Evergreen Park, South Chicago, 11-12 miles.

Area roughly 35 x 20.

The Detroit Schools Cases

This brief memo is simply an attempt to more fully elucidate the basis of this Court's remand to the district court for the taking of further evidence. The SG basically proposes that an interdistrict remedy will be appropriate where the actions of the State, or of several local school districts, or of a single local district have been a direct or substantial cause of or have contributed substantially to interdistrict school segregation.

Accordingly, the district court should take evidence upon the following questions: (1) whether the suburban districts have committed acts of de jure segregation; (2) whether state or local officials altered district lines for purposes of racial discrimination; (3) whether any of the state or city violations already found by the district court have directly altered or substantially affected the racial composition of the schools outside of Detroit, or (4) whether, the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools.

Under this formulation of the SG's proposed standard, examples of circumstances warranting interdistrict relief include the transference of pupils across district lines on a racially discriminatory basis or the drawing or alteration of boundaries separating districts on the basis of race. See my memo at 21-22.

No. 73-434 MILLIKEN v. BRADLEY Detroit School Argued 2/27/74 Siegel

Kelley (AG of Mich)

State is not a party, nor is Legislature.

Orig Complaint confined to Detroit, & raised only limited & narrow issues.

At time case first tried 1971(?) was almost 62%-38% black.

CA 6, in substance, affirmed DC's order of June 14, 1972.

The DC's findings & order went far beyond any allegations in Complaint or Amend. Complaint. The DC assumed a "racial role" (See 40, 41 Appendix to Pet for Cert).

Gov., AG, St Treas & St Rd Ed are only chiefs St Supt of Pub Inst
AG represents. No three addressed the only claims & findings made vs these Ds

Cannot tell if there a high school at time Detroit took its high school grade pupils.

No obligation under Mich law on a S/Dist. to accept pupils from another District.

X. Cases in contiguous to Detroit - predominantly Negro

Kelley (A G - Cont)

School Dists decide school const, site, time & place, & bonds all issued by School Dist's — usually on vote of people. Not State obligations. (SG should check to see whether Const governmental bodies or the S/Dist's are makers of bonds).

No ~~—~~ decision of this Ct. has ever ruled a predom

Saxton (for 44 S/Districts). Excellent Argument

Some Dists are 30/35 miles away from Detroit. 53 are involved - some have never been before Ct. (18 have never been before Ct) All of 44 represented by Saxton have now intervened - but some of them are not in the 53 within the plan.

There is no claim & no evidence whatever of any de jure ~~segregation~~ acts of segregation in any Dist. other than Detroit. Nor was any Dist. of complicity with Detroit. Unlawful acts in Detroit can't be used to drag in innocent Dists.

Basic error of D C: it viewed the mere existence of a predominately black student body as per se a segregated system; i.e. held that there are more blacks in D. than whites, the schools are — necessarily segregated.

See Record for racial mix in each Districts Amended Complaint, Vol I of printed R, p 290, 294

Saxton (cont.)

Cite to Carver, only 4 places in entire record where it is even mentioned. DC's findings wholly unsupported.

CA 6 relied on an expert (Dr Drake ??) — pure hearsay — & wholly ignored him testimony at Vol V, 176.

CA 6 (& DC) found pattern of school construction in Detroit was segregatory — but only basis in fact that schools were built. Obviously they had to be built to serve pupils who lived there.

Berry (SG)

Unique aspect of case in the sterling record to include Detroit not found to have committed any de jure. It is proposed that long established governmental units will be destroyed

Obvious flaw: racial seg. has to be found in Detroit; only remedy is to reach out to Dists. to find whites to balance with blacks in D.

Q. military school system is not a ~~racially~~ racially balanced one. It is one in which there is no discrimination on account of race.

Berry suggests remand — rather than new law suit.

There must be inter-district violation — such as (1) ordered by State or (2) collusion or cooperation by 2 or more districts — e.g. crowded. busing to process seg.

Stewart asked what is meant by inter-district violation.

Bork (cont).

Marshall suggested that as no plan has been adopted, the remand should be limited to allowing D.C. Hum. chance. Bork answered that even tho no approved plan, it is clear that C.A. 6 has approved the principle of a plan & there would be finding.

Dist. lines are not artificial lines except in sense they are not natural (rivers). Many Districts have long been established. People have arranged their lives - bonds have been issued, etc

Flannery (for Resp) (Responds Bradley & others)

Q - whether C.A. 6 was correct in holding that inter-district remedies. (I/D/R)

C.A. 6 has approved I/D/R only under the facts of this case.

Here blacks have been segregated by State. Only practical way of doing - is to cross lines.

Segregation practiced by State & also variety of other private & pub. segregative actions (e.g. zoning, housing, etc): (A122, 123).

Flannery (cont.)

Until 1962, school site selections were at state level.

Act 4.7 of 1970 by State Leg. in culmination evidence of state segregatory action 9+ remanded to a D.C. case in Detroit.

Massive busing req.

See Vol II, p 41, 44, 70 – shows the relief sought is not of recent origin

CA 6 has determined there is no need for any further ev. or showing of discriminatory activities in the 53 Districts – & Flannery agrees. Thus on remand, its order should be as CA 6 ordered.

Jones (for Leeper) (Gen Counsel of NAACP)

Relies heavily on State's control of entire school system

Proclamation considered by D.C.

1. Relevant area – 3 counties entitled the standard statistical Metro Area.

2 have a prohibition.

Bonding auth: a municipal finance commission (state level); school districts must go thru Commission – but Mr. Jones does not know who is obligated on bonds. Jones argues that State/Bds assess the taxes & fix budgets.

Sexton (Rebilled) (Very strong)

The State Commissioner (Authority) merely assures compliance with state law.

Bds are guaranteed by State.

School Bds may borrow up to specified amt w/o election — thereafter must have election.

S/Bd members may be removed by State Bd only for malfeasance in office.

S/Bds are elected by people.

CA 6 has held that remedy is not det. by the violator but rather remedy may be imposed on wholly innocent

Disagrees with SG that case should be remanded. Case should be reversed. If TS desires to bring fresh lawsuit, they have right.

CA 6 held a multi-district, racial balance remedy is required. This is plain error.

× × × ×

Complainants in this case simply haven't proved a case — they failed to submit requisite ev. They can't be allowed, at this level, to

(c. ESA. 1974 ?)

Start from dance of June 1973
– financial balance, not disproportionate
to population ratio in 52 Dists, must
be established in groups, school, garden, dean.

Powell

Worker Man. Rel.

Dehart School Cases

Hurd, Nolen & Qs.

Q – will any substantial plans under
or affect the cost of education in the
52 Dade schools of Dehart? Yes

a. Cost of buses & annual operation
many substantial

b. Teacher salaries (probably very little)

c. No of children in Dists (as Jones
revealed) with change – not
necessarily all Dists but in
many. If no DC's racial
balance is required, there will
be changes in number & mix
of pupils – year to year. Unless
they are carted around (like
fungible cattle) from Dehart to
Districts, no required balance
cannot be maintained.

For pupil-expenditure
comp. (need not
be same under
Kadrmas, etc) will
Hun be equalized?

d. Problem of most economical
use of school buildings & facilities
Some Districts have newer &
longer school than others.

Q – who determines bus routes, bond issues,
when buildings are located, pay for fairs
costs, salaries, etc.

Jeb District Judge

Under
local control

Detroit School Case

Plaintiffs' arguments

2. DC's order of June 14 '72 would create 15 "clusters", each containing part of Detroit & 2 or more suburban Districts (SG Br. 7)

coordinator let clusters choose

1. a. Do Reps still support Hills as required by Const?

b. Who raises taxes for these new Districts created by a Fed Judge?

(i) Does DC decide each year the tax rate & assessment policy & order governing bodies to put them in effect {CA 6 said yes Appendix 182a

(ii) What would George III think of this system of taxation w/o representation?

c. School populations changes yearly — shifts in population, birth rates, etc. As these occur & schools, grades & classrooms — as they will — from the prescribed "racial balance," must the DC annually adjust the District lines? When will Rinehart — at the Detroit/suburban border?

Validity of Borders?

Is the Board under Const. compelled to keep racial balance as of DC? Who will be affected? Plaintiff children? Can appropriate Plaintiff be found?

2. Why shouldn't the Detroit schools be desegregated within that large city? If all appropriate steps are taken to desegregate D. system, what in Const. requires that a Fed Ct reach out & enlarge city boundaries for ed. purposes?

Suppose Detroit population is 65-35%, if every school, grade & class in city were in that ratio, would you say that the D. system had not been fully desegregated?

(See S.G's Brief - quoting from memo, in Rd. case - 12, 13)

If answer is "no", how far does Const. require D.C to go beyond the city district? Why stop with the 53 districts?

If the answer is that their provides a ratio of 65 white to 35 negro, what in the Const. says this ratio is required? What not 60-40 or 50-50 or 90-10?

And does D.C bring their individual with their prescribed ratio each year by further changes or extensions?

1. Qs about organization & financing of schools

(a) Are School Bds. constitutional bodies?

(b) How chosen? Elected?

(c) Areas of responsibility?

(d) Financing

(i) State aid (3 of 70)

(ii) Annual ops: who determines budget? Who determines levies tax?

(iii) Capital budget & expenditures? Who issues & who obligated on bonds?

(iv) Who determines when & where new schools built & existing schools expanded?

No. 73-434 MILLIKEN v. BRADLEY Conf. 3/1/74

The Chief Justice Reverse

There was de jure seg. in School. No finding of seg. in any other District. Case at no point was decided by D.C. on a "de minimis" concept.

Dists. allowed to intervene were never allowed proper opportunity to participate in proceedings.

D-C reduced that balance in each school, and made the case may not be representative of population in metro.

Douglas, J. Affirm

Each Dist. is area of state. State can work out adjustments. See no error.

See dissent of D/P to Dist. Ct.

Brennan, J. Affirm

Difference here & Keyes & Richmond is that in those cases there were no findings of unconstitutional by State.

No basis in this case yet.

See no D/P issues.

Remand about whether Dist. Ct. committed segregative acts in respects. Dist. Ct. merits whether Dists. were entirely blameless. The State is responsible & must make the reparations to whatever is necessary.

Stewart, J. Reverse & Remand

Agree with SG's memo.

"D/P issues go out of case" under Pasco's view

White, J. Affirm

Detroit Edison case
unmistakable. Agrees with
Brennan.

As matter of municipal
civil in Detroit, DC
may need clarification
for as many to maintain

Marshall, J. Affirm

Agrees with Brennan.
Recommend of record: No writ
what at by Police Review with, also
no relief sought Dalton. Has provided
adequate Fair.

Blackmun, J. Reverse & Remand.
Agrees in to Reverse & Remand
eliminate absence of damages for
Detroit relief, due to Appeals to
appeal remand basing on any
discharge.
This is unnecessary. Then Reclaimed.
Concerned with discharging Detroit
But agrees with SG

Powell, J. Reverse & Remand.
Detroit, meaning have allowed
to intervene as limited
basis, have been denied P/P. Thereby
require Reverse & Remand.
But we should state remand
of immediate to be applied in the
remand, as well as Brennan
require to be addressed. SG's
they accept in Mem.
There can be no inter-district
remedy where - & may vote -
There is inter-district segregation
action. Then, the remedy must
be framed in relation to the
concept, violation. (See SG Br p 14, 15)
to type of inter-district
action that could be worded, see
SG - 14, 15
Reference to Mem Brennan
are viewed (see my Reports), especially
in an inter-district case the State
be heard in the organization of local
part & school Bds.

Rehnquist, J. Reverse & Remand
Procedure - partly (R/P) with
Agrees generally with SG
- must add to what he
said.

DC's attorneys joined by CA 6 here

March 7, 1974

Detroit School Case

Dear Chief:

I recall a story in the press - several weeks ago I believe - to the effect that Senator Ervin was then holding hearings of a subcommittee on the proposed anti-busing constitutional amendment.

The story mentioned the testimony, as I recall, of an official of the Charlotte-Mecklenberg school district on the effect of the Court's decision on the public school system there.

I have no idea whether this or other testimony before the subcommittee would be relevant or helpful background to your research on the Detroit case, but thought possibly you might wish to have a clerk see what is available. My guess is that the subcommittee has heard testimony both pro and con, which might well cancel out. Yet, Charlotte-Mecklenberg was the first major guinea pig and any documentary evidence as to what has happened there might be relevant background. I doubt that the subcommittee has yet submitted a report, but this might also be the subject of inquiry.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1974

Re: No. 73-434 - Milliken v. Bradley

Dear Chief:

As I told you on the telephone, I am with you in this case, and the following suggestions are designed only to make even more clear what I think is the basic thrust of your opinion -- that without a cross-district violation, there cannot be a cross-district remedy. Your opening paragraph is very strong and persuasive, and I would be sorry to see you tinker with it and would not think of trying to tinker with it myself; but because it accurately describes the case as lacking all four of the elements which it sets forth, there is the possible implication, unless strongly negatived somewhere else in the opinion, that the presence of any one of the four elements now lacking might be sufficient to support a metropolitan remedy. The following suggestions are my tentative idea on how to make even clearer this basic point.

Page 24, first full paragraph, change the existing first sentence to read something like this: "Federal authority to impose cross-district remedies presupposes a fair and reasonable determination not only that each of the districts to be affected by the remedy has a school system that is segregated by law, but that they have disregarded their own boundaries in seeking to create or maintain such a segregated system."

Same paragraph, change fourth sentence to read as follows: "The District Court went beyond this theory of the case and

mandated a metropolitan area remedy before the intervenors were heard and without permitting any evidence on the intervenors' claim that they were guilty of no violation which had created or maintained unconstitutional discrimination in the Detroit system."

Same paragraph, insert new phrase in next sentence so that it reads as follows: "Thus, to approve the remedy imposed by the District Court on these facts would make racial balance the constitutional objective and standard; a result not even hinted at in Brown I and Brown II which held that the operation of dual school systems, not some hypothetical level of racial imbalance in a geographical metropolitan area consisting of more than one school district, is the constitutional violation to be remedied.

Page 25, first full sentence: Since we conclude that the "incidental findings" by the District Court do not afford a basis for multi-district relief, would it be a good idea to substitute "thought to afford" for "suggesting" in that sentence, in order to make it clear that it is the District Court, and not we, who think the findings afford a basis for such relief?

Page 27, last sentence, insert after the words "276,000 pupils" the phrase "and involving numerous districts which were not parties to the arrangement,".

Sincerely,

The Chief Justice

Blind copy to: Mr. Justice Powell

JJB/gg 6-5-74

MEMORANDUM

TO: Mr. Justice Powell

FROM: John J. Buckley DATE: June 5, 1974

No. 73-433, Milliken v. Bradley

I have written some random thoughts on the main deficiencies of the opinion above. Some of the points need more explanation, but I thought you would want these comments as expeditiously as possible.

I.

/. In pp. 18-23, the opinion states that the district court erred in attempting to impose a desegration remedy requiring a "fixed mathematical racial balance" for each school. In my view, this entire discussion is largely irrelevant. It is premised on an unstated assumption that we are confronted with a single school district and that the question is whether, once a finding of de jure racial segregation is made, a court must order implementation of a desegregation plan requiring that each and every school within that school district reflect the racial composition of the district as a whole. Swann answered that question, and it is not involved here. Rather, the present question is whether, and under what circumstances, an inter district remedy is constitutionally required. The opinion proceeds as if only a

single school district were involved and attempts to define the remedy within that context. This is a serious conceptual error and is dangerously confusing.

4. The opinion also contains the following statement on p. 21:

> "Here, it was assumed by both courts, without supporting evidence, that a member of a racial or ethnic minority who attends a school in which his or her minority group is predominant is in some way injured and thereby receives a lesser quality of education. Assuming that racial balance to avoid this presumed injury is desirable on broad social or educational grounds, school authorities can rationally make that choice but it is not a constitutional requirement."

This plainly mischaracterizes the nature of the holding of the courts below. Their theory was that racial imbalance, when imposed as a result of state action, results in a constitutional injury to the school children against whom the discrimination occurred. Brown I established that principle. The error of the courts below was not the one stated in the opinion. Rather, it was in finding that there was sufficient state action to permit or require an interdistrict remedy. And that is the ground on which the holding below must be addressed.

II.

In pp. 24-25, the opinion attempts to articulate the prerequisites for an interdistrict remedy. The opinion states that an interdistrict remedy presupposes a determination that there has been a violation by "all the districts affected by the remedy" and that such a remedy "might be appropriate, for example, if it could be established that the segregatory practice of one or more districts created or maintained the segregated condition within the central remedy." Several points come to mind. First, I would think it essential to state the standard to be applied in determining whether a school district is racially segregated as a result of state action. Presumably, this would be the Keyes standard which requires a finding of intentional discrimination. Second, it should be emphasized that there must be a finding that the discriminatory acts of the suburban school districts contributed substantially to the racial imbalance of the city school district. In other words, there must be an interdistrict effect resulting from the discriminatory actions of the suburban school district. I would also think that some specific examples would be helpful. See., e.g., p. 14 of Brief for the United States as Amicus Curiae. Third, I wonder if it might not be appropriate to restate the Swann principle that the scope of the remedy is determined by the scope of the constitutional violation. I am referring not to "busing,"

but to the commonsense notion that the more serious the violation, the more extensive the remedy required to eliminate the effects of the violation.

III.

In pp. 25-27, the opinion addresses the findings made by the district court as the basis for an interdistrict remedy. It fails to confront and rebut one of the main arguments of respondents, namely, the "agency theory." In essence, respondents contend that the constitutional violations of the Detroit school board are attributable to the State, and further, that the State's violations are attributable to the independent suburban school districts. This argument is premised on the assumption that all school districts are basically instrumentalities of the State. Moreover, since they are regulated by, and receive funds from, the State, these districts are necessarily "partners" or "joint participants" in any constitutional violation.

I have other comments, but these are the main ones.

JJB

June 5, 1974

No. 73-434 Milliken v. Bradley

MEMORANDUM TO THE CHIEF JUSTICE:

In accordance with your request, I submit comments on your preliminary, xeroxed draft of May 31. I am not unmindful of the inherent complexity of identifying and defining the issues in this difficult case or of the problem of dealing with the enormous record. Accordingly, I am sure you will accept my comments in the uncritical spirit in which they are offered and also as reflecting only my preliminary impressions of the draft - impressions which will probably change as your work on the case progresses.

In any event, and for what they are worth, I submit the following:

1. In the broadest sense, this case is viewed as the test case to resolve two burning issues of great public

concern: (i) what conditions, if any, would justify a federal court in ordering "consolidation" of two or more school districts or parts thereof for the purpose of achieving racial desegregation; and (ii) assuming that conditions do justify such a court order, what are the limitations, if any, upon the power of a federal court to order extensive interdistrict transportation to achieve desegregation?

These, stated in quite general terms, are the broad issues involved. The draft opinion, as I read it, deals summarily and not entirely clearly with the first of these issues. It does not mention transportation or busing at all.

2. As to whether and when interdistrict remedies * may be ordered, I commend to you the Solicitor General's amicus memorandum. At Conference, each of us who voted

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* I will equate the popular term "consolidation" with "interdistrict remedies", which necessarily involve consolidation - in varying degrees - of the functions and responsibilities of two or more separate school districts.

to reverse expressed a significant degree of approval of the SG's analysis. The draft opinion finally comes close to this analysis, but is pretty much limited to the condensed discussion on page 24 of the xeroxed draft.

3. The principal concern of the draft is with the racial balance issue. I agree that the courts below concluded that this was the appropriate remedy for the segregated condition in Detroit, and that the only means of achieving it was partial consolidation of some 53 other school districts with the Detroit district. But it seems to me that an analysis based on racial balance misses the core issue. Assume, for example, that the DC - instead of decreeing what in effect was mathematical racial balance - had concluded that the remedy for the segregated condition in Detroit was consolidation with the surrounding districts, but had expressly also held that racial balance was not necessary? Putting it differently, busing - as noted in Swann - is only one tool of desegregation; there could have been a consolidation decree with the DC merely saying that the consolidated district should proceed to desegregate the schools therein in accordance with the Court's opinion in Swann - expressly disclaiming any necessity for racial balance.

I thus conclude that whether the DC ordered racial balance or not is essentially immaterial to the basic issue in this case, namely, whether and under what circumstances a federal court may order a consolidation of school operations in disregard of established school districts pursuant to state law.

4. As the draft recognizes, before a DC may inject itself into the manner in which a state and school districts operate the public schools, there must be a constitutional violation. Here the only violation found was by and within the Detroit district, namely, the operation there of a segregated school system. There was no finding that the violation within the City had been caused or contributed to in any way by action of the other 53 districts sought to be consolidated or indeed by any one of them. Nor was there any evidence that the violation within the City had caused or contributed to unlawful segregation in these neighboring districts. This Court has never held that a constitutional infringement within one school district, without implicating in some significant manner another school district, justified remedies beyond

and outside of the offending district. We are asked in this case to do precisely that. Five members of the Court are willing to say - and I think we should say it explicitly - that the Constitution requires no such extra district or interdistrict remedy.

5. In this connection, it is important to bear in mind the difference between states which, for historic and other reasons, practiced school segregation, and on the other hand states (of which Michigan may be one) in which there is no past history of segregated schools. For example, in the Richmond case, both Chesterfield County and the City of Richmond had de jure segregation in accordance with Virginia law until compelled by Brown and subsequent cases to take affirmative action to desegregate. Four members of the Court in Bradley were of the opinion that the mere fact that these two adjacent school districts had formerly practiced segregation did not in itself justify consolidation or interdistrict remedies. Some interdistrict violation was required.

I will mention specific examples below, but stated in general terms there must be a showing that Detroit and the adjoining district or neighboring districts acted in

concert to further or maintain desegregation.

As the Solicitor General put it:

> ". . . an interdistrict remedy, requiring the restructuring of state or local goverement entities, is appropriate only in the unusual circumstance where it is necessary to undo the interdistrict effect of a constitutional violation. Specifically, if it were shown that the racially discriminatory acts of the State, or of several local school districts, or of a single local district, have been a direct or substantial cause of interdistrict school segregation [with Detroit], then a remedy designed to eliminate the segregation so caused would be appropriate." (S.G's Br. 13-14)

The Solicitor General then cited the following examples:

> "One example of circumstances warranting interdistrict relief is where one or more school systems have been created and maintained for members of one race. See, e.g., United States v. Texas, 321 F. Supp. 1043 (E.D. Texas) affirmed, 447 F. 2d 441 (C.A. 5), certiorari denied sub nom. Edgar v. United States, 404 U.S. 1016; Haney v. County Board of Education of Sevier County, 429 F. 2d 364 (C.A. 8). Similarly, where the boundaries separating districts have been drawn on account of race, an interdistrict remedy is appropriate. See, e.g., United States v. Missouri, 363 F. Supp. 739 (E.D. Mo.). Some form of interdistrict relief may also be appropriate where pupils have been transferred across district lines on a racially discriminatory basis.
>
> In each instance of an interdistrict violation, the remedy should, in accordance with traditional principles of equity and the law of remedies, be tailored to fit the violation,

Finally, in stating standards, I would reiterate the Swann principle that the scope of the remedy is determined by the scope of the Constitutional violation.

6. The draft (p. 25 et seq) addresses the argument that the State itself (State Board of Education, State Legislature and State officials) is responsible, and that the district school boards are mere agencies of the State. You probably have in mind tightening and strengthing the opinion on this point.

A good deal of assistance can be obtained in the brief filed on behalf of the Grosse Pointe public school system, commencing at p. 46.

This Court in all previous cases has looked solely to the local school district. Moreover, as we said in Rodriguez (411 U.S. 1), and in other cases (see, e.g., Emporia), public education in this country has been organized around the concept of local control. To be sure, a state board of education has certain authority and the state government itself - amending a state constitution where necessary - could exercise a broad control and supervision over the schools. But this would be contrary to our tradition and to the conviction that the values of

local school board autonomy and responsibility are fundamental.

See Footnote 91 in the Grosse Pointe brief for a summary of some of the powers of local boards in Michigan. These are to be borne in mind when one considers the consequences of consolidation or interdistrict remedies. Who then makes all of these decisions? Who, in particular, determines school budgets, the assessment and collection of school taxes, etc? Does the Detroit board decide this for the other 53 districts? How do 54 school boards work all of these out? In the end, interdistrict remedies really will require consolidation so that a single controlling entity can make the vital decisions as to how much money is required, how to raise it, curricula content, teacher's salaries, etc., etc.

7. The opinion of the Court of Appeals denegrates school districts as little more than lines on a map "drawn for political convenience". This is nonsense for the reasons indicated above, and should be so pointed out in our opinion.

8. The draft conveys the impression, at least to me, of an overriding concern with the way the case was tried

and the failure to afford an effective hearing to the various districts. For example, the draft refers (p. 27) to the "crucial fact that the theory upon which the case proceeded related solely to the establishment of Detroit City violations . . . and that, at the time of trial, neither the parties nor the trial judge were concerned with a foundation for interdistrict relief."

This is quite true, and is a point which is adequately made in Part IV of the draft. I urge you, however, to deemphasize it in the preceding parts of the opinion (except in the statement of facts), as it conveys the impression that we are more concerned about failure to afford hearings to the suburban districts than we are about the fundamental issues. Little purpose will be served by our taking this case merely to remand it for a full rehearing with all parties before the court. Whether we reverse outright or remand, ~~our opinion~~, I think we should state unequivocally the standards to be applied on the merits.

9. As to the extent of busing or transporting students for vast distances in the enormous area included within the decree below, I quote the following statement from the SG's brief:

> "Moreover, even a finding of some interdistrict violations would not mean

> that extensive interdistrict busing should be required as a remedy regardless of its disruptive effects or other costs." Footnote 12, p. 15 S.G.'s Br.

See also the portion of my concurring opinion in Keyes in which I argued(with some force, I thought) that the Constitution does not require busing solely to achieve desegregation.

10. I would certainly pay my respects to the radical nature of the decree approved by the courts below, requiring racial balance in "every school, grade and class". This is just about as absurd as any court decree I have ever read. Racial balance, even if it were constitutionally required, is difficult enough to achieve in each school. It is literally impossible to achieve it within a school in every grade and class. Moreover, even were it possible, the mix would change with each semester. In short, the school officials would spend a large portion of their time counting whites and blacks and juggling them around from grade to grade and class to class, all to no purpose except the neglect of quality education!

* * * * *

Forgive this long-winded and somewhat disjointed commentary. It may not be helpful, but at least I wanted to share these ideas with you promptly.

L.F.P

June 10, 1974

No 73-434

Detroit School Case

Dear Chief:

Perhaps you saw the article in Sunday's Washington Post to the effect that the liberal Republican Governor of Massachusetts has come out in favor of repeal of Massachusetts' racial balance statute, which would require extensive busing by next term.

The news story states that all other candidates for Governor - including a Republican and two Democrats - likewise urge repeal. Senator Brooke, however, still favors the law.

Sincerely,

The Chief Justice

lfp/ss

LFP/gg

Suggested revision of page 26 of Bradley draft of 6-11-74

The controlling principle, continually expounded in our decisions, is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Swann, supra. In the present context, this means that an interdistrict remedy is appropriate only where there has been a significant interdistrict constitutional violation. Specifically, it must be shown that racially discriminatory acts of the State, local school districts, or a single school district, have been a direct and substantial cause of interdistrict school segregation. Thus, for example, an interdistrict remedy might be appropriate where the discriminatory acts of one or more school districts created or maintained the racial segregation of the central city, or where school district lines have been intentionally drawn on the basis of race. In these circumstances, an interdistrict remedy is appropriate and should be designed to eliminate the interdistrict segregation directly caused by the constitutional violation. In this case no showing has been made of any significant interdistrict constitutional violation.

MEMORANDUM

TO: The Chief Justice DATE: June 14, 1974

FROM: Lewis F. Powell, Jr.

Bradley

I return herewith the revised pages which you gave me this afternoon. These include revised pages 20-25, and an unnumbered page commencing: "Underlying this case. . . ."

I have suggested a few changes of language, of no great consequence, on pages 23 and 25. I have added a rider to page 22, in substitution for the quotation that I originally used from Rodriguez. The rider embodies what seems to me to be a better quote from Rodriguez.

I do not know where you have in mind locating the unnumbered page. It would be out of place, if it followed page 25 and preceded page 26 (where it is now situated in the copy which you gave me). The first part of the single paragraph on the unnumbered page goes back to the "racial balance" question. I suggest - what you no doubt have in mind with respect to location - that certainly this part of the unnumbered page be consolidated with your discussion of racial balance on pages 20 and 21. The second half, roughly, of the unnumbered page comes from material which I gave you. It seems out of place on this page and, if used, should be tied in with the discussion of the disruptive effect

of inter-district remedies.

I hesitate to repeat what I said in my original memorandum to you, but I continue to feel that overemphasis of the racial balance aspect of the case is unnecessary to our decision and also detracts from the force of the inter-district remedy issue. Nevertheless, if Potter and your other constituents are willing to accept the degree of emphasis on racial balance which remains in your draft, I will, of course, be with you. I recognize in this connection that this draft was written late last night by you, without assistance and under very considerable pressure. As you said to me this afternoon, you recognize the necessity for considerable polishing and tying up, to assure a logically consistent flow of the opinion.

Finally, omit the last paragraph remaining on page 25, as it also reverts to racial balance. As noted above it is more effective, I think, to move directly from the discussion of the disruption of the school system to the discussion on page 26 of when an inter-district remedy may be decreed.

Finally, there are two points made in the SG's brief which I would certainly like to see included in our opinion - perhaps in footnotes if nowhere else:

1. On page 11 of his brief, the SG states:

> "The mere co-existence, within a State, of adjacent school districts having disparate racial compositions is not itself a constitutional violation. Spencer v. Kugler, 404 U.S. 1027, affirming 326 F. Supp. 1235 (D. N.J.)."

2. On page 13, there is the following statement:

> ". . . an interdistrict remedy, requiring the restructuring of state or local government entities, is appropriate only in the unusual circumstances where it is necessary to undo the interdistrict effect of a constitutional violation."

* * * *

Perhaps these suggestions will only add to your problems. Yet, after all you did invite them. If you think I can be of further assistance, please let me know.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 17, 1974

Re: No. 73-434, Milliken v. Bradley

Dear Chief,

I continue firmly to believe that "racial balance" is not a question in this case, and that a discussion of that subject in the Court opinion will serve only to distract attention from the real issue.

"Racial balance" has become something of a code phrase, and perhaps means different things to different people. As I have understood the term, however, it relates to the proper scope of a remedial decree designed to effectuate the dismantling of an unconstitutionally segregated school district. It does not relate to the initial question of whether or not the school district has been unconstitutionally segregated, and it certainly does not relate to some supposed abstract constitutional requirement of a minimum percentage of white students in any school district or any individual school.

Specifically, the "racial balance" question has been whether the objective of a remedial decree to correct an adjudged violation (a) must or (b) may be to produce a situation

where every individual school within the district contains, so far as practicable, the same racial ratio that is contained in the district as a whole -- whatever that ratio may be. So far as I am concerned, this double-barreled question has no categorical answers. For the questions are not questions of constitutional law, but questions for a court of equity. In a small district containing three schools, racial balance in each school might be so easy to achieve and so clearly equitable as to be a virtual requirement of any permissible decree. In New York City or Los Angeles, racial balance in every individual school would obviously be impossible to achieve except at a wholly intolerable social cost.

In short, I think that when a constitutional violation has been found in any school district, the appropriate decree should be largely left to the equitable discretion of the district court -- under the ultimate supervision of the Court of Appeals. This view no more than reflects my understanding of what was said both in Swann and in Brown II many years earlier.

In the present case, however, we deal with quite a different question. We do not have any remedial decree before us. For here the courts have held that even assuming that such an equitable decree could properly accomplish racial balance in every individual Detroit school, the result would be that each school would then be identifiably black. This, in the courts' view, would be an impermissible situation, and the only remedy for that situation, the courts held, was to reach beyond Detroit's boundaries and implicate a large number of outlying school districts in the remedial decree. It is here, and here only, that I think the courts went astray.

The significant facts are these: The respondents commenced this suit in 1970 claiming only that a constitutionally impermissible allocation of educational facilities along racial lines had occurred within the City of Detroit. No evidence was adduced and no findings were made concerning the activities of school officials in districts outside the City of Detroit, and no school officials from the outside districts even participated in the suit until after the District Court had made the initial determination that is the focus of this case.

In spite of the limited scope of the inquiry and the findings, the District Court concluded that the sole sufficient remedy for the constitutional violations found to have existed within the City of Detroit was a desegregation plan calling for busing pupils to and from school districts outside the city. The District Court found that any desegregation plan operating wholly "within the corporate geographical limits of the city" was insufficient since it "would clearly make the entire Detroit public school system racially identifiable as Black." Pet. App. 161a-162a. The Court of Appeals, in affirming the decision that an inter-district remedy was necessary, noted that a Detroit only plan "would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area."

The courts were in error for the simple reason that the remedy they thought necessary was not commensurate with the constitutional violation found. In particular, there has been absolutely no showing that the disparity in racial composition between schools in the City of Detroit and the schools immediately outside the City was the result of segregation imposed, fostered, or encouraged by the State or any of its subdivisions.

This is not a case where the State has contributed to a separation of the races by drawing or redrawing school district lines, see Haney v. County Board of Education of Sevier County, 429 F. 2d 364 (CA 8, 1969); cf., Wright v. Council of City of Emporia, 407 U. S. 451; United States v. Scotland Neck Board of Education, 407 U. S. 484; by transfer of school units between districts, United States v. Texas, 321 F. Supp. 1043 (E. D. Tex., 1970), aff'd, 447 F. 2d 441 (CA 5, 1971); Turner v. Warren County Board of Education, 313 F. Supp. 380 (E. D. N. C., 1970); by busing students across district lines; or by purposeful use of state housing or zoning laws. In the absence of such an interdistrict violation, the order directing the formulation of an interdistrict remedy was simply not responsive to the factual record before the District Court and was an abuse of that court's equitable powers.

In Swann the Court addressed itself to the range of equitable remedies available to the courts to effectuate the desegregation mandated by Brown and its progeny, noting that the task in choosing appropriate relief is "to correct . . . the condition that offends the Constitution," and that "the nature of the violation determines the scope of the remedy...." 402 U. S., at 16.

The disposition of this case thus falls squarely under these principles. The only "condition that offends the Constitution" found by the District Court in this case is the existence of officially-supported segregation in and among public schools within the City of Detroit. There were no findings that the fact of differing racial composition between schools in the City and in the outlying suburbs was caused by official activity of any sort. It follows that the decision to include in the desegration plan pupils from school districts outside Detroit was not predicated upon any constitutional violation involving such pupils. By ordering a plan to reach beyond the limits of the City of Detroit to correct a constitutional violation found to have occurred solely within the City the District Court thus overreached the governing remedial principles developed in this Court's decisions.

The resolution of this case, in my view, rests on a relatively simple proposition: an interdistrict remedy may permissibly be based only upon an inter-district violation.

Sincerely yours,

P. S.

The Chief Justice

cc: Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

MEMORANDUM

TO: Mr. John Buckley DATE: June 14, 1974

FROM: Lewis F. Powell, Jr.

No 73-434 Milliken - Bradley

1. The most important thing you can do today - unless the Conference votes to carry Bradley over - is to spend a few hours on that case. The Chief Justice agreed to accept our draft as a substitute for the material from p. 20-25. I submitted our draft as rough and subject to revision, and the Chief indicated that he would use it as the basis for his revision without commiting himself to any verbatim use.

It was recognized that what will be left on p. 26 (after we omit from that page the reference to racial balance) is the most important part of the case, as it deals with the basic issue. But it deals with it rather summarily. Also, there will have to be, I believe, some transition between the draft we submitted to the Chief and what is left on p. 26, as it may be revised.

Accordingly, three things could benefit from your attention: (i) polishing up our draft; (ii) giving special attention to the page 26 issue, as lower federal courts will look primarily to what we say about this issue for future guidance; and (iii) if you have time left over, give some consideration to the transition;

My thought is that if we can come up with something by the end of the day that might help the Chief along, and

keep him in a posture acceptable to other Justices, it would be quite constructive.

Of course, if the case is carried over I will send you a note from the Conference and we can forget it.

2. I do want to add one or more footnotes to Bangor Punta to reply to Marshall. He has fired, at random, a load of birdshot - some remotely relevant but most of them irrelevant. He seems to overlook the fact entirely that the parties for whom he sheds tears (the minority stockholders and creditors) may bring suit on their own behalf; nothing precludes them, and they have asserted no injury.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1974

Re: No. 73-434 - Milliken v. Bradley

Dear Chief:

Last evening I carefully read Potter's letter to you of June 17. I am in agreement with him and feel that, generally, emphasis on remedy and de-emphasis on racial balance is indicated for this opinion. It may well be that the district judge went astray on racial balance but I, for one, would prefer to give it little more than the necessary passing reference.

You advised me that you have a new draft at the Printer. Perhaps it will do just that, and I look forward to reading it.

Sincerely,

The Chief Justice

cc: Mr. Justice Stewart
Mr. Justice Powell
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1974

Re: 73-434 - Milliken v. Bradley
73-435 - Allen Park Public Schools v. Bradley
73-436 - Grosse Pointe Public School System v. Bradley

MEMORANDUM TO: Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

I have your several memos and I reiterate what I said in our informal discussion that our differences are essentially semantical. To say that racial balance is not in the case, of course, eludes reality since it was the explicitly articulated basis for the inter-district remedy the court ordered to be formulated.

I do not care what words are used to describe the sequence of events. The draft sent to the printer before I received your memos has now been stripped down regarding the discussion of "racial balance" and it has been confined to one page in which I recite the uncontrovertible fact that the desire for racial balance was the fulcrum from which the District Court proceeded to the error that followed, i.e., mandating an inter-district remedy with no showing of an inter-district violation.

The print shop is "swamped" with Wednesday's opinions but they have only the re-run from page 20 onward, plus minor editorial changes.

I hope it will be available soon.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1974

Re: Nos. 73-434, 73-435, and 73-436 - Milliken v. Bradley, et al.

Dear Chief:

I think you have made very substantial changes to accommodate the views expressed by the rest of us who voted with you at Conference on this case, and I am prepared to join the draft which you circulated on June 19th. I sincerely hope that we can come out with an opinion for the Court.

Sincerely,

Copy to: Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1974

PERSONAL

Re: 73-434 - Milliken v. Bradley
73-435 - Allen Park Public Schools v. Bradley
73-436 - Grosse Pointe Public School System v. Bradley

MEMORANDUM TO:

Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

The balance of the opinion in the above is now ready for circulation. If there are details on which any of you have suggestions, it would seem these could be dealt with in the final "honing" process. I believe I have met the problems raised by Potter's memo.

Meanwhile we should try to circulate the draft to the full Court today if at all possible.

Regards,

WEB

June 20, 1974

Re: Nos. 73-434, 73-435, 73-436 - Milliken v. Bradley

Dear Chief:

I agree with Bill Rehnquist's comments that the changes effected in what you circulated to the four of us on June 19 take us a long way toward accommodating the views that have been expressed.

In my judgment, it is imperative that we have a solid majority in this case, and that it would be tragic if the judgment were to come down with several opinions revealing a fractionated court.

In general, I am inclined to go along with what now has been developed. I offer the following, however, as additional (and comparatively minor) suggestions for your consideration.

1. On page 21, in the second line of the paragraph beginning on that page, I would like to eliminate the words "additional and."

2. As you have undoubtedly noticed, there are typographical mixups in the material at the bottom of page 23 and the top of page 24; specifically, the top line of page 24 belongs above the present sixth from the last line of the paragraph ending on page 23.

3. On page 25, first paragraph, second line, would it be well to insert the words "de jure" before the word "segregated"?

4. The next full sentence in the same paragraph begins with the words "The Court went" and ends with the phrase "with

no showing of significant violation by the 53 outlying school districts." Would it help to have the ending phrase read "with no showing of any significant government responsibility, either state or local, for the interdistrict imbalance." I suggest this because the opinion does not preclude an interdistrict remedy if it is shown that the State itself (in contrast with the district) caused the imbalance.

5. I, for one, could go along with the elimination of Part IV except, of course, the material bringing the opinion to a close.

Sincerely,

Harry Blackmun (Sg)

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 20, 1974

73-434, Milliken v. Bradley, etc.

Dear Chief,

While I do not want to delay the recirculation of your proposed opinion in these cases, I feel obligated to say that I still have serious reservations about some aspects of your partial recirculation of yesterday.

Sincerely yours,

P.S.

The Chief Justice

cc: Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 24, 1974

Re: Nos. 73-434, 73-435, and 73-436 - Milliken v. Bradley, et al.

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 24, 1974

Re: 73-434, Milliken v. Bradley
73-435, Allen Park Public Schools v. Bradley
73-436, Grosse Pointe Public School System v. Bradley

Dear Chief,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

The Chief Justice

Copies to the Conference

June 24, 1974

No. 73-434 Milliken v. Bradley
No. 73-435 Allen Park v. Bradley
No. 73-436 Groose Point v. Bradley

Dear Chief:

Please join me in your draft of June 21.

I have not had an opportunity to review the draft of June 24,(which just came in), but I understand from your note that it merely embodies in type the penciled in changes reflected in the June 21 draft.

I do have a couple of word changes which I would like to suggest. I can give them either to you or to your clerk, as you prefer. Also, I suggest that you may wish to add, at an appropriate place, a citation to Spencer v. Kugler, cited at page 11 of the SG's brief.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

THE P	B L	W	P S	R W	T V	D A B	L E P	W H
3/5/74								
1st Draft 5-31-74	2nd draft 6-5-74		memo 6-20-74 John CJ 6-24-74			John CJ 6-26-74	John CJ 6/24/74	John CJ 6-20-74 John CJ 6-24-74
2nd draft 6-11-74	4th draft 6/14/74							
3rd draft 6/21/74								

No. 73-434 Milliken v. Bradley
No. 73-435 Allen Park v. Bradley
No. 73-436 Groose Point v. Bradley

To: Mr. Justice [illegible]
Mr. Justice Powell
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Rehnquist
memo. to C.J.

MILLIKEN v. BRADLEY, No. 73-434

Circulated: MAY 31 1974

Recirculated: _____

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-district, area wide remedy to a single district de jure segregation problem absent any claim or finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any claim or finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multi-district remedy or on the question of constitutional violations by those neighboring districts. 1/

I

The action was commenced in August of 1970 by the respondents, the Detroit Branch of the National Association for the Advancement of Colored People 2/ and individual parents and students, on behalf of a class later defined by order of the United States District Court, E.D. Michigan, dated February 16, 1971, to include "all school children of the City of Detroit and all Detroit resident parents who have children of school age." The named defendants in

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1/ Bradley v. Milliken, 484 F. 2d 215 (CA 6 1973); cert. granted, 414 U.S. 1038 (Nov. 19, 1973).

2/ The standing of the NAACP as a proper party plaintiff was not contested in the trial court and is not an issue in this case.

the District Court included 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 is not a party to this litigation and references to the State must be read as references to the public officials, State and local, through whom the State is alleged to have acted. In their complaint respondents attacked the constitutionality of a statute of the State of Michigan known as Act 48 of the 1970 Legislature on the ground that it put the State of Michigan in the position of unconstitutionally interfering with the execution and operation of a voluntary plan of partial high school desegregation, known as the April 7, 1970 Plan, which had been adopted by the Detroit Board of Education to be effective beginning with the fall 1970 semester. The complaint also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office, and called for the implementation of a plan that would eliminate "the racial identity of every school in the [Detroit] system and . . . maintain now and hereafter a unitary non-racial school system."

Initially the matter was tried on respondents' motion for preliminary injunction to restrain the enforcement of Act 48 so as to permit the April 7 Plan to be implemented. On that issue, the District Court ruled that Respondents were not entitled to a preliminary injunction since at that stage there was no proof that Detroit had a dual segregated school system. On appeal, the Court of Appeals found that the "implementation of the April 7 Plan was [unconstitutionally] thwarted by State action in the form of the Act of the Legislature of Michigan."

43 F.2d 897, 902 (CA 6 1970), and that such action could not be interposed to delay, obstruct or nullify steps lawfully taken for the purpose of protecting rights guaranteed by the Fourteenth Amendment. The case was remanded to the District Court for an expedited trial on the merits.

On remand the respondents moved for immediate implementation of the April 7 Plan in order to remedy the deprivation of the claimed constitutional rights. In response the School Board suggested two other plans, along with the April 7 Plan, and urged that top priority be assigned to the so-called "Magnet Plan" which was "designed to attract children to a school because of its superior curriculum." The District Court approved the Board's Magnet Plan, and respondents again appealed to the Court of Appeals moving for summary reversal. The Court of Appeals refused to pass on the merits of the Magnet Plan and ruled that the District Court had not abused its discretion in refusing to adopt the April 7 Plan prior to an evidentiary hearing. The case was again remanded with instructions to proceed immediately to a trial on the merits of respondents' substantive allegations concerning the Detroit School System. 438 F.2d 945 (CA 6 1971).

The trial of the issue of segregation in the Detroit school system began on April 6, 1971, and continued through July 22, 1971, consuming some 41 trial days. On September 27, 1971, the District Court issued its findings and conclusions on the issue of segregation finding that "Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential

segregation throughout the Detroit metropolitan area." Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Michigan 1971). While still addressing a Detroit-only violation, the District Court reasoned:

> "It would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools." 303 F. Supp. at 587.

The District Court found that the Detroit Board of Education created and maintained optional attendance zones [3/] within Detroit neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. These zones, the court found, had the "natural, probable, foreseeable and actual effect" of allowing White pupils to escape identifiably Negro schools. 338 F. Supp. at 587. Similarly, the District Court found that Detroit school attendance zones had been drawn along north-south boundary lines despite the Detroit Board's awareness that drawing boundary lines in an east-west direction would result in significantly greater desegregation. Again, the District Court concluded, the natural and actual effect of these acts was the creation and perpetuation of school segregation within Detroit.

3/ Optional zones, sometimes referred to as dual zones or dual overlapping zones, provide pupils living within certain areas a choice of attendance at one of two high schools.

The District Court found that in the operation of its school transportation program, which was designed to relieve overcrowding, the Detroit Board had admittedly bused Negro Detroit pupils to predominantly Negro schools which were beyond or away from closer White schools with available space.[*/] This practice was found to have continued in recent years despite the Detroit Board's avowed policy, adopted in 1967, of utilizing transportation to increase desegregation:

> "With one exception (necessitated by the burning of a white school), defendant Board has never bused white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,901 vacant seats in schools 90% or more black." 338 F. Supp. at 588.

With respect to the Detroit Board of Education's practices in school construction, the District Court found that Detroit school construction generally tended to have segregative effect with the great majority of schools being built in either overwhelmingly all Negro or all White neighborhoods so that the new schools opened as predominantly one race schools. Thus, of the 14 schools which opened for use in 1970-71, 11 opened over 90% Negro and one opened less than 10% Negro.

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*/ The Court of Appeals found record evidence that in at least one instance during the period between 1957-58, Detroit served a suburban school district by contracting with it to educate its Negro high school students by transporting them away from nearby suburban White high schools, and past Detroit high schools which were predominantly White, to all or predominantly Negro Detroit schools. Bradley v. Milliken, 484 F. 2d 215, 231 (CA 6 1973).

The District Court also found that the State of Michigan had committed several constitutional violations with respect to the exercise of its general responsibility for, and supervision of, public education.[1] The State, for example, was found to have failed, until the 1971 Session of the Michigan legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned; during this same period the State provided many neighboring, mostly White, suburban districts the full range of state supported transportation.

The District Court found that the State, through Act 48, acted to "impede, delay and minimize racial integration in Detroit schools." The first sentence of Sec. 12 of Act 48 was designed to delay the April 7, 1970 desegregation plan originally adopted by the Detroit Board. The remainder of Section 12 sought to prescribe for each school in the eight districts criterion of "free choice" and

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[1] School districts in the State of Michigan are instrumentalities of the State and subordinate to its State Board of Education and legislature. The Constitution of the State of Michigan, Article VIII, Section 2, provides in relevant part:

> "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."

Similarly, the Michigan Supreme Court has stated that "The school district is a state agency. Moreover, it is of legislative creation . . . ." Attorney General v. Lowrey, 131 Mich. 639, 644, 92 N.W. 280, 290 (1902): "Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over to the legislature . . . ." Attorney General v. Detroit Board of Education, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908).

"neighborhood schools," which, the District Court found, "had as their purpose and effect the maintenance of segregation." 338 F. Supp. at 589. 6/

The District Court also held that the acts of the Detroit Board of Education, as a subordinate entity of the State, were attributable to the State of Michigan thus creating a vicarious liability on the part of the State. Under Michigan law, M.S.A. § 15, 1961, for example, school building construction plans had to be approved by the State Board of Education, and prior to 1962, the State Board had specific statutory authority to supervise school site selection. The proofs concerning the effect of Detroit's school construction program were, therefore, found to be largely applicable to show State responsibility for the segregative results. 7/

6/ "Sec. 12. The implementation of any attendance provisions for the 1970-71 school year determined by any first class school district board shall be delayed pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not impair the right of any such board to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. . . ." Act No. 48, Section 12, Public Acts of Michigan, 1970; Michigan compiled Laws Section 388.182, (emphasis added).

7/ The District Court briefly alluded to the possibility that the State, along with private persons, had caused, in part, the housing patterns of the Detroit metropolitan area which, in turn, produced the predominantly White and predominantly Negro neighborhoods that characterize Detroit:

> "It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community - as we know, the

Turning to the question of an appropriate remedy for these several constitutional violations, the District Court deferred a pending motion [8] by intervening parent defendants to join as additional parties defendant some 85

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[7] cont'd.

> choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of 'harmonious' neighborhoods, i.e., racially and economically harmonious. The conditions created continue." 338 F. Supp. at 587.

Thus, 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 racial segregation." 338 F. Supp. at 593.

The Court of Appeals, however, expressly noted that:

> "In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation." 484 F. 2d at 242.

Accordingly, in its present posture, the case does not present any question concerning possible state housing violations.

[8] On March 22, 1971, a group of Detroit residents, who were parents of children enrolled in the Detroit public schools, were permitted to intervene as parties defendant. On June 24, 1971, the District Judge alluded to the "possibility" of a metropolitan school system stating: "As I have said to several witnesses in this case: how do you desegregate a black city, or a black school system." IV App. at 259-260. Subsequently, on July 17, 1971, various parents filed a motion to require the joinder of all of the 85 independent school districts within the tri-county area.

school districts in the three counties surrounding Detroit on the ground that effective relief could not be achieved without their presence.[9/] The District Court concluded that this motion to intervene was "premature," since it "has to do with relief" and no reasonably specific desegregation plan was before the court. 338 F. Supp. at 595. Accordingly, the District Court proceeded

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[9/] The respondents, as plaintiffs below, opposed the motion to join the additional school districts, arguing that the presence of the State defendants was sufficient and all that was required, even if, in shaping a remedy, the affairs of these other districts was to be affected. 338 F. Supp. at 595.

separately or in conjunction with Detroit.

to order the Detroit Board of Education to submit desegregation plans limited to the segregation problems found to be existing within the city of Detroit. At the same time, however, the State defendants were directed to submit desegregation plans encompassing the three-county metropolitan area[10/] despite the fact that the school districts of these three counties were not parties to the action and despite the fact that there had been no claim that these outlying counties, encompassing some 85 separate school districts, had committed constitutional violations.[11/]

10/ At the time of the 1970 census, the population of Michigan was 8,875,083, almost half of which, 4,199,931, resided in the tri-county area of Wayne, Oakland, and Macomb. Oakland and Macomb Counties abut Wayne County to the north, and Oakland County abuts Macomb County to the west. These counties cover 1,952 square miles, Michigan Statistical Abstract, 1972 (9th ed.), and the area is approximately the size of the State of Delaware (2,057 square miles), more than half again the size of the State of Rhode Island (1,214 square miles) and almost 30 times the size of the District of Columbia (67 square miles). Statistical Abstract of United States, 1972 (93rd ed.). The population of Wayne, Oakland and Macomb Counties was 2,666,751, 907,871 and 625,309, respectively in 1970. Detroit, the State's largest city, is located in Wayne County.

In the 1970-71 school year, there were 2,157,449 children enrolled in the school districts in Michigan. There are 86 independent, legally distinct school districts within the tri-county area, having a total enrollment of approximately 1,000,000 children. In 1970, the Detroit Board of Education operated 319 schools with approximately 276,000 students.

11/ In its formal opinion, subsequently announced, the District Court candidly recognized that:

> "It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation," 345 F. Supp. 914, 920.

An effort to appeal these orders to the Court of Appeals was dismissed on the ground that the orders were not appealable. 469 F.2d 903, cert. denied, 409 U.S. 844.

The sequence of the ensuing actions and orders of the District Court are significant factors and will therefore be catalogued in some detail. Following the District Court's abrupt announcement that it planned to consider the implementation of a multi-district, metropolitan area remedy to the segregation problems identified within the city of Detroit, the District Court was again requested to grant the outlying school districts intervention as of right on the ground that the District Court's new request for multi-district plans "may, as a practical matter, impair or impede [the intervenors'] ability to protect" the welfare of their students. The District Court took the motions to intervene under advisement pending submission of the requested desegregation plans by Detroit and the State officials. On March 7, 1972, the District Court notified all parties and the petitioner school districts seeking intervention, that March 14, 1972 was the deadline for submission of recommendations for conditions of intervention and the date of the commencement of hearings on Detroit-only desegregation plans. On the second day of the scheduled hearings, March 15, 1972, the District Court granted the motions of the intervenor school districts [12/] subject, inter alia, to the following conditions:

[12/] According to the District Court, intervention was permitted under Rule 24(a), Fed. R. Civ. P., "Intervention of Right," and also under Rule 24(b), "Permissive Intervention."

"1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.

"2. No intervenor shall reopen any question or issue which has previously been decided by the court.

"7. New intervenors are granted intervention for two principal purposes: (a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Constitution and the prior orders of this court." I App. at 206.

Upon granting the motion to intervene, on March 15, 1972, the District Court advised the petitioning intervenors that the court had previously set March 22, 1972, as the date for the filing of briefs on the legal propriety of a "metropolitan" plan of desegregation and, accordingly, that the intervening suburban districts would have one week to muster their legal arguments on the issue.[3] Thereafter, and following the completion of hearings on the Detroit-only desegregation plans, the District Court issued the four rulings that were the principal issues in the Court of Appeals.

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[3] This rather abbreviated briefing schedule was maintained despite the fact that the District Court had deferred consideration of a motion made eight months earlier, to bring the suburban districts into the case. See note [2] supra.

(a) On March 24, 1972, two days after the intervenors' briefs were due, the District Court issued its ruling on the question of whether it could "consider relief in the form of a metropolitan plan, encompassing not only the city of Detroit, but the larger Detroit metropolitan area." It rejected both the State defendants' arguments that no state action caused the segregation of the Detroit schools, and the intervening suburban districts' contention that inter-district relief was inappropriate unless the suburban districts had themselves committed violations. The court concluded:

> "[I]t is proper for the court to consider metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to the present intra-city desegregation plans before it and, in the event that the court finds such intra-city plans inadequate to desegregate such schools, [t]he court is of the opinion that it is required to consider a [m]etropolitan remedy for desegregation." Pet. App. at 51a.

(b) On March 28, 1972, the District Court issued its findings and conclusions on the three "Detroit-only" plans submitted by the city Board and the respondents. It found that the best of the three plans "would make the Detroit system more identifiably Black . . . thereby increasing the flights of Whites from the city and the system." Pet. App. at 53a-55a. From this the court concluded that the plan "would not accomplish desegregation within the corporate geographical limits of the city." Id. at 56a. Accordingly, the District Court held that "it must look beyond the limits of the Detroit school district for a solution to the problem," and that "[s]chool district lines are simply matters of political convenience and may not be used to deny constitutional rights." Id. at 57a.

(c) During the period from March 28, 1972 to April 14, 1972, the District Court conducted hearings on a metropolitan plan. Counsel for the petitioning intervenors was allowed to participate in these hearings, but he was ordered to confine his argument to "the size and expense of the metropolitan plan" without addressing the intervenors' opposition to such a remedy or the claim that a finding of a constitutional violation by the intervenor districts was an essential predicate to any remedy involving them. Thereafter, on June 14, 1972, the District Court issued its ruling on the "desegregation area" and related findings and conclusions. The court acknowledged at the outset that it had "taken no proofs with respect to the establishment of the boundaries of the 85 public school districts in the counties [in the Detroit area], nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." Nevertheless, the court designated 53 of the 85 suburban school districts plus Detroit as the "desegregation area" and appointed a panel to prepare and submit "an effective desegregation plan" for the Detroit schools that would encompass the entire desegregation area.[14] The plan was to be based on 15 clusters, each containing part of the Detroit system and two or more suburban districts, and was to "achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition." Pet. App. 101a-102a.

[14] The 53 school districts outside the city of Detroit that were included in the court's "desegregation area" have a combined student population of approximately 503,000 students compared to Detroit's approximately 276,000 students. Nevertheless, the District Court directed that the intervening districts should be represented by only one member on the desegregation panel while the Detroit Board of Education was granted three panel members. Pet. App. at 99a.

(6) On July 11, 1972, and in accordance with a recommendation by the court-appointed desegregation panel, the District Court ordered the Detroit Board of Education to purchase or lease "at least" 295 school buses for the purpose of providing transportation under an interim plan to be developed for the 1972-73 school year. The costs of this acquisition were to be borne by the state defendants. Pet. App. at 106a-107a.

On June 12, 1973, a divided Court of Appeals, sitting en banc, affirmed in part, vacated in part, and remanded for further proceedings. 484 F. 2d 215 (CA 6 1973).[15/] The Court of Appeals held, first, that the record supported the District Court's findings and conclusions on the constitutional violations committed by the Detroit Board, 484 F. 2d at 221-38, and by the State defendants, 484 F. 2d at 239-41.[16/] It stated that the acts of racial discrimination shown to

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[15/] The District Court had certified most of the foregoing rulings for interlocutory review pursuant to 28 U.S.C. 1292(b) (I App. 265-266) and the case was initially decided on the merits by a panel of three judges. However, the panel's opinion and judgment were vacated when it was determined to rehear the case en banc, 484 F. 2d 215, 218 (CA 6 1973).

[16/] With respect to the State's violations, the Court of Appeals held: (1) that, since the city Board is an instrumentality of the State and subordinate to the State Board, the segregative actions of the Detroit Board "are the actions of an agency of the State" (484 F. 2d at 238); (2) that the state legislation rescinding Detroit's voluntary desegregation plan contributed to increasing segregation in the Detroit schools (id.); (3) that under state law prior to 1962 the state Board had authority over school construction plans and must therefore be held responsible "for the segregative results" (id.); (4) that the "State statutory scheme of support of transportation for school children directly discriminated against Detroit" (484 F. 2d at 240) by not providing transportation funds to Detroit on the same basis as funds were provided to suburban districts (484 F. 2d at 238); and (5) that the transportation of Negro students from one suburban district to a Negro school in Detroit must have had the "approval, tacit or express, of the State Board of Education." (id.)

the record are "causally related to the substantial amount of segregation found in the Detroit school system," 484 F. 2d at 241, and that "the District Court was, therefore, authorized and required to take effective measures to desegregate the Detroit Public School System," 484 F. 2d 242.

The Court of Appeals also agreed with the District Court that "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelming white majority population in the total metropolitan area." 484 F. 2d at 245. The court went on to state that it could "not see how such segregation can be any less harmful to the minority students than if the same result were accomplished within one school district," 484 F. 2d at 245.

Accordingly, the Court of Appeals concluded that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan." 484 F. 2d at 249. It reasoned that such a plan would be appropriate because of the State's violations, and could be implemented because of the State's authority to control local school districts. Without further elaboration, and without any discussion of the claims that no constitutional violation by the outlying districts had been shown and that no evidence on that point had been allowed, the Court of Appeals held:

"[T]he State has committed de jure acts of segregation and . . . the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts."

held to be

Id. An inter-district remedy is thus "within the equity powers of the District Court." [17] 484 F. 2d at 250.

The Court of Appeals expressed no views on the propriety of the District Court's composition of the metropolitan "desegregation area." It held that all suburban school districts that might be affected by any metropolitan-wide remedy should, under Rule 19, Fed. R. Civ. P., be made parties to the case on remand and be given an opportunity to be heard with respect to the scope and implementation of such a remedy. 484 F. 2d at 251-52. Under the terms of the remand, however, the District Court was "not required" to receive further evidence on the issue of segregation in the Detroit schools or on the propriety of a Detroit-only remedy, or on the question of whether the affected districts had committed any violation of the constitutional rights of Detroit pupils or others. 484 F. 2d at 252. Finally, the Court of Appeals vacated the District Court's order directing the acquisition of school buses, subject to the right of the District Court to consider reimposing the order "at the appropriate time." 484 F. 2d 252.

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[17] The court sought to distinguish Bradley v. School Board of the City of Richmond, Virginia, 462 F. 2d 1058 (CA 4), affirmed by an equally divided Court, 412 U.S. 92, on the grounds that the District Court in that case had ordered an actual consolidation of three school districts and that Virginia's constitution and statutes, unlike Michigan's, did not give the local boards exclusive power to operate the public schools. 484 F. 2d at 251.

II.

Ever since Brown v. Board of Education, 347 U.S. 483 (1954), the starting point in judicial consideration of school desegregation cases has remained the same:

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

347 U.S. at 495. The target in Brown was clear and forthright: the elimination of state mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for White pupils. This was the duality and racial segregation held to violate the Constitution in Green v. County School Board of New Kent County, 391 U.S. 430 (1968); Raney v. Board of Education, 391 U.S. 443 (1968); Monroe v. Board of Commissioners, 391 U.S. 450 (1968); and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

The Swann case, of course, dealt

> "with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing Brown I and the mandate to eliminate dual systems and establish unitary systems at once."

402 U.S. at 6. In Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II), the Court's first encounter with the problem of remedies in school desegregation cases, the Court noted that:

> "In fashioning and effectuating the decrees the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." Brown v. Board of Education, 349 U.S. 294, 299-300 (1955).

In further refining the remedial process, Swann held, the task is to correct, by a balancing of the individual and collective interests, "the condition that offends the Constitution." A federal remedial power may be exercised "only on the basis of a constitutional violation" and, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." 402 U.S. at 15, 16.

Proceeding from these basic principles, we first note that in the District Court the complainants sought to formulate a remedy aimed at the condition that offends the Constitution -- the segregation found to exist within the Detroit city school district. [18/] The court acted on this theory of the case and in its initial ruling on the "Desegregation Area" stated:

> "The task before this court, therefore, is now, and . . . has always been, how to desegregate the Detroit public schools." Pet. App. at 61a.

Thereafter, however, the District Court abruptly rejected the proposed Detroit-only plans on the ground that "while it would provide a racial mix more in keeping with the Black-White proportions of the student population, [it] would accentuate the racial identifiability of the [Detroit] district as a Black school system, and would not accomplish desegregation." Pet. App. at 56a. "[T]he racial composition of the student body is such," said the

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[18/] Although the list of issues presented for review in petitioners' briefs and petitions for writs of certiorari do not include arguments on the findings of segregatory violations on the part of the Detroit defendants, two of the petitioners argue in brief that these findings constitute error. Supreme Court Rules 23(1)(c) and 40(1)(d)(2), at a minimum, limit our review of the Detroit violation findings to "plain error," and, under our decision last Term in Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, the findings appear to be correct.

court, "that the plan's implementation would clearly make the entire Detroit public school system racially identifiable" (Pet. App. at 54a), "leav[ing] many of its schools 75 to 90 percent Black." Pet. App. at 55a. Consequently, the court reasoned, it was imperative to "look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit schools . . . ." since "school district lines are simply matters of political convenience and may not be used to deny constitutional rights." Id. at 57a. Accordingly, the District Court proceeded to redefine the relevant area to include areas of predominantly White pupil population in order to ensure that "upon implementation, no school, grade or classroom [would be] substantially disproportionate to the overall racial composition" of the entire metropolitan area.

While specifically acknowledging that the District Court's findings of a condition of segregation were limited to Detroit, the Court of Appeals approved the use of a metropolitan remedy largely on the grounds that it is:

> "impossible to declare 'clearly erroneous' the District Judge's conclusion that any Detroit only segregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a state in which the racial composition is 87 percent white and 13 percent black." 484 F.2d at 249.

Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals placed the primary focus on the desire to achieve "racial balance" in a city predominantly composed of Negro students, and this approach plainly equated desegregation with racial balance as a constitutionally mandated remedy. In Swann, we recognized that racially

identifiable schools are often symptomatic of a segregated system and that

> "[w]here [a system] . . . contemplates the continued existence of some schools that are all or predominantly of one race, [school authorities] have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U.S. at 26.

There has never been, however, a constitutional requirement that a school system reflect "any particular degree of racial balancing or mixing." Id. at 24. Moreover, there is no constitutional requirement that each school in the system reflect -- either precisely or substantially -- the racial composition of the entire school system or that a remedial order guarantee that "no school, grade or classroom [be] substantially disproportionate to the overall racial composition" of the school system, as the District Court and Court of Appeals held. Here, it was assumed by both courts, without supporting evidence, that a member of a racial or ethnic minority who attends a school in which his or her minority group is predominant is in some way injured and thereby receives a lesser quality of education. Assuming that racial balancing to avoid this presumed injury is desirable on broad social or educational grounds, school authorities can rationally make that choice but it is not a constitutional requirement. In Wright v. Council of City of Emporia, 407 U.S. 451, 457, we were constrained to affirm desegregation plans that resulted in racial ratios of 66% Negro and 34% White. Similarly, in Swann we noted that although the District Court had employed the racial composition of the entire system (71% - 29%) as a starting point in developing a remedy, the court

> 'went on to acknowledge that variation 'from that norm may be unavoidable.' This contains intimations that the 'norm' is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter ——→

> of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

[redacted]

> "We see therefore that the use of [the] racial ratio was no more than a starting point in the process of fixing a remedy, rather than an inflexible requirement." 402 U.S. at 23-24 (emphasis added).

Here, in sharp contrast to Swann, the DC expressly and frankly directed the use of a "fixed mathematical racial balance" which was to be based on the "overall pupil racial composition" of Detroit and the 53 outlying school districts to ensure that:

> "Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P.M. 14 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition." Pet. App. at 101a-102a (emphasis added).

This is far from the use of the total racial composition as a "starting point" in the analysis of possible violations as envisioned in Swann and Wright, supra. Great disparity between the racial composition of the urban school districts and that of the central district may well constitute a signal to a district court at the outset, leading to inquiry into the reasons accounting for the pronounced racial identifiability of schools within the school system. We noted in Swann, for example, that:

> "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.

> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since Brown, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into a mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy." 402 U.S. at 20-21.

Furthermore, while the presence of clearly racially identifiable schools in close proximity to one another does not automatically dictate a required constitutionally remedy, it may, as we said in Swann, supra, and restated in Keyes v. School District No. 1, 413 U.S. 189 (1973), serve to shift the burden of proof to the school authorities and thereby constitute

> "a prima facie case of unlawful segregative design on the part of school authorities, [shifting] to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. We hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious." Keyes, 413 U.S. at 208.

See also Swann, 402 U.S. at 26. However, 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 in the form of an order for some fixed racial balance accomplished by enlarging the relevant area until the hypothetically 'desirable' racial mix is achieved. Keyes, supra, for example, involved a remedial order within a single autonomous school district.

Federal authority to impose cross-district remedies presupposes a fair and reasoned determination that there has been a constitutional violation by all of the districts affected by the remedy. Thus, a cross-district remedy might be appropriate, for example, if it could be established that the segregatory practice of one or more districts created or maintained the segregated condition within the central city. Here, however, the record, as voluminous as it is, understandably contains evidence concerning only the segregated condition of the Detroit school district ~~because this was the only theory upon which the case went through and on which the court proceeded.~~ The District Court ~~rejected this~~ adhered to theory of the case and mandated a metropolitan area remedy before the intervenors were heard and without permitting any evidence on the intervenors' claim that they were guilty of no violation of the constitutional rights of others. Thus, to approve the remedy imposed by the District Court on these facts would make racial balance the constitutional objective and standard; a result not even hinted at in Brown I and Brown II which held that the operation of dual school systems, not some hypothetical level of racial imbalance, is the constitutional violation to be remedied. Unlike Swann, this case did not involve a "very limited use . . . of . . . mathematical ratios" as a "starting point", but, on the contrary, the finding of racial imbalance became the controlling standard for determining the existence of a violation. This ~~conflicts~~ exceeds the explicit

guidelines of Swann that "to require, as a matter of substantive constitutional right any particular degree of racial balance or mixing" would be reversible error.

III

We recognize that the six-volume record presently under consideration contains language and some specific incidental findings by the District Court suggesting a basis for multi-district relief. However, these comparatively isolated findings and brief comments concerning multi-district violations are found in the context of a proceeding that, as the District Court conceded, included no proofs of segregation practiced by any of the 85 suburban school districts surrounding Detroit, and which did not provide for the participation of any of the outlying districts as parties. The Court of Appeals, for example, relied on five factors which, it held, amounted to unconstitutional state action with respect to the violations found in the Detroit system:

(1) It held the State derivatively responsible for the Detroit Board's violations on the theory that actions of Detroit as a political subdivision of the State were attributable to the State.

(2) It cited the enactment of state legislation (Act 48) which had the effect of rescinding Detroit's voluntary desegregation plan (the April 7 Plan). That plan, however, affected only 12 of 21 Detroit high schools and had no causal connection with the distribution of pupils by race between Detroit and any other school district within the tri-county area.

(3) It relied on the State's authority to supervise school site selection and to approve building construction as a basis for holding the State responsible for the segregative results of the school construction program in Detroit. Specifically,

the Court of Appeals asserted that during the period between 1949 and 1962 the State Board of Education exercised general authority as overseer of site acquisitions by local school boards for new school construction, and suggested that this State approved school construction "fostered segregation throughout the Detroit Metropolitan area." Pet. App. at 157a. This brief comment, however, is not supported by the evidence taken at trial since that evidence was specifically limited to proof that school site acquisition and school construction within the city of Detroit produced de jure segregation within the city itself. Pet. App. at 144a-151a. Thus, there was no evidence suggesting that the State's activities with respect to either school construction or site acquisition within Detroit effected the racial composition of the school population outside Detroit or, conversely, that the State's school construction and site acquisition activities within the outlying districts affected the racial composition of the schools within Detroit.

(4) The Court of Appeals also relied upon the District Court's finding that:

> "This and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effect, have created and perpetuated systematic educational inequalities." Pet. App. at 152a.

However, neither the Court of Appeals nor the District Court offered any indication in the record or in their opinions as to how, if at all, the availability of state-financed transportation for some Michigan students outside Detroit but not within Detroit, might have affected the racial character of any of the State's school districts. Furthermore, as the respondents recognize, the application of our recent ruling in San Antonio Independent School District v.

But this is not what disturbs the country

Rodriguez, 411 U.S. 1, to this state education financing system is questionable, and this issue was not addressed by either the Court of Appeals or the District Court. This, again, underscores the crucial fact that the theory upon which the case proceeded related solely to the establishment of Detroit city violations as a basis for desegregating Detroit schools and that, at the time of trial, neither the parties nor the trial judge were concerned with a foundation for inter-district relief. 19/

(5) There was evidence introduced at trial that, during the late 1950s, one suburban school district contracted to have Negro high school students educated in a predominantly Negro Detroit school. According to the Court of Appeals, this arrangement was dependent upon the "tacit or express" approval of the State Board of Education. This situation, whether with or without the State's consent, amounted to racial segregation affecting the populations of the two school districts involved. However, since "the nature of the violation determines the scope of the remedy," 402 U.S. at 16, this isolated instance would not justify the broad metropolitan-wide remedy, involving 503,000 pupils in addition to Detroit's 276,000 pupils, contemplated by the District Court and approved by the Court of Appeals.

19/ Apparently, when the District Court, sua sponte, abruptly altered the theory of the case to include the possibility of multi-district relief, neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory.

IV.

We now turn to the claim that the proceedings in the District Court denied due process to the outlying school districts embraced within the District Court's order for a multi district, metropolitan area remedy. It is argued that even if the District Court had used the correct constitutional standard which looks to the dismantling of a dual school system, the Court's procedural steps denied the outlying districts an opportunity to present evidence that (a) they did not operate dual school systems and (b) they had committed no acts violative of the constitutional rights of Detroit pupils.

Thus even had the District Court applied the correct constitutional standard to find a violation, its misconception of the remedial requirements for the constitutional violations within the boundaries of Detroit was compounded by the failure, as soon as a multi-district remedy was contemplated, to require that all interested parties be brought into the case. Only by so doing could they have been provided with a meaningful opportunity to address their respective interests. [20] As we have [illegible]

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[20] The respondents maintain that the interests of the suburban school districts were adequately represented by "their parent state defendant." Clearly, however, the state defendants were defending against the claims of the plaintiffs that the State had by its actions created racial segregation within the school district of the city of Detroit. An examination of the record indicates that none of the state defendants felt compelled to offer evidence in defense of an unasserted claim that the existence of suburban school districts was, without other evidence, a violation of the constitutional rights of the students in the schools of the city of Detroit. Evidence of this supposition is the fact that the state defendants did not join in the original motion to join the outlying districts as parties defendant. Furthermore, the Court of Appeals expressly directed that on remand the intervening districts be joined as parties defendant of right under Rule 19(a) Fed. R. Civ. P., thereby indicating its recognition that their "absence might as a practical matter impair [their] ability to protect that interest . . . ." C. Wright, Handbook of the Law of Federal Courts 338 (West Publishing Co. 1970).

noted, the District Court first alluded to the possibility of a metropolitan remedy on June 24, 1971. App. Vol. IV, pp. 259-60. Thereafter, and in response to the suggestion of a new remedial concept, motions for joinder of the 85 outlying suburban districts were filed on July 17, 1971. The District Court declined to rule on these motions for joinder, effectively tabling them until March 15, 1972, some eight months after the initial motions for joinder. Thus, at the time intervention was finally allowed the court had already commenced hearings on the inadequacy of the Detroit-only plans and the petitioners were permitted less than one week to prepare briefs in response to the District Court's already scheduled hearings on a metropolitan area remedy for the segregation found to exist in Detroit. The intervenors therefore found themselves faced with a ruling mandating a multi-district remedy two days after the date of submission of their briefs on the question. Further compounding this, the District Court's grant of intervention precluded submission of evidence and confined the petitioners to the presentation of briefs, but not oral argument "(a) To advise the court, by briefs, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them . . . ."

It is, of course, abundantly clear that "[a]n intervention of right under the amended rule [24(a) F. R. Civ. Proc.] may be subject to appropriate conditions or restrictions responsive among other things to the requirement of efficient conduct of the proceedings." 3B J. Moore, Moore's Federal Practice ¶ 24.01[10], at 24-16 (2d ed. 1948). It is equally certain, however, that "[i]t would be meaningless to give an intervenor an absolute right to intervene in order to protect his interest, if once in the proceeding he were barred from raising questions necessary

to his own protection." Id., at ¶ 24.16[4], 24-63. Here, the suburban school districts have been denied any opportunity to be heard with respect to constitutional violations by them - which incidentally no one had alleged - or within their respective school districts or with respect to the placement of their respective school boundaries. The record of constitutional violations found in this case was made at a time when the respondents were seeking to establish only the existence of violations within the city of Detroit and, as we have noted, the pleadings made no allegations that any of the outlying districts committed any constitutional violations. This brings us full circle, for the District Court, with the approval of the Court of Appeals, has provided a multi-district remedy in the face of a record which shows significant constitutional violations only within the city of Detroit. There was thus no occasion for the parties to develop fully, or for the District Court to consider, the existence of violations affecting students of the 53 outlying districts covered by its order for a metropolitan remedy. We conclude that the relief ordered by the District Court and affirmed by the Court of Appeals was based upon an erroneous constitutional standard, and is unsupported by record evidence. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion, including specifically prompt formulation of a remedial decree directed to ~~eliminating the segregation found to exist in~~ desegregating the Detroit city schools.

Reversed and remanded.

P might consider a focus of my Part II in Reply.

No mention of busing

No clear holding that an interdistrict (South-district) remedy is not correct. required in absence of segregatory conduct by each dist. individually unless the multi-dist plan and party that such conduct

Dist Courts are not yet drawn for habitual concurrence (13) Swann only "to combat actual districts" - 16

D C's for working order - consolidation in effect of 53 districts with District - 14

Cite Rodriguez & Burgess for local control of schools

Racial bal. identified by C.J. as objective - ✓ in certain parts of op. (pp. 16 to 24)

Pg 24 - adjustment would modify - clear finding any that there must be unconstitutional action (segregation by race) in a district that created or maintained seg. in city - 24 (This is central point). But SG's statement p. 13, 14 is knife in chest)

Sentence in 25 - changes!

Too much emphasis on off. on Hanes as while case was brought - see, p. 27.

We need a standard & must give guidance

See SG's example of violation - 14 (inc.)

Racial balance in each class room - 14 (change and yr)

See my memo. to C.J.

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

MILLIKEN v. BRADLEY, No. 73-434

(This must be rewritten)

1st DRAFT

MAY 31 1974

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-district, area wide remedy to a single district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multi-district remedy or on the question of constitutional violations by those neighboring districts. 1/

I

The action was commenced in August of 1970 by the respondents, the Detroit Branch of the National Association for the Advancement of Colored People 2/ and individual parents and students, on behalf of a class later defined by order of the United States District Court, E.D. Michigan, dated February 16, 1971, to include "all school children of the City of Detroit and all Detroit resident parents who have children of school age." The named defendants in

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1/ Bradley v. Milliken, 484 F. 2d 215 (CA 6 1973); cert. granted, 414 U.S. 1038 (Nov. 19, 1973).

2/ The standing of the NAACP as a proper party plaintiff was not contested in the trial court and is not an issue in this case.

the District Court included 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 is not a party to this litigation and references to the State must be read as references to the public officials, State and local, through whom the State is alleged to have acted. In their complaint respondents attacked the constitutionality of a statute of the State of Michigan known as Act 48 of the 1970 Legislature on the ground that it put the State of Michigan in the position of unconstitutionally interfering with the execution and operation of a voluntary plan of partial high school desegregation, known as the April 7, 1970 Plan, which had been adopted by the Detroit Board of Education to be effective beginning with the fall 1970 semester. The complaint also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office, and called for the implementation of a plan that would eliminate "the racial identity of every school in the [Detroit] system and . . . maintain now and hereafter a unitary non-racial school system."

Initially the matter was tried on respondents' motion for preliminary injunction to restrain the enforcement of Act 48 so as to permit the April 7 Plan to be implemented. On that issue, the District Court ruled that Respondents were not entitled to a preliminary injunction since at that stage there was no proof that Detroit had a dual segregated school system. On appeal, the Court of Appeals found that the "implementation of the April 7 Plan was [unconstitutionally] thwarted by State action in the form of the Act of the Legislature of Michigan."

43 F.2d 897, 902 (CA 6 1970), and that such action could not be interposed to delay, obstruct or nullify steps lawfully taken for the purpose of protecting rights guaranteed by the Fourteenth Amendment. The case was remanded to the District Court for an expedited trial on the merits.

On remand the respondents moved for immediate implementation of the April 7 Plan in order to remedy the deprivation of the claimed constitutional rights. In response the School Board suggested two other plans, along with the April 7 Plan, and urged that top priority be assigned to the so-called "Magnet Plan" which was "designed to attract children to a school because of its superior curriculum." The District Court approved the Board's Magnet Plan, and respondents again appealed to the Court of Appeals moving for summary reversal. The Court of Appeals refused to pass on the merits of the Magnet Plan and ruled that the District Court had not abused its discretion in refusing to adopt the April 7 Plan prior to an evidentiary hearing. The case was again remanded with instructions to proceed immediately to a trial on the merits of respondents' substantive allegations concerning the Detroit School System. 438 F.2d 945 (CA 6 1971).

The trial of the issue of segregation in the Detroit school system began on April 6, 1971, and continued through July 22, 1971, consuming some 41 trial days. On September 27, 1971, the District Court issued its findings and conclusions on the issue of segregation finding that "Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as housing institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential

segregation throughout the Detroit metropolitan area." Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Michigan 1971). While still addressing a Detroit-only violation, the District Court reasoned:

> "It would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools." 383 F. Supp. at 587.

The District Court found that the Detroit Board of Education created and maintained optional attendance zones [3/] within Detroit neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. These zones, the court found, had the "natural, probable, foreseeable and actual effect" of allowing White pupils to escape identifiably Negro schools. 338 F. Supp. at 587. Similarly, the District Court found that Detroit school attendance zones had been drawn along north-south boundary lines despite the Detroit Board's awareness that drawing boundary lines in an east-west direction would result in significantly greater desegregation. Again, the District Court concluded, the natural and actual effect of these acts was the creation and perpetuation of school segregation within Detroit.

3/ Optional zones, sometimes referred to as dual zones or dual overlapping zones, provide pupils living within certain areas a choice of attendance at one of two high schools.

The District Court found that in the operation of its school transportation program, which was designed to relieve overcrowding, the Detroit Board had admittedly bused Negro Detroit pupils to predominantly Negro schools which were beyond or away from closer White schools with available space.[*/] This practice was found to have continued in recent years despite the Detroit Board's avowed policy, adopted in 1967, of utilizing transportation to increase desegregation:

> "With one exception (necessitated by the burning of a white school), defendant Board has never bused white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,961 vacant seats in schools 90% or more black." 335 F. Supp. at 588.

With respect to the Detroit Board of Education's practices in school construction, the District Court found that Detroit school construction generally tended to have segregative effect with the great majority of schools being built in either overwhelmingly all Negro or all White neighborhoods so that the new schools opened as predominantly one race schools. Thus, of the 14 schools which opened for use in 1970-71, 11 opened over 90% Negro and one opened less than 10% Negro.

[*/] The Court of Appeals found record evidence that in at least one instance during the period between 1957-58, Detroit served a suburban school district by contracting with it to educate its Negro high school students by transporting them away from nearby suburban White high schools, and past Detroit high schools which were predominantly White, to all or predominantly Negro Detroit schools. Bradley v. Milliken, 484 F.2d 215, 232 (CA 6 1973).

The District Court also found that the State of Michigan had committed several constitutional violations with respect to the exercise of its general responsibility for, and supervision of, public education. [7] The State, for example, was found to have failed, until the 1971 Session of the Michigan legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned; during this same period the State provided many neighboring, mostly White, suburban districts the full range of state supported transportation.

The District Court found that the State, through Act 48, acted to "impede, delay and minimize racial integration in Detroit schools." The first sentence of Sec. 12 of Act 48 was designed to delay the April 7, 1970 desegregation plan originally adopted by the Detroit Board. The remainder of Section 12 sought to prescribe for each school in the eight districts criterion of "free choice" and

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[7] School districts in the State of Michigan are instrumentalities of the State and subordinate to its State Board of Education and legislature. The Constitution of the State of Michigan, Article VIII, Section 2, provides in relevant part:

> "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."

Similarly, the Michigan Supreme Court has stated that "The school district is a state agency. Moreover, it is of legislative creation . . . ." Attorney General v. Lowrey, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902): "Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over to the legislature . . . ." Attorney General v. Detroit Board of Education, 154 Mich. 554, 560, 118 N.W. 606, 609 (1908).

"neighborhood schools," which, the District Court found, "had as their purpose and effect the maintenance of segregation." 338 F. Supp. at 589.[6]

The District Court also held that the acts of the Detroit Board of Education, as a subordinate entity of the State, were attributable to the State of Michigan thus creating a vicarious liability on the part of the State. Under Michigan law, M.S.A. § 15. 1961, for example, school building construction plans had to be approved by the State Board of Education, and prior to 1962, the State Board had specific statutory authority to supervise school site selection. The proofs concerning the effect of Detroit's school construction program were, therefore, found to be largely applicable to show State responsibility for the segregative results.[7]

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[6] "Sec. 12. The implementation of any attendance provisions for the 1970-71 school year determined by any first class school district board shall be delayed pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not impair the right of any such board to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. . . ." Act No. 48, Section 12, Public Acts of Michigan, 1970; Michigan Compiled Laws Section 388.152, (emphasis added).

[7] The District Court briefly alluded to the possibility that the State, along with private persons, had caused, in part, the housing patterns of the Detroit metropolitan area which, in turn, produced the predominantly White and predominantly Negro neighborhoods that characterize Detroit:

> "It is no answer to say that restrictive practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community - as we know, the

Turning to the question of an appropriate remedy for these several constitutional violations, the District Court deferred a pending motion[8/] by intervening parent defendants to join as additional parties defendant some 85

7/ cont'd,

> choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of 'harmonious' neighborhoods, i.e., racially and economically harmonious. The conditions created continue." 338 F. Supp. at 587.

Thus, 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 racial segregation." 338 F. Supp. at 593.

The Court of Appeals, however, expressly noted that:

> "In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation." 484 F.2d at 242.

Accordingly, in its present posture, the case does not present any question concerning possible state housing violations.

8/ On March 22, 1971, a group of Detroit residents, who were parents of children enrolled in the Detroit public schools, were permitted to intervene as parties defendant. On June 24, 1971, the District Judge alluded to the "possibility" of a metropolitan school system stating: 'As I have said to several witnesses in this case: how do you desegregate a black city, or a black school system." IV App. at 559-560. Subsequently, on July 17, 1971, various parents filed a motion to require the joinder of all of the 85 independent school districts within the tri-county area.

school districts in the three counties surrounding Detroit on the ground that effective relief could not be achieved without their presence. 9/ The District Court concluded that this motion to intervene was "premature," since it "has to do with relief" and no reasonably specific desegregation plan was before the court. 338 F. Supp. at 595. Accordingly, the District Court proceeded

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9/ The respondents, as plaintiffs below, opposed the motion to join the additional school districts, arguing that the presence of the State defendants was sufficient and all that was required, even if, in shaping a remedy, the affairs of these other districts was to be affected. 338 F. Supp. at 595.

to order the Detroit Board of Education to submit desegregation plans limited to the segregation problems found to be existing within the city of Detroit. At the same time, however, the State defendants were directed to submit desegregation plans encompassing the three-county metropolitan area [10] despite the fact that the school districts of these three counties were not parties to the action and despite the fact that there had been no claim that these outlying counties, encompassing some 85 separate school districts, had committed constitutional violations. [11]

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[10] At the time of the 1970 census, the population of Michigan was 8,875,083, almost half of which, 4,199,931, resided in the tri-county area of Wayne, Oakland, and Macomb. Oakland and Macomb Counties abut Wayne County to the north, and Oakland County abuts Macomb County to the west. These counties cover 1,952 square miles, Michigan Statistical Abstract, 1972 (9th ed.), and the area is approximately the size of the State of Delaware (2,057 square miles), more than half again the size of the State of Rhode Island (1,214 square miles) and almost 30 times the size of the District of Columbia (67 square miles). Statistical Abstract of United States, 1972 (93rd ed.). The population of Wayne, Oakland and Macomb Counties was 2,666,751, 907,871 and 625,309, respectively in 1970. Detroit, the State's largest city, is located in Wayne County.

In the 1970-71 school year, there were 2,157,449 children enrolled in the school districts in Michigan. There are 86 independent, legally distinct school districts within the tri-county area, having a total enrollment of approximately 1,000,000 children. In 1970, the Detroit Board of Education operated 319 schools with approximately 270,000 students.

[11] In its formal opinion, subsequently announced, the District Court candidly recognized that:

> "It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." 345 F. Supp. 914, 920.

An effort to appeal these orders to the Court of Appeals was dismissed on the ground that the orders were not appealable. 468 F.2d 902, cert. denied, 409 U.S. 844.

The sequence of the ensuing actions and orders of the District Court are significant factors and will therefore be catalogued in some detail. Following the District Court's abrupt announcement that it planned to consider the implementation of a multi-district, metropolitan area remedy to the segregation problems identified within the city of Detroit, the District Court was again requested to grant the outlying school districts intervention as of right on the ground that the District Court's new request for multi-district plans "may, as a practical matter, impair or impede [the intervenor's] ability to protect" the welfare of their students. The District Court took the motions to intervene under advisement pending submission of the requested desegregation plans by Detroit and the State officials. On March 7, 1972, the District Court notified all parties and the petitioner school districts seeking intervention, that March 14, 1972 was the deadline for submission of recommendations for conditions of intervention and the date of the commencement of hearings on Detroit-only desegregation plans. On the second day of the scheduled hearings, March 15, 1972, the District Court granted the motions of the intervenor school districts [12/] subject, inter alia, to the following conditions:

12/ According to the District Court, intervention was permitted under Rule 24(a), Fed. R. Civ. P., "Intervention of Right," and also under Rule 24(b), "Permissive Intervention."

"1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.

"2. No intervenor shall reopen any question or issue which has previously been decided by the court

* * * * *

"7. New intervenors are granted intervention for two principal purposes: [a] To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; [b] To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Constitution and the prior orders of this court." 1 App. at 206.

Upon granting the motion to intervene, on March 15, 1972, the District Court advised the petitioning intervenors that the court had previously set March 22, 1972, as the date for the filing of briefs on the legal propriety of a "metropolitan" plan of desegregation and, accordingly, that the intervening school districts would have one week to muster their legal arguments on the issue. [3] Thereafter, and following the completion of hearings on the Detroit-only desegregation plans, the District Court issued the four rulings that were the principal issues in the Court of Appeals.

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[3] This rather abbreviated briefing schedule was maintained despite the fact that the District Court had deferred consideration of a motion made eight months earlier, to bring the suburban districts into the case. See note [7] supra.

(a) On March 24, 1972, two days after the intervenors' briefs were due, the District Court issued its ruling on the question of whether it could "consider relief in the form of a metropolitan plan, encompassing not only the city of Detroit, but the larger Detroit metropolitan area." It rejected both the State defendants' arguments that no state action caused the segregation of the Detroit schools, and the intervening suburban districts' contention that inter-district relief was inappropriate unless the suburban districts had themselves committed violations. The court concluded:

> "[I]t is proper for the court to consider metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to the present intra-city desegregation plans before it and, in the event that the court finds such intra-city plans inadequate to desegregate such schools, the court is of the opinion that it is required to consider a metropolitan remedy for desegregation." Pet. App. at 51a.

(b) On March 28, 1972, the District Court issued its findings and conclusions on the three "Detroit-only" plans submitted by the city Board and the respondents. It found that the best of the three plans "would make the Detroit system more identifiably Black . . . thereby increasing the flights of Whites from the city and the system." Pet. App. at 53a-55a. From this the court concluded that the plan "would not accomplish desegregation within the corporate geographical limits of the city." Id. at 56a. Accordingly, the District Court held that "it must look beyond the limits of the Detroit school district for a solution to the problem," and that "[s]chool district lines are simply matters of political convenience and may not be used to deny constitutional rights." Id. at 57a.

(c) During the period from March 28, 1972 to April 14, 1972, the District Court conducted hearings on a metropolitan plan. Counsel for the petitioning intervenors was allowed to participate in these hearings, but he was ordered to confine his argument to "the size and expanse of the metropolitan plan" without addressing the intervenors' opposition to such a remedy or the claim that a finding of a constitutional violation by the intervenor districts was an essential predicate to any remedy involving them. Thereafter, on June 14, 1972, the District Court issued its ruling on the "desegregation area" and related findings and conclusions. The court acknowledged at the outset that it had "taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties [in the Detroit area], nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." Nevertheless, the court designated 53 of the 85 suburban school districts plus Detroit as the "desegregation area" and appointed a panel to prepare and submit "an effective desegregation plan" for the Detroit schools that would encompass the entire desegregation area.[7/] The plan was to be based on 15 clusters, each containing part of the Detroit system and two or more suburban districts, and was to "achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition." Pet. App. 101a-102a.

[7/] The 53 school districts outside the city of Detroit that were included in the court's "desegregation area" have a combined student population of approximately 503,000 students compared to Detroit's approximately 276,000 students. Nevertheless, the District Court directed that the intervening districts should be represented by only one member on the desegregation panel while the Detroit Board of Education was granted three panel members. Pet. App. at 99a.

(d) On July 11, 1972, and in accordance with a recommendation by the court-appointed desegregation panel, the District Court ordered the Detroit Board of Education to purchase or lease "at least" 295 school buses for the purpose of providing transportation under an interim plan to be developed for the 1972-73 school year. The costs of this acquisition were to be borne by the state defendants. Pet. App. at 106a-107a.

On June 12, 1973, a divided Court of Appeals, sitting en banc, affirmed in part, vacated in part, and remanded for further proceedings. 484 F. 2d 215 (CA 6 1973).[15/] The Court of Appeals held, first, that the record supported the District Court's findings and conclusions on the constitutional violations committed by the Detroit Board, 484 F. 2d at 231-38, and by the State defendants. 484 F. 2d at 239-41.[16/] It stated that the acts of racial discrimination shown in

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[15/] The District Court had certified most of the foregoing rulings for interlocutory review pursuant to 28 U.S.C. 1292(b) (I App. 265-266) and the case was initially decided on the merits by a panel of three judges. However, the panel's opinion and judgment were vacated when it was determined to rehear the case en banc, 464 F. 2d 215, 218 (CA 6 1973).

[16/] With respect to the State's violations, the Court of Appeals held: (1) that, since the city Board is an instrumentality of the State and subordinate to the State Board, the segregative actions of the Detroit Board "are the actions of an agency of the State" (484 F. 2d at 238); (2) that the state legislation rescinding Detroit's voluntary desegregation plan contributed to increasing segregation in the Detroit schools (id.); (3) that under state law prior to 1962 the state Board had authority over school construction plans and must therefore be held responsible "for the segregative results" (id.); (4) that the "State statutory scheme of support of transportation for school children directly discriminated against Detroit" (484 F. 2d at 240) by not providing transportation funds to Detroit on the same basis as funds were provided to suburban districts (484 F. 2d at 236); and (5) that the transportation of Negro students from one suburban district to a Negro school in Detroit must have had the "approval, tacit or express, of the State Board of Education." (Id.)

the record are 'causally related to the substantial amount of segregation found in the Detroit school system, 484 F. 2d at 241, and that "the District Court was, therefore, authorized and required to take effective measures to desegregate the Detroit Public School System." 484 F. 2d 242.

The Court of Appeals also agreed with the District Court that 'any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelming white majority population in the total metropolitan area." 484 F. 2d at 245. The court went on to state that it could "not see how such segregation can be any less harmful to the minority students than if the same result were accomplished within one school district." 484 F. 2d at 245.

Accordingly, the Court of Appeals concluded that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan." 484 F. 2d at 249. It reasoned that such a plan would be appropriate because of the State's violations, and could be implemented because of the State's authority to control local school districts. Without further elaboration, and without any discussion of the claim that no constitutional violation by the outlying districts had been shown and that no evidence on that point had been allowed, the Court of Appeals held:

> "[T]he State has committed de jure acts of segregation and . . . the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts."

held to be

Id. An inter-district remedy is thus/"within the equity powers of the District Court." 484 F. 2d at 250. [7]

The Court of Appeals expressed no views on the propriety of the District Court's composition of the metropolitan "desegregation area." It held that all suburban school districts that might be affected by any metropolitan-wide remedy should, under Rule 19, Fed. R. Civ. P., be made parties to the case on remand and be given an opportunity to be heard with respect to the scope and implementation of such a remedy. 484 F. 2d at 251-52. Under the terms of the remand, however, the District Court was "not required" to receive further evidence on the issue of segregation in the Detroit schools or on the propriety of a Detroit-only remedy, or on the question of whether the affected districts had committed any violation of the constitutional rights of Detroit pupils or others. 484 F. 2d at 252. Finally, the Court of Appeals vacated the District Court's order directing the acquisition of school buses, subject to the right of the District Court to consider reimposing the order "at the appropriate time." 484 F. 2d 252.

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[7] The court sought to distinguish Bradley v. School Board of the City of Richmond, Virginia, 462 F. 2d 1058 (CA 4), affirmed by an equally divided Court, 412 U.S. 92, on the grounds that the District Court in that case had ordered an actual consolidation of three school districts and that Virginia's constitution and statutes, unlike Michigan's, did not give the local boards exclusive power to operate the public schools. 484 F. 2d at 251.

II.

Ever since Brown v. Board of Education, 347 U.S. 483 (1954), the starting point in judicial consideration of school desegregation cases has remained the same:

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

347 U.S. at 495. The target in Brown was clear and forthright: the elimination of state mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for White pupils. This was the duality and racial segregation held to violate the Constitution in Green v. County School Board of New Kent County, 391 U.S. 430 (1968); Raney v. Board of Education, 391 U.S. 443 (1968); Monroe v. Board of Commissioners, 391 U.S. 450 (1968); and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

The Swann case, of course, dealt

> "with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing Brown I and the mandate to eliminate dual systems and establish unitary systems at once."

402 U.S. at 6. In Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II), the Court's first encounter with the problem of remedies in school desegregation cases, the Court noted that:

> "In fashioning and effectuating the decrees the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." Brown v. Board of Education, 349 U.S. 294, 299-300 (1955).

In further refining the remedial process, Swann held, the task is to correct, by a balancing of the individual and collective interests, "the condition that offends the Constitution." A federal remedial power may be exercised "only on the basis of a constitutional violation" and, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." 402 U.S. at 15, 16.

Proceeding from these basic principles, we first note that in the District Court the complainants sought to formulate a remedy aimed at the condition that offends the Constitution -- the segregation found to exist within the Detroit city school district.[18/] The court acted on this theory of the case and in its initial ruling on the "Desegregation Area" stated:

> "The task before this court, therefore, is now, and . . . has always been, how to desegregate the Detroit public schools." Pets. App. at 61a.

Thereafter, however, the District Court abruptly rejected the proposed Detroit-only plans on the ground that "while it would provide a racial mix more in keeping with the Black-White proportions of the student population, [it] would accentuate the racial identifiability of the [Detroit] district as a Black school system, and would not accomplish desegregation." Pet. App. at 56a. "[T]he racial composition of the student body is such," said the

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18/ Although the list of issues presented for review in petitioners' briefs and petitions for writs of certiorari do not include arguments on the findings of segregatory violations on the part of the Detroit defendants, two of the petitioners argue in brief that these findings constitute error. Supreme Court Rules 23(1)(c) and 40(1)(d)(2), at a minimum, limit our review of the Detroit violation findings to "plain error," and, under our decision last Term in Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, the findings appear to be correct.

court, "that the plan's implementation would clearly make the entire Detroit public school system racially identifiable" (Pet. App. at 54a), "leav[ing] many of its schools 75 to 90 percent Black." Pet. App. at 55a. Consequently, the court reasoned, it was imperative to "look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit schools . . . ," since "school district lines are simply matters of political convenience and may not be used to deny constitutional rights," Id. at 57a. Accordingly, the District Court proceeded to redefine the relevant area to include areas of predominantly White pupil population in order to ensure that "upon implementation, no school, grade or classroom [would be] substantially disproportionate to the overall racial composition" of the entire metropolitan area.

While specifically acknowledging that the District Court's findings of a condition of segregation were limited to Detroit, the Court of Appeals approved the use of a metropolitan remedy largely on the grounds that it is:

> "impossible to declare 'clearly erroneous' the District Judge's conclusion that any Detroit only segregation plan will lead directly to a single segregated Detroit school district overwhelmingly Black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a state in which the racial composition is 87 percent white and 13 percent black," 484 F.2d at 249.

Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals placed the primary focus on the desire to achieve "racial balance" in a city predominantly composed of Negro students, and this approach plainly equated desegregation with racial balance as a constitutionally mandated remedy. In Swann, we recognized that racially

identifiable schools are often symptomatic of a segregated system and that

> "[w]here [a system] . . . contemplates the continued existence of some schools that are all or predominantly of one race, [school authorities] have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U.S. at 26.

There has never been, however, a constitutional requirement that a school system reflect "any particular degree of racial balancing or mixing." Id. at 24. Moreover, there is no constitutional requirement that each school in the system reflect -- either precisely or substantially -- the racial composition of the entire school system or that a remedial order guarantee that "no school, grade or classroom [be] substantially disproportionate to the overall racial composition" of the school system, as the District Court and Court of Appeals held. Here, it was assumed by both courts, without supporting evidence, that a member of a racial or ethnic minority who attends a school in which his or her minority group is predominant is in some way injured and thereby receives a lesser quality of education. Assuming that racial balancing to avoid this presumed injury is desirable on broad social or educational grounds, school authorities can rationally make that choice but it is not a constitutional requirement. In Wright v. Council of City of Emporia, 407 U.S. 451, 457, we were constrained to affirm desegregation plans that resulted in racial ratios of 66% Negro and 34% White. Similarly, in Swann we noted that although the District Court had employed the racial composition of the entire system (71% - 29%) as a starting point in developing a remedy, the court

> "went on to acknowledge that variation 'from that norm may be unavoidable. This contains intimations that the 'norm' is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter ——————→

> of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

> "We see the record [as the use of mathematical ratio] was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." 402 U.S. at 23-24 (emphasis added).

Here, in sharp contrast to Swann, the [illegible] expressly and frankly directed the use of a "fixed mathematical racial balance" which was to be based on the "overall pupil racial composition" of Detroit and the 53 outlying school districts to ensure that:

> "Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit D.M. 14 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition." Pet. App. at 101a-102a (emphasis added).

This is far from the use of the total racial composition as a "starting point" in the analysis of possible violations as envisioned in Swann and Wright, supra. Great disparity between the racial composition of the urban school districts and that of the central district may well constitute a signal to a district court at the outset, leading to inquiry into the causes accounting for the pronounced racial identifiability of schools within the school system. We noted in Swann, for example, that:

> "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.

> "In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since Brown, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into a mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy." 402 U.S. at 20-21.

Furthermore, while the presence of clearly racially identifiable schools in close proximity to one another does not automatically dictate a required constitutionally/remedy, it may, as we said in Swann, supra, and restated in Keyes v. School District No. 1, 413 U.S. 189 (1973), serve to shift the burden of proof to the school authorities and thereby constitute

> "a prima facie case of unlawful segregative design on the part of school authorities, [shifting] to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. We hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious." Keyes, 413 U.S. at 208.

See also Swann, 402 U.S. at 26. However, 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 in the form of an order for some fixed racial balance accomplished by enlarging the relevant area until the hypothetically "desirable" racial mix is achieved. Keyes, supra, for example, involved a remedial order within a single autonomous school district.

Federal authority to impose cross-district remedies presupposes a fair and reasoned determination that there has been a constitutional violation by all of the districts affected by the remedy. Thus, a cross-district remedy might be appropriate, for example, if it could be established that the segregatory practice of one or more districts created or maintained the segregated condition within the central city. Here, however, the record, as voluminous as it is, understandably contains evidence concerning only the segregated condition of the Detroit school district because that was the only theory upon which the case was brought and on which the court proceeded. The District Court altered the theory of the case and mandated a metropolitan area remedy before the intervenors were heard and without permitting any evidence on the intervenors' claim that they were guilty of no violation of the constitutional rights of others. Thus, to approve the remedy imposed by the District Court on these facts would make racial balance the constitutional objective and standard; a result not even hinted at in Brown I and Brown II which held that the operation of dual school systems, not some hypothetical level of racial imbalance, is the constitutional violation to be remedied. Unlike Swann, this case did not involve a "very limited use . . . of . . . mathematical ratios" as a "starting point", but, on the contrary, the finding of racial imbalance became the controlling standard for determining the existence of a violation. This misread the explicit

guidelines of Swann that "to require, as a matter of substantive constitutional right any particular degree of racial balance or mixing" would be reversible error.

III

We recognize that the six-volume record presently under consideration contains language and some specific incidental findings by the District Court suggesting a basis for multi-district relief. However, these comparatively isolated findings and brief comments concerning multi-district violations are found in the context of a proceeding that, as the District Court conceded, included no proofs of segregation practiced by any of the 85 suburban school districts surrounding Detroit, and which did not provide for the participation of any of the outlying districts as parties. The Court of Appeals, for example, relied on five factors which, it held, amounted to unconstitutional state action with respect to the violations found in the Detroit system:

(1) It held the State derivatively responsible for the Detroit Board's violations on the theory that actions of Detroit as a political subdivision of the State were attributable to the State.

(2) It cited the enactment of state legislation (Act 48) which had the effect of rescinding Detroit's voluntary desegregation plan (the April 7 Plan). That plan, however, affected only 12 of 21 Detroit high schools and had no causal connection with the distribution of pupils by race between Detroit and any other school district within the tri-county area.

(3) It relied on the State's authority to supervise school site selection and to approve building construction as a basis for holding the State responsible for the segregative results of the school construction program in Detroit. Specifically,

the Court of Appeals asserted that during the period between 1949 and 1962 the State Board of Education exercised general authority as overseer of site acquisitions by local school boards for new school construction, and suggested that this State approved school construction "fostered segregation throughout the Detroit Metropolitan area." Pet. App. at 157a. This brief comment, however, is not supported by the evidence taken at trial since that evidence was specifically limited to proof that school site acquisition and school construction within the city of Detroit produced de jure segregation within the city itself. Pet. App. at 144a-151a. Thus, there was no evidence suggesting that the State's activities with respect to either school construction or site acquisition within Detroit affected the racial composition of the school population outside Detroit or, conversely, that the State's school construction and site acquisition activities within the outlying districts affected the racial composition of the schools within Detroit.

(4) The Court of Appeals also relied upon the District Court's finding that:

> "This and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effect, have created and perpetuated systematic educational inequalities." Pets. App. at 152a.

However, neither the Court of Appeals nor the District Court offered any indication in the record or in their opinions as to how, if at all, the availability of state-financed transportation for some Michigan students outside Detroit but not within Detroit, might have affected the racial character of any of the State's school districts. Furthermore, as the respondents recognize, the application of our recent ruling in San Antonio Independent School District v.

Rodriguez, 411 U.S. 1, to this state education financing system is questionable, and this issue was not addressed by either the Court of Appeals or the District Court. This, again, underscores the crucial fact that the theory upon which the case proceeded related solely to the establishment of Detroit city violations as a basis for desegregating Detroit schools and that, at the time of trial, neither the parties nor the trial judge were concerned with a foundation for inter-district relief.[19/]

(5) There was evidence introduced at trial that, during the late 1950s, one suburban school district contracted to have Negro high school students educated in a predominantly Negro Detroit school. According to the Court of Appeals, this arrangement was dependent upon the "tacit or express" approval of the State Board of Education. This situation, whether with or without the State's consent, amounted to racial segregation affecting the populations of the two school districts involved. However, since "the nature of the violation determines the scope of the remedy," 402 U.S. at 16, this isolated instance would not justify the broad metropolitan-wide remedy, involving 503,000 pupils in addition to Detroit's 276,000 pupils, contemplated by the District Court and approved by the Court of Appeals.

19/ Apparently, when the District Court, sua sponte, abruptly altered the theory of the case to include the possibility of multi-district relief, neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory.

IV.

We now turn to the claim that the proceedings in the District Court denied due process to the outlying school districts embraced within the District Court's order for a multi-district, metropolitan area remedy. It is argued that even if the District Court had used the correct constitutional standard which looks to the dismantling of a dual school system, the Court's procedural steps denied the outlying districts an opportunity to present evidence that (a) they did not operate dual school systems and (b) they had committed no acts violative of the constitutional rights of Detroit pupils.

Thus even had the District Court applied the current constitutional standard to find a violation, its misconception of the remedial requirements for the constitutional violations within the boundaries of Detroit was compounded by the failure, as soon as a multi-district remedy was contemplated, to require that all interested parties be brought into the case. Only by so doing could they have been provided with a meaningful opportunity to address their respective interests.[20/] As we have [illegible]

20/ The respondents maintain that the interests of the suburban school districts were adequately represented by "their parent state defendant." Clearly, however, the state defendants were defending against the claims of the plaintiffs that the State had by its actions created racial segregation within the school district of the city of Detroit. An examination of the record indicates that none of the state defendants felt compelled to offer evidence in defense of an unasserted claim that the existence of suburban school districts was, without other evidence, a violation of the constitutional rights of the students in the schools of the city of Detroit. Evidence of this supposition is the fact that the state defendants did not join in the original motion to join the outlying districts as parties defendant. Furthermore, the Court of Appeals expressly directed that on remand the intervening districts be joined as parties defendant of right under Rule 19(a) Fed. R. Civ. P., thereby indicating its recognition that their "absence might as a practical matter impair [their] ability to protect that interest . . . ." C. Wright, Handbook of the Law of Federal Courts 308 (West Publishing Co. 1970).

noted, the District Court first alluded to the possibility of a metropolitan remedy on June 24, 1971. App. Vol. IV, pp. 259-60. Thereafter, and in response to the suggestion of a new remedial concept, motions for joinder of the 85 outlying suburban districts were filed on July 17, 1971. The District Court declined to rule on these motions for joinder, effectively tabling them until March 15, 1972, some eight months after the initial motions for joinder. Thus, at the time intervention was finally allowed the court had already commenced hearings on the inadequacy of the Detroit-only plans and the petitioners were permitted less than one week to prepare briefs in response to the District Court's already scheduled hearings on a metropolitan area remedy for the segregation found to exist in Detroit. The intervenors therefore found themselves faced with a ruling mandating a multi-district remedy two days after the date of submission of their briefs on the question. Further compounding this, the District Court's grant of intervention precluded submission of evidence and confined the petitioners to the presentation of briefs, but not oral argument "(a) To advise the court, by briefs, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them . . . ."

It is, of course, abundantly clear that "[a]n intervention of right under the amended rule [24(a) F. R. Civ. Proc.] may be subject to appropriate conditions or restrictions responsive among other things to the requirement of efficient conduct of the proceedings." 3B J. Moore, Moore's Federal Practice ¶ 24.01[10], at 24-18 (2d ed. 1948). It is equally certain, however, that "[i]t would be meaningless to give an intervenor an absolute right to intervene in order to protect its interest, if once in the proceeding he were barred from raising questions necessary

to his own protection." Id., at ¶ 24.16[4], 24-63. Here, the suburban school districts have been denied any opportunity to be heard with respect to constitutional violations by them - which incidentally no one had alleged - or within their respective school districts or with respect to the placement of their respective school boundaries. The record of constitutional violations found in this case was made at a time when the respondents were seeking to establish only the existence of violations within the city of Detroit and, as we have noted, the pleadings made no allegations that any of the outlying districts committed any constitutional violations. This brings us full circle, for the District Court, with the approval of the Court of Appeals, has provided a multi-district remedy in the face of a record which shows significant constitutional violations only within the city of Detroit. There was thus no occasion for the parties to develop fully, or for the District Court to consider, the existence of violations affecting students of the 53 outlying districts covered by its order for a metropolitan remedy. We conclude that the relief ordered by the District Court and affirmed by the Court of Appeals was based upon an erroneous constitutional standard, and is unsupported by record evidence. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion, including specifically prompt formulation of a remedial decree directed to eliminating the segregation found to exist in Detroit city schools.

Reversed and remanded.

LFP/gg

Suggested revision of page 26 of Bradley draft of 6-11-74

The controlling principle, continually expounded in our decisions, is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Swann, supra. In the present context, this means that an interdistrict remedy is appropriate only where there has been a significant interdistrict constitutional violation. Specifically, it must be shown that racially discriminatory acts of the State, local school districts, or a single school district, have been a direct and substantial cause of interdistrict school segregation. Thus, for example, an interdistrict remedy might be appropriate where the discriminatory acts of one or more school districts created or maintained the racial segregation of the central city, or where school district lines have been intentionally drawn on the basis of race. In these circumstances, an interdistrict remedy is appropriate and should be designed to eliminate the interdistrict segregation directly caused by the constitutional violation. In this case no showing has been made of any significant interdistrict constitutional violation.

[RE 6/13/74]

This memo. was prepared hurriedly on 6/13 as basis for conference with C.J. & other Justices

I proposed the substance of this as a substitute for the Chief's draft circulated on 6/11 — pages 20 — 25 inclusive.

LFP/6/13/74

Bradley 73-434

Jill

The District Court and the Court of Appeals predicated their respective holdings on the assumption that the City of Detroit school system could not be desegregated unless the racial composition of the student body within that system was equivalent to the racial composition of the population of the Detroit metropolitan area as a whole. In effect, both courts sought to prescribe a particular percentage of racial balance as the touchstone of a desegregated school system. This Court has never so held. In Swann, we recognized that limited use of "mathematical ratios" was a proper "starting point" in a desegregation plan. But we also stated that "to require, as a matter of constitutional right, any particular degree of racial balance or mixing" would be reversible error. Id., at ___. The clear import of Swann is that desegregation, in the constitutional sense, does not require any specific percentage of racial balance within a school system. A

The approach of the courts below also obscured the central question before us, ~~how~~ ~~[illegible]~~ ~~concerns~~ whether, and under what circumstances, a federal court may/Order desegregation relief which embraces more than a single school district. We note at the outset that the Court of Appeals misconceived the status and function of school districts. There is no basis, in the history of public education in our country or under Michigan law, for the view of the Court of Appeals that school districts are no more than lines on the map "drawn for political convenience", __ F.2d at ___. No single tradition in public education is more deeply rooted than local control over the operation of schools. Local control has long been thought essential both to the maintenance of community interest and support for public schools and to the preservation of the quality of educational process. As the Court stated in Wright v. Council of the City of Emporia, 407 U.S. 451, 469 (1972), "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society. . . ." The importance of maintaining this control through local school

boards was again emphasized by the Court in San Antonio School District v. Rodriguez, 411 U.S. 1, 49 (1973). There, we described the statutory division of responsibilities under Texas law:

> "Although policy decision making and supervision in certain areas are reserved to the state, the day-to-day authority over the 'management and control' of all public elementary and secondary schools is squarely placed on local school boards." Id. at 52, n. 108.

The Michigan educational structure involved in this case likewise provides for a large measure of local control. The authority and responsibility of local school boards over the educational process are impressive.* A review of the scope and character of these powers indicates the extent to which the inter-district remedy approved by the courts below could disrupt and alter the structure of public education in Michigan.

*Insert footnote 19 of second draft opinion. Also, if there are constitutional provisions creating local school boards and authorizing the creation of local school districts, these should be quoted.

The metropolitan remedy would require consolidation of the schools in 54 separate school districts, in addition to the City of Detroit. Quite apart from the problem of large-scale transporation of students, this plan would create an array of other problems in the financing and operation of what in effect would be a vast new amorphous super school district imposed on existing districts.[8]

To be sure, no state law is above the Constitution. School district lines, and the present laws with respect to local control, are neither immune nor immutable in the face of the express command of the Fourteenth Amendment. Accordingly, if the constitutional violation is sufficiently substantial and direct to justify an intrusion of this magnitude upon the powers of a state and traditional values of public education, federal courts have a duty to prescribe appropriate remedies. Our previous decisions have been confined to violations and remedies within a single school district. We turn now for the first time to address the validity of an inter-district remedy and to determine applicable standards in such cases.

*Some of the more obvious questions include: What would happen to the composition of the present popularly elected school boards? Would, for example, the children of Detroit be within the jurisdiction and operating control of a school board elected by the parents and residents of other districts? What board or boards would levy taxes for school operations in these 54 districts? What provisions could be made for assuring substantial equality in tax levies among the districts, if this were deemed requisite? What about short and long-term borrowing? Would the validity of long-term bonds be jeopardized unless approved by all of the districts as well as the state? And what about the determination of that portion of the curricula within the discretion of local boards, the establishment of attendance zones, the purchase of school equipment, the location and construction of new schools, and indeed who would make the multitude of day-to-day decisions that are necessary with respect to public school operations.

It may be answered that all of these vital operational problems have yet to be resolved by the District Court, and that this is a purpose of the proposed remand. But it is obvious that the scope of the inter-district plan itself that, absent a complete restructuring of the laws of Michigan, the District Court itself will become the school superintendent for the entire area - a task for which few judges are qualified to perform and one which would deprive the people of control through their elected representatives of their own institutions and taxation.

We note at the outset that the Court of Appeals misconceived the status and function of school districts. There is no basis, in the history of public education in our country nor under Michigan law, for the view of the Court of Appeals that school districts are not more than lines on the map 'drawn for political convenience'. No single tradition in public education is more deeply rooted than the conviction that a large measure of local control is necessary. As the Court put it in Wright v. Council of the City of Emporia, 407 U.S. 451, 469 (1972), '[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society. . . .' The importance of maintaining this control through local school boards was again emphasized by the Court in San Antonio School District v. Rodriguez, 411 U.S. 1, 49 (1973). There, we described the statutory division of responsibilities under Texas law:

> 'Although policy decision making and supervision in certain areas are reserved [exclusively] to the state, the day-to-day authority over the 'management and control' of all public elementary and secondary schools is squarely placed on local

A similar division of responsibilities for public education also is prescribed by Michigan law.* An incomplete summary of the powers and authority of local boards of education (school boards) within their respective school districts is set forth in the margin below. A casual review of the scope and character of these powers indicates the extent to which the interdistrict remedy approved by the courts below would disrupt and profoundly change the structure of public education in Michigan. The metropolitan plan would unite, at least for the ~~purpose~~ purpose of achieving the prescribed racial balance, the schools in 54 separate school districts, including the City of Detroit. Quite apart from the problem of massive transportation which has attracted wide public attention, this plan would create an array of other problems in the financing and operation of what in effect would be a vast new amorphous super-district imposed on existing districts. Some of the more obvious questions include: what would happen to the composition of the present popularly elected school boards? Would,

*Here, pick up note 19 in the Chief Justice's second draft. Also, if there are constitutional provisions creating local school boards and authorizing the creation of local school

for example, the children of Detroit be within the jurisdiction and operating control of a school board elected by the parents and residents of other districts? What board or boards would levy taxes for school operations in these 54 districts? What provisions could be made for assuring substantial equality in tax levies among the districts, if this were deemed requisite? What about short and long-term borrowing? Would the validity of long-term bonds be jeopardized unless approved by all of the districts as well as the state? And what about the determination of that portion of the curricula within the discretion of local boards, the establishment of attendance zones, the purchase of school equipment and sites for new schools, and indeed who would make the multitude of almost day-to-day decisions that are necessary with respect to public school operations? It may be answered that all of these vital operating questions have yet to be resolved by the District Court, and that this is a purpose of the proposed remand. But it is obvious from the scope of the interdistrict plan itself that, absent a complete restructuring of the laws

of Michigan, the District Court itself will become the super school superintendent for the entire area - a task for which few judges are qualified to perform and one which would deprive the people of control through their elected representatives of their own institutions and taxation. To be sure, no state law is above the Constitution and certainly school district lines, and the present laws with respect to local control, are not sacrosanct. Accordingly, if the constitutional violation were sufficiently substantial and direct to justify an intrusion of this magnitude upon the powers of a state and traditional values of public education, federal courts would have a duty to prescribe appropriate remedies. Our previous decisions have been confined to violations and remedies within a single school district. We turn now for the first time to address the validity of an interdistrict remedy and to determine applicable standards where this is proposed.

[REVised DRAFT 6/14/74]

Chief's suggested file revisions in light of our talk (all 5 of us) on 6/13. See my memo. to C.J. of 6/14 commenting on this.

ZFP

> gation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a state in which the racial composition is 87 percent white and 13 percent black." 484 F. 2d, at 249.

Viewing the record as a whole, it is clear that the Distri Court and the Court of Appeals placed their primary focus on the assumption that the city of Detroit school system could not be desegregated -- in their view of what constituted desegregation -- unless the racial composition of the student body in t he schools within the Detroit system reflected substantially the racial composition of the population of the Detroit metropolitan area as a whole. The scope of the "metropolitan area" was late defined as embracing 53 outlying districts and the City of Detroit. Both courts sought to prescribe a particular percentag of racial balance as a touchstone of a desegregated school syster and to equate desegregation with racial balance. This Court has never so held, and indeed explicitly rejected racial balance as a constitutional requirement in a unanimous opinion in Swann. There we recognized that limited use of "mathematical ratios" was one appropriate "starting point" in a desegregation case. But we also stated that "to require, as a matter of constitutional right, any particular degree of racial balance or mixing" would

I still think this should be left out. We've said enough. We've lost!

be reversible error. Id., at ___. The clear import of Swann is that desegregation, in the sense of dismantling a dual school system on constitutional grounds, does not require any particular racial balance in each school within a school system.

That the District Court expressly sought such a racial balance is made clear from its holding directing the formulation of a plan that would embrace the city of Detroit and the outlying districts, all

> "to the end that, upon implementation [of that plan] no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition." Pet. App. 101a, 102a (emphasis added).

This is far from examining the racial composition of schools as a "starting point" in the analysis of possible violations, as contemplated in Swann and Wright, supra. Moreover, the presence of racially identifiable schools in close proximity to each other does not itself constitute a violation but rather serves to shift the burden of proof and thus make out

> "a prima facie case of unlawful segregative design, [shifting] to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions . . . ." Keyes, 413 U.S., at 208. See also, Swann, 402 U.S., at 26.

The approach of the two courts also obscured the questio whether, and under what circumstances, a federal court may order desegregation relief which embraces more than a single school district. From the time the District Court concluded tha

total desegregation of Detroit schools would not achieve what it considered an appropriate remedy, it misconceived the status and function of school districts; thereafter, the Court of Appeals fell into the same error. There is no basis, in the history of public education in our country or under Michigan law, for the view of the Court of Appeals that school districts are no more than arbitrary lines on the map "drawn for political convenience, ____F. 2d, at ____. No single tradition in public education is more deeply rooted than local control over the operation of schools. Local control has long been thought essential both to th maintenance of community concern and support for public schools and to the quality of the educational process. In Wright v. Council of the City of Emporia, 407 U.S. 451, 469

lfp/ss

Rider A, p. 22 (Bradley) 6/14/74

(1972), the Court said: "[d]irect control over decisions vitally affecting the education of one's children is a need that is [illegible] felt in our society. . . ." The vital importance of maintaining this control through local school boards was again emphasized by the Court in San Antonio School District v. Rodriguez, 411 U.S. [illegible] (1973), in describing the division of responsibilities under Texas law:

> "Although policy decision making and supervision in the day-to-day authority over the 'management and control' of all public elementary and secondary schools is squarely placed on local school boards." Id., at 52, n. 108.

There, we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation and a healthy competition for educational excellence." Id., at 50.

The Michigan educational structure involved in this case, in common with most states, similarly provides for a large measure of local control. The authority and responsibility of local school boards over the educational process are broad indeed. *

A review of the scope and character of these powers indicates the extent to which the inter-district remedy approved by the two courts could disrupt and alter the structure of public education in Michigan. The metropolitan remedy would require consolidation of the schools in 53 separate school districts, with the schools of the city of Detroit. Entirely independent of the problems attending large-scale transportation of students, such a plan would create an array of other problems in the financing and operation of what in effect would be a vast new amorphous super school district imposed on the 54 existing and autonomous districts. Some of the more obvious questions include: What would be the status of the present popularly elected school boards? Would the children of Detroit be within the jurisdiction and operating control of a school board elected

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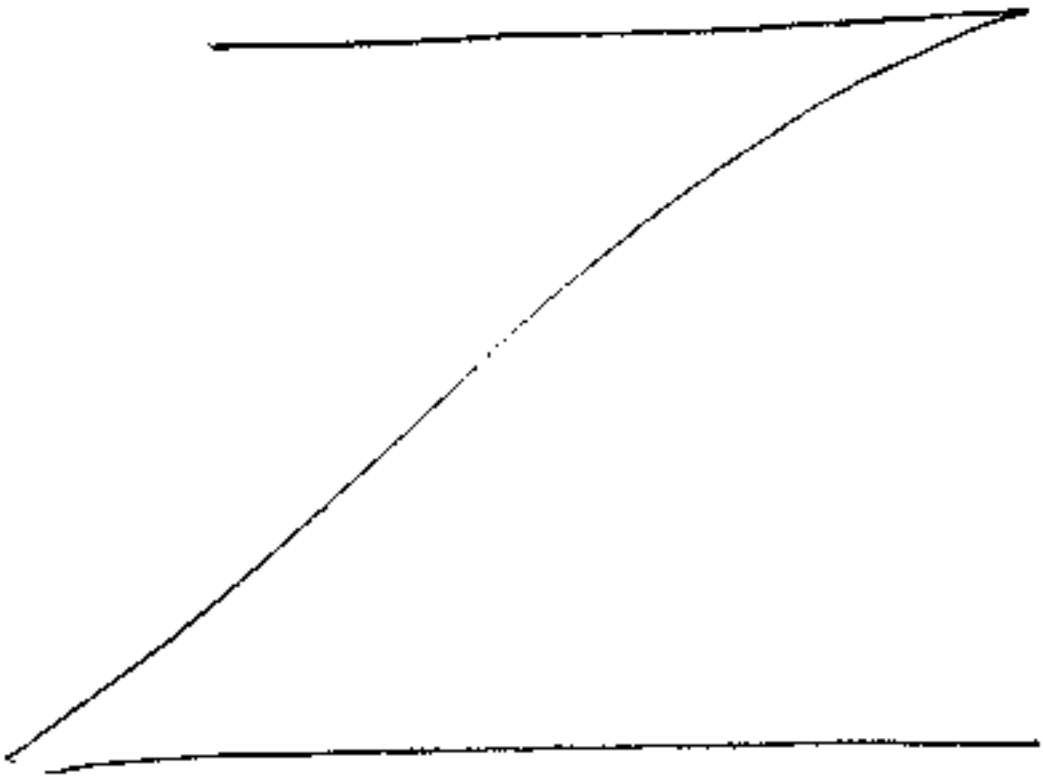
* [Insert footnote 19 of second draft opinion. Also, if there are constitutional provisions creating local school boards and authorizing the creation of local school districts, these should be quoted.]

by the parents and residents of other districts? What board or boards would levy taxes for school operations in these districts constituting the metropolitan area? What provisions could be made for assuring substantial equality in tax levies among the 54 districts, if this were deemed requisite? What provisions would be made for financing? Would the validity of long-term bonds be jeopardized unless approved by all of the component districts as well as the state? What body would determine that portion of the curricula which is left to the discretion of local school boards beyond the minimum state requirements, the establishment of attendance zones, the purchase of school equipment, the location and construction of new schools, and indeed all the myriad day-to-day decisions that are necessary to school operations?

It may be answered that all of these vital operational problems have yet to be resolved by the District Court, and that this is a purpose of the proposed remand. But it is obvious from the scope of the inter-district plan itself that, absent a complete restructuring of the laws of Michigan, relating to school districts, the District Court itself will become the school superintendent for the entire area -- a task for which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives of their own institutions and their own decisions on taxation.

Of course, no state law is above the Constitution. School district lines, and the present laws with respect to local control, are not sacrosanct if they operate in conflict with the Fourteenth Amendment. Accordingly, if constitutional violations have a substantial and direct interdistrict effect on the racial composition of schools, federal courts have a duty to prescribe appropriate remedies. But prior holdings have been confined to violations and remedies within a single school district. We turn now to address for the first time the validity of a remedy mandating cross-district or inter-district consolidation to remedy a condition of segregation found to exist in only one of the districts affected.



2nd Draft
6/14/74

[redacted]

Nos. 73-434, etc.
Milliken v. Bradley

Underlying this case is the standard articulated in a unanimous holding of the Court that there is no constitutional requirement that each school in the system reflect -- either precisely or substantially -- the racial composition of the entire school system. Swann, supra, at 16. It follows that a remedial decree providing that "no school, grade or classroom [be] substantially disproportionate to the overall racial composition" of the school system, as the District Court and the Court of Appeals held, rests on a premise explicitly rejected by this Court. Indeed, quite apart from the Court's categorical rejection of any such constitutional requirement, it is obvious that such an order would be both disruptive of the educational process and in practice virtually impossible to implement. It would be difficult enough to establish and even more so to maint racial balance in a specified percentage in a single school, sinc the mobility of the population and the inevitable turnover resulti from pupils entering and leaving the school each year would frustrate the balancing of a particular school for more than one year at most. If this effort were extended to every grade and classroom, some of the most promising teaching techniques and procedures would have to be abandoned to assure that the same children march in unison year by year through the variou grades regardless of their aptitudes and achievement.

gation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a state in which the racial composition is 87 percent white and 13 percent black." 484 F. 2d, at 240.

Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals placed the primary focus on the desire to achieve "racial balance" when it developed that total desegregation of Detroit would not produce racial balance in a city predominantly composed of Negro students, and this approach plainly equated desegregation with racial balance as a constitutionally mandated remedy. The statement of the Court of Appeals that school districts are no more than lines on a map "drawn for political convenience" is contrary to the established tradition of local autonomy in matters of education; of course "lines" are not sacrosanct, but neither may they be casually ignored or treated as a mere administrative convenience. In *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1, the Court noted that

> "In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright v. Council of the City of Emporia*, 407 U. S. 451 (1972). MR. JUSTICE STEWART stated there that '[d]irect control over decisions vitally affecting the education of one's children is a sound principle strongly felt in our society.' *Id.*, at 469. The . . . dissent agreed that '[l]ocal control is not

> only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well *Id.*, at 478.
>
> . . . . . .
>
> "[Mr. Justice Marshall, in his dissenting opinion, also noted that] '[a]lthough policy decisionmaking and supervision in certain areas are reserved to the State, the day-to-day authority over the "management and control" of all public elementary and secondary schools is squarely placed in the local school boards.'" 411 U. S., at 49–52 n. 108.[*]

To lay aside the boundaries of separate and autonomous school districts by merging them or by imposing

[*] Under the Michigan School Code of 1955, the local school district is an instrumentality of the state, operating through a Board of Education popularly elected. Mich. Comp. Laws Ann. §§ 340.27, 340.55, 340.107, 340.148–9, 340.188. As such, "the boundaries of the school districts are determined at the local level in accordance with the plenary power to acquire real and personal property. Mich. Comp. Laws Ann. (MCLA) §§ 340.26–340.77; 340.113–340.165, 340.190–340.196; to hire and contract with personnel, MCLA § 340.760–§ 340.774; to levy taxes for operations, MCLA § 340.561; to borrow against tax rates, MCLA § 340.567; to determine the length of school terms, MCLA § 340.575; to control the admission of non-resident students, MCLA § 340.582; to determine courses of study, MCLA § 340.583; to provide a kindergarten program, MCLA § 340.584; to establish and operate vocational schools, MCLA § 340.585; to provide special education programs, MCLA § 340.586; to establish scholarship funds, MCLA § 340.589; to arrange for transportation of pupils, MCLA § 340.581; to acquire transportation equipment, MCLA § 340.804; to receive gifts and bequests for school purposes, MCLA § 340.905; to employ attorneys, MCLA § 340.901; to suspend or expel students, MCLA § 340.743; to make rules and regulations for the operation of schools, MCLA § 340.881; to raise funds by authorized millage, MCLA § 340.443; to acquire property by eminent domain, MCLA § 340.431; to sue and be sued, and to appeal or not appeal, MCLA § 340.892.

cross-district remedies, as, for example, by moving pupils from one district to another, it must first be shown that there has been a constitutional violation within one district that produces a significant impact on constitutional rights of pupils in another district. Without an inter-district effect there is no wrong calling for an inter-district remedy. Moreover, as with all equitable remedies, the nature and scope of any such cross-district remedy imposed must relate to and be limited by the nature and scope of the violation. *Swann*, *supra*, at 15–16.

In *Swann*, we recognized that racially identifiable schools are often symptomatic of a segregated system and that

> "[w]here [a system] . . . contemplates the continued existence of some schools that are all or predominantly of one race, [school authorities] have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U. S., at 26.

There has never been, however, a constitutional requirement that a school system reflect "any particular degree of racial balancing or mixing." *Id.*, at 24. Moreover, there is no constitutional requirement that each school in the system reflect—either precisely or substantially—the racial composition of the entire school system or that a remedial order guarantee that "no school, grade or classroom [be] substantially disproportionate to the overall racial composition" of the school system, as the District Court and Court of Appeals held. Here, it was assumed by both courts, without supporting evidence, that a member of a racial or ethnic minority who

attends a school in which his or her minority group is predominant is in some way injured and thereby receives a lesser quality of education. Assuming that racial balancing to avoid this presumed injury is desirable on broad social or educational grounds, school authorities can rationally make that choice but it is not a constitutional requirement. In *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 457, we were constrained to affirm desegregation plans that resulted in racial ratios of 66% Negro and 34% White. Similarly, in *Swann* we noted that although the District Court had employed the racial composition of the entire system (71%–29%) as a starting point in developing a remedy, the court

> "went on to acknowledge that variation 'from that norm may be unavoidable.' This contains intimations that the 'norm' is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require as a matter of substantive constitutional right any particular degree of racial balance or mixing, *that approach would be disapproved and we would be obliged to reverse.* The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U. S., at 23–24 (emphasis added).

Here, in sharp contrast to *Swann*, the District Court expressly and frankly directed the use of a "fixed mathematical racial balance" which was to be based on the "overall pupil racial composition" of Detroit and the 53 outlying school districts to ensure that:

> "Within the limitations of reasonable travel time and distance factors pupil reassignments shall be effected within the clusters described in Exhibit P. M. / 12 so as to achieve the greatest degree of actual de-

segregation to the end that, upon implementation, *no school, grade or classroom* (would be) substantially disproportionate *to the overall pupil racial composition.*" Pet. App., at 101a–102a (emphasis added).

This is far from the use of the total racial composition as a "starting point" in the analysis of possible violations as envisioned in *Swann* and *Keyes*, *supra*. Great disparity between the racial composition of the urban school districts and that of the central district may well constitute a signal to a district court at the outset, leading to inquiry into the cause accounting for the pronounced racial identifiability of schools within the school system. We noted in *Swann*, for example, that:

> "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.
>
> "In the past choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a

new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into a mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy." 402 U. S., at 20–21.

Furthermore, while the presence of clearly racially identifiable schools in close proximity to one another does not automatically dictate a constitutionally required remedy, it may, as we said in *Swann*, *supra*, and restated in *Keyes v. School District No. 1*, 413 U. S. 189 (1973), serve to shift the burden of proof to the school authorities and thereby constitute:

> "a *prima facie* case of unlawful segregative design on the part of school authorities, [shifting] to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. . . . We hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious." *Keyes*, 413 U. S., at 208.

~~See also *Swann*, 402 U. S., at 26.~~

However, 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 within Detroit as a constitutional violation calling for a remedy in the form of an order for some fixed racial balance accomplished by enlarging the relevant area until the hypothetically "desirable" racial mix is achieved. *Keyes*, *supra*, for example, involved a remedial order within a single autonomous school district. It was clearly erroneous for the District Court to treat the existence of racially identifiable schools in Detroit as a predicate for shifting the burden of proof to school districts outside Detroit to show they had not caused the Detroit segregation.

L 7-1

Changes 17, 20, 21, 22, 26, 27, 28, 29, 32, 34

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell ✓
Mr. Justice Rehnquist

2nd DRAFT

From: The Chief Justice

Circulated: _____

Recirculated: JUN 11 1974

Received 6/12 L 7-1

See pp. 20

SUPREME COURT OF THE UNITED STATES

Nos. 73-434, 73-435, AND 73-436

William G. Milliken, Governor of Michigan, et al., Petitioners,
73-434 v.
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

Allen Park Public Schools et al., Petitioners,
73-435 v.
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

The Grosse Pointe Public School System, Petitioner,
73-436 v.
Ronald Bradley and Richard Bradley, by Their Mother and Next Friend, Verda Bradley, et al.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-

district areawide remedy to a single district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those neighboring districts.[1]

I

The action was commenced in August of 1970 by the respondents, the Detroit Branch of the National Association for the Advancement of Colored People[2] and individual parents and students on behalf of a class later defined by order of the United States District Court, ED Michigan, dated February 16, 1971, to include "all school children of the City of Detroit and all Detroit resident parents who have children of school age." The named defendants in the District Court included 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 is not a party to this litigation and references to the State must be read as references to the public officials, State and local,

[1] *Bradley v. Milliken*, 484 F. 2d 215 (CA6 1973); cert. granted, 414 U. S. 1038 (Nov. 19, 1973).

[2] The standing of the NAACP as a proper party plaintiff was not pursued in the trial court and is not an issue in the case.

through whom the State is alleged to have acted. In their complaint respondents attacked the constitutionality of a statute of the State of Michigan known as Act 48 of the 1970 Legislature on the ground that it put the State of Michigan in the position of unconstitutionally interfering with the execution and operation of a voluntary plan of partial high school desegregation known as the April 7, 1970 Plan, which had been adopted by the Detroit Board of Education, to be effective beginning with the fall 1970 semester. The complaint also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office, and called for the implementation of a plan that would eliminate "the racial identity of every school in the [Detroit] system and . . . maintain now and hereafter a unitary non-racial school system."

Initially the matter was tried on respondents' motion for preliminary injunction to restrain the enforcement of Act 48 so as to prevent the April 7 Plan to be implemented. On that issue, the District Court ruled that respondents were not entitled to a preliminary injunction since at that stage there was no proof that Detroit had a dual segregated school system. On appeal, the Court of Appeals found that the "implementation of the April 7 Plan was [unconstitutionally] thwarted by state action in the form of the Act of the Legislature of Michigan." 43 F. 2d 807, 902 (CA6 1970), and that such action could not be interposed to delay, obstruct, or nullify steps lawfully taken for the purpose of protecting rights guaranteed by the Fourteenth Amendment. The case was remanded to the District Court for an expedited trial on the merits.

On remand the respondents moved for immediate implementation of the April 7 Plan in order to remedy

the deprivation of the claimed constitutional rights. In response the School Board suggested two other plans, along with the April 7 Plan, and urged that top priority be assigned to the so-called "Magnet Plan" which was "designed to attract children to a school because of its superior curriculum." The District Court approved the Board's Magnet Plan, and respondents again appealed to the Court of Appeals moving for summary reversal. The Court of Appeals refused to pass on the merits of the Magnet Plan and ruled that the District Court had not abused its discretion in refusing to adopt the April 7 Plan to an evidentiary hearing. The case was again remanded with instructions to proceed immediately to a trial on the merits of respondents' substantive allegations concerning the Detroit School System. 438 F. 2d 945 (CA6 1971).

The trial of the issue of segregation in the Detroit school system began on April 6, 1971, and continued through July 22, 1971, consuming some 41 trial days. On September 27, 1971 the District Court issued its findings and conclusions on the issue of segregation finding that "Government actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as housing institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area." *Bradley v. Milliken*, 338 F. Supp. 582, 587 (ED Mich. 1971). While still addressing a Detroit-only violation, the District Court reasoned:

> "It would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these

> other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools." 338 F. Supp. at 587.

The District Court found that the Detroit Board of Education created and maintained optional attendance zones[1] within Detroit neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. These zones, the court found, had the "natural, probable, foreseeable and actual effect" of allowing White pupils to escape identifiably Negro schools. 338 F. Supp., at 587. Similarly, the District Court found that Detroit school attendance zones had been drawn along north-south boundary lines despite the Detroit Board's awareness that drawing boundary lines in an east-west direction would result in significantly greater desegregation. Again, the District Court concluded, the natural and actual effect of those acts was the creation and perpetuation of school segregation within Detroit.

The District Court found that in the operation of its school transportation program, which was designed to relieve overcrowding, the Detroit Board had admittedly bused Negro Detroit pupils to predominantly Negro

[1] Optional zones, sometimes referred to as dual zones or dual overlapping zones, provide pupils living within certain areas a choice of attendance at one of two high schools.

schools which were beyond or away from closer White schools with available space.[4] This practice was found to have continued in recent years despite the Detroit Board's avowed policy, adopted in 1967, of utilizing transportation to increase desegregation:

> "With one exception (necessitated by the burning of a white school), defendant Board has never bused white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,901 vacant seats in schools 90% or more black." 338 F. Supp., at 588.

With respect to the Detroit Board of Education's practices in school construction the District Court found that Detroit school construction generally tended to have segregative effect with the great majority of schools being built to either overwhelmingly all Negro or all White neighborhoods so that the new schools opened as predominantly one race schools. Thus, of the 14 schools which opened for use in 1970–1971, 11 opened over 90% Negro and one opened less than 10% Negro.

The District Court also found that the State of Michigan had committed several constitutional violations with respect to the exercise of its general responsibility for, and supervision of, public education.[5] The State, for ex-

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[4] The Court of Appeals found record evidence that in at least one instance during the period between 1957–1958 Detroit zoned a suburban school district by contracting with it to educate its Negro high school students by transporting them away from nearby suburban White high schools and past Detroit high schools which were predominantly White to all or predominantly Negro Detroit schools. *Bradley v. Milliken*, 484 F. 2d 215, 231 (CA6 1973).

[5] School districts in the State of Michigan are instrumentalities of the State and subordinate to its State Board of Education and legis-

ample, was found to have failed, until the 1971 Session of the Michigan Legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned; during this same period the State provided many neighboring mostly White, suburban districts the full range of state supported transportation.

The District Court found that the State, through Act 48, acted to "impede, delay and minimize racial integration in Detroit schools." The first sentence of § 12 of Act 48 was designed to delay the April 7, 1970, desegregation plan originally adopted by the Detroit Board. The remainder of § 12 sought to prescribe for each school in the eight districts criterion of "free choice" and "neighborhood schools," which, the District Court found, "had as their purpose and effect the maintenance of segregation." 338 F. Supp., at 589.*

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lature. The Constitution of the State of Michigan, Art. VIII, § 2, provides in relevant part:

"The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."

Similarly, the Michigan Supreme Court has stated that "The school district is a state agency. Moreover, it is of legislative creation . . . ." *Attorney General v. Lowrey*, 131 Mich. 639, 644, 92 N. W. 289, 290 (1902); "Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over to the legislature . . . ." *Attorney General v. Detroit Board of Education*, 154 Mich. 554, 560, 118 N. W. 606, 609 (1908).

*"Sec. 12. The implementation of any attendance provisions for the 1970–71 school year determined by any first class school district board shall be delayed pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not preclude the right of any such board to determine and implement prior

The District Court also held that the acts of the Detroit Board of Education, as a subordinate entity of the State, were attributable to the State of Michigan thus creating a vicarious liability on the part of the State. Under Michigan law, Mich. Stat. Ann. § 15.1961, for example, school building construction plans had to be approved by the State Board of Education, and prior to 1962, the State Board had specific statutory authority to supervise school site selection. The proofs concerning the effect of Detroit's school construction program were, therefore, found to be largely applicable to show State responsibility for the segregative results.[7]

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in such a way such changes in attendance practices as are mandated by practical necessity. . . ." Art. No. 48, Sec. on 22, Public Acts of Michigan, 1970, Michigan compiled Laws Section 388.182 (emphasis added).

[7] The District Court briefly alluded to the possibility that the State, along with private persons, had caused, in part, the housing patterns of the Detroit metropolitan area which in turn, produced the predominantly White and predominantly Negro neighborhoods that characterize Detroit:

"It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community—as we know the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of 'harmonious' neighborhoods, i. e., racially and economically homogeneous. The conditions created continue." 338 F. Supp., at 587.

Thus, the District Court concluded:

"The affirmative obligations of the defendant Board [to keep and to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation]." 338 F. Supp., at 588.

The Court of Appeals, however expressly noted that:

"In affirming the District Judge's findings of constitutional violations

Turning to the question of an appropriate remedy for these several constitutional violations, the District Court deferred a pending motion[8] by intervening parent defendants to join as additional parties defendant some 85 school districts in the three counties surrounding Detroit on the ground that effective relief could not be achieved without their presence.[9] The District Court concluded that this motion to intervene was "premature," since it "has to do with relief" and no reasonably specific desegregation plan was before the court. 338 F. Supp., at 595. Accordingly, the District Court proceeded to order the Detroit Board of Education to submit desegregation plans limited to the segregation problems found to be existing within the city of Detroit. At the same time, however, the state defendants were directed to submit desegregation plans encompassing the three-county metropolitan

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by the Detroit Board of Education or [by the State defendants resulting in segregated schools in Detroit, we have not acted at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation." 484 F. 2d, at 242.

Accordingly, in its present posture, the case does not present any question concerning possible state housing violations.

[8] On March 22, 1971, a group of Detroit residents, who were parents of children enrolled in the Detroit public schools, were permitted to intervene as party defendants. On June 24, 1971, the District Judge stated to the "possibility" of a metropolitan school system, stating: "As I have said to several witnesses in this case, how do you desegregate a black city, or a black school system." IV App., at 370-380. Subsequently, on July 17, 1971, various parents filed a motion to require the joinder of all of the 85 independent school districts within the tri-county area.

[9] The respondents as plaintiffs below, opposed the motion to join the additional school districts, arguing that the presence of the state defendants was sufficient and all that was required, even if, in shaping a remedy, the affairs of those other districts were to be affected. 338 F. Supp., at 595.

area [10] despite the fact that the school districts of these three counties were not parties to the action and despite the fact that there had been no claim that these outlying counties, encompassing some 85 separate school districts, had committed constitutional violations.[11] An effort to appeal these orders to the Court of Appeals was dismissed on the ground that the orders were not appealable. 468 F. 2d 902, cert. denied, 409 U. S. 844. The sequence of the ensuing actions and orders of the District Court are significant factors and will therefore be catalogued in some detail.

Following the District Court's abrupt announcement

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[10] At the time of the 1970 census, the population of Michigan was 8,875,083, almost half of which, 4,199,931, resided in the tri-county area of Wayne, Oakland, and Macomb. Oakland and Macomb Counties abut Wayne County to the north, and Oakland County abuts Macomb County to the west. These counties cover 1,952 square miles. Michigan Statistical Abstract 2 (1972 ed.), and the area is approximately the size of the State of Delaware (2,057 square miles), more than half again the size of the State of Rhode Island (1,214 square miles), and almost 30 times the size of the District of Columbia (67 square miles). Statistical Abstract of United States, 1972 (93d ed.). The population of Wayne, Oakland, and Macomb Counties was 2,666,751; 1,074,629; and 625,309, respectively, in 1970. Detroit, the State's largest city, is located in Wayne County.

In the 1970–1971 school year, there were 2,457,449 children enrolled in the school districts in Michigan. There are 85 independent, legally distinct school districts within the tri-county area, having a total enrollment of approximately 1,300,000 children. In 1970, the Detroit Board of Education operated 319 schools with approximately 276,000 students.

[11] In its formal opinion, subsequently announced, the District Court readily recognized that:

"It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb nor on the issue of whether, with the exception of the city of Detroit school district, such school districts have committed acts *de jure* segregation." 345 F. Supp. 914, 920.

that it planned to consider the implementation of a multidistrict, metropolitan area remedy to the segregation problems identified within the city of Detroit, the District Court was again requested to grant the outlying school districts intervention as of right on the ground that the District Court's new request for multidistrict plans "may, as a practical matter, impair or impede [the intervenor's] ability to protect" the welfare of their students. The District Court took the motions to intervene under advisement pending submission of the requested desegregation plans by Detroit and the state officials. On March 7, 1972, the District Court notified all parties and the petitioner school districts seeking intervention, that March 14, 1972 was the deadline for submission of recommendations for conditions of intervention and the date of the commencement of hearings on Detroit-only desegregation plans. On the second day of the scheduled hearings, March 15, 1972, the District Court granted the motions of the intervenor school districts[7] subject, *inter alia*, to the following conditions:

> "1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.
>
> "2. No intervenor shall reopen any question or issue which has previously been decided by the court.
>
> . . . . .
>
> "7. New intervenors are granted intervention for two principal purposes: (a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or

[7] According to the District Court, intervention was permitted under Rule 24(a), Fed. Rule Civ. Proc., "Intervention of Right," and also under Rule 24(b), "Permissive Intervention."

them, and in accordance with the requirements of the United States Constitution and the prior orders of this court." I App., at 206.

Upon granting the motion to intervene, on March 16, 1972, the District Court advised the petitioning intervenors that the court had previously set March 22, 1972, as the date for the filing of briefs on the legal propriety of a "metropolitan" plan of desegregation and accordingly, that the intervening school districts would have one week to muster their legal arguments on the issue.[1] Thereafter, and following the completion of hearings on the Detroit-only desegregation plans, the District Court issued the four rulings that were the principal issues in the Court of Appeals.

(a) On March 24, 1972, two days after the intervenors' briefs were due, the District Court issued its ruling on the question of whether it could "consider relief in the form of a metropolitan plan, encompassing not only the city of Detroit, but the larger Detroit metropolitan area." It rejected the state defendants' arguments that no state action caused the segregation of the Detroit schools, and the intervening suburban districts' contention that inter-district relief was inappropriate unless the suburban districts had themselves committed violations. The court concluded:

> "[I]t is proper for the court to consider metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to the the present intra-city desegregation plans before it and, in the event that the court finds such intra-city

[1] The rather abbreviated briefing schedule was maintained despite the fact that the District Court had deferred consideration of a motion made eight months earlier to bring the suburban districts into the case. See n. 8, supra.

plans inadequate to desegregate such schools, the court is of the opinion that it is required to consider a metropolitan remedy for desegregation." Pet. App., at 51a.

(b) On March 28, 1972, the District Court issued its findings and conclusions on the three "Detroit-only" plans submitted by the city Board and the respondents. It found that the best of the three plans "would make the Detroit system more identifiably Black . . . thereby increasing the flights of Whites from the city and the system." Pet. App., at 53a-55a. From this the court concluded that the plan "would not accomplish desegregation within the corporate geographical limits of the city." *Id.*, at 56a. Accordingly, the District Court held that "it must look beyond the limits of the Detroit school district for a solution to the problem," and that "[s]chool district lines are simply matters of political convenience and may not be used to deny constitutional rights." *Id.*, at 57a.

(c) During the period from March 28, 1972 to April 14, 1972, the District Court conducted hearings on a metropolitan plan. Counsel for the petitioning intervenors was allowed to participate in these hearings, but he was ordered to confine his argument to "the size and expanse of the metropolitan plan" without addressing the intervenors' opposition to such a remedy or the claim that a finding of a constitutional violation by the intervenor districts was an essential predicate to any remedy involving them. Thereafter, on June 14, 1972, the District Court issued its ruling on the "desegregation area" and related findings and conclusions. The court acknowledged at the outset that it had "taken no proofs with respect to the establishment of the boundaries of the 85 public school districts in the counties [in the Detroit

area], nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of *de jure* segregation." Nevertheless, the court designated 53 of the 85 suburban school districts plus Detroit as the "desegregation area" and appointed a panel to prepare and submit "an effective desegregation plan" for the Detroit schools that would encompass the entire desegregation area." The plan was to be based on 15 clusters, each containing part of the Detroit system and two or more suburban districts, and was to "achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition. Pet. App. 101a–102a.

(d) On July 11, 1972, and in accordance with a recommendation by the court-appointed desegregation panel, the District Court ordered the Detroit Board of Education to purchase or lease "at least" 295 school buses for the purpose of providing transportation under an interim plan to be developed for the 1972–1973 school year. The costs of this acquisition were to be borne by the state defendants. Pet. App., at 106a–107a.

On June 12, 1973, a divided Court of Appeals, sitting en banc, affirmed in part, vacated in part and remanded for further proceedings. 484 F. 2d 215 (CA6 1973).[3]

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[2] The 53 school districts outside the city of Detroit that were included in the court's "desegregation area" have a combined student population of approximately 503,000 students compared to Detroit's approximately 276,000 students. Nevertheless, the District Court directed that the intervening districts should be represented by only one member on the desegregation panel while the Detroit Board of Education was granted three panel members. Pet. App. at 99a.

[3] The District Court had certified most of the foregoing rulings for interlocutory review pursuant to 28 U. S. C. § 1292 (b). (1 App. 265–266) and the case was initially decided on the merits by a panel of

The Court of Appeals held, first, that the record supported the District Court's findings and conclusions on the constitutional violations committed by the Detroit Board, 484 F. 2d, at 221–238, and by the state defendants, 484 F. 2d, at 239–241.* It stated that the acts of racial discrimination shown in the record are "causally related to the substantial amount of segregation found in the Detroit school system," 484 F. 2d, at 241, and that "the District Court was, therefore, authorized and required to take effective measures to desegregate the Detroit Public School System." 484 F. 2d 242.

The Court of Appeals also agreed with the District Court that "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelming white majority population in the total metropolitan area." 484 F. 2d, at 245. The court went on to state that it could "not see how such segregation can be any less harmful

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three judges. However, the panel's opinion and judgment were vacated when it was determined, to rehear the case en banc, 481 F. 2d 205, 218 (CA6 1973).

* With respect to the State's violations, the Court of Appeals held: (1) that, since the city Board is an instrumentality of the State and subordinate to the State Board, the segregative actions of the Detroit Board "are the actions of an agency of the State," 484 F. 2d, at 238; (2) that the State Legislature, overruling Detroit's voluntary desegregation plan, contributed to increasing segregation in the Detroit schools, *id.*, at 239; that "[e]ven if no law prior to 1962 the state Board had authority over school construction plans and must therefore be held responsible [for the segregative result]," *id.*, at 240; (3) that the State's scheme of support of transportation for school children directly discriminated against Detroit, 484 F. 2d, at 240, by not providing transportation funds in Detroit on the same basis as funds were granted to suburban districts, 484 F. 2d, at 238; and (5) that the transportation of Negro students from one suburban district to a Negro school in Detroit must have had the "approval, tacit or express, of the State Board of Education." *Id.*

to the minority students than if the same result were accomplished within one school district." 484 F. 2d, 245.

Accordingly, the Court of Appeals reasoned that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan." 484 F. 2d, at 249. It reasoned that such a plan would be appropriate because of the State's violations, and could be implemented because of the State's authority to control local school districts. Without further elaboration, and without any discussion of the claims that no constitutional violation by the outlying districts had been shown and that no evidence on that point had been allowed, the Court of Appeals held:

> "[T]he State has committed *de jure* acts of segregation and . . . the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts." *Ibid.*

An inter-district remedy was thus held to be "within the equity powers of the District Court." 484 F. 2d, at 250.[*]

The Court of Appeals expressed no views on the propriety of the District Court's composition of the metropolitan "desegregation area." It held that all suburban school districts that might be affected by any metropolitanwide remedy should, under Rule 19, Fed. Rule Civ. Proc., be made parties to the case on remand and be given an opportunity to be heard with respect to the

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[*] The court spoke to this point in *Bradley v. School Board of the City of Richmond, Virginia*, 462 F. 2d 1058 (CA4), affirmed by an equally divided Court, 412 U. S. 92, on the grounds that the District Court in that case had ordered interdistrict relief in the absence of inter-school district acts and that Virginia's constitution and statutes, unlike Michigan's, did not give the local boards exclusive power to operate the public schools. 484 F. 2d, at 251.

scope and implementation of such a remedy. 484 F. 2d, at 251–252. Under the terms of the remand, however, the District Court was "not required" to receive further evidence on the issue of segregation in the Detroit schools or on the propriety of a Detroit-only remedy, or on the question of whether the affected districts had committed any violation of the constitutional rights of Detroit pupils or others. 484 F. 2d, at 252. Finally the Court of Appeals vacated the District Court's order directing the acquisition of school buses, subject to the right of the District Court to reconsider reimposing the order "at the appropriate time." 484 F. 2d 252.

II

Ever since *Brown v. Board of Education*, 347 U. S. 483 (1954), judicial consideration of school desegregation cases has begun with the standard that:

> "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." 347 U. S., at 495.

This is not challenged as the controlling rule of law. The target of the *Brown* holding was clear and forthright: the elimination of state mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for White pupils. It was the duality and the racial segregation that was held to violate the Constitution in *Green v. County School Board of New Kent County*, 391 U. S. 430 (1968); *Raney v. Board of Education*, 391 U. S. 443 (1968); *Monroe v. Board of Commissioners*, 391 U. S. 443 (1968); *Moses v. Board of Commissioners, Mobile County Board of Education*, 402 U. S. 1 (1971).

The *Swann* case, of course, dealt

> "with the problem of defining in more precise terms than heretofore the scope of the duty of school au-

> thorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once." 402 U. S., at 6.

In *Brown* v. *Board of Education*, 349 U. S. 294 (1955) (*Brown II*), the Court's first encounter with the problem of remedies in school desegregation cases, the Court noted that:

> "In fashioning and effectuating the decrees the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education*, 349 U. S. 294, 299–300 (1955).

In further refining the remedial process, *Swann* held, the task is to correct, by a balancing of the individual and collective interests, "the condition that offends the Constitution." A federal remedial power may be exercised "only on the basis of a constitutional violation" and, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." 402 U. S., at 15, 16.

Proceeding from these basic principles, we first note that in the District Court the complainants sought to formulate a remedy aimed at the *condition* that offends the Constitution: the segregation found to exist within the Detroit City school district.[9] The court acted on

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[9] Although the list of issues presented for review in petitioners' briefs and petition for writ of certiorari do not include questions on the findings of segregation violations on the part of the Detroit defendants, two of the petitioners argue in brief that those findings constitute error. Supreme Court Rules 23 (1)(c) and 40 (1)(d)(2). As a minimum both our review of the Detroit trial that finishes in "plain error," and under our decision last Term in *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189, the findings appear to be correct.

this theory of the case and in its initial ruling on the "Desegregation Area" stated:

> "The task before this court, therefore, is now, and . . . has always been, how to desegregate the Detroit public schools." Pet. App. at 61a.

Thereafter, however, the District Court abruptly rejected the proposed Detroit-only plans on the ground that "while it would provide a racial mix more in keeping with the Black-White proportions of the student population, [it] would accentuate the racial identifiability of the [Detroit] district as a Black school system, and would not accomplish desegregation." Pet. App. at 56a. "[T]he racial composition of the student body as such," said the court, "that the plan's implementation would clearly make the entire Detroit public school system racially identifiable" (Pet. App. at 54a), "leav[ing] many of its schools 75 to 91 percent Black." Pet. App. at 55a. Consequently, the court reasoned, it was imperative to "look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit schools . . ." since "school district lines are simply matters of political convenience and may not be used to deny constitutional rights." *Id.*, at 57a. Accordingly, the District Court proceeded to redefine the relevant area to include areas of predominantly White pupil population in order to ensure that "upon implementation, no school, grade or classroom [would be] substantially disproportionate to the overall racial composition" of the entire metropolitan area.

While specifically acknowledging that the District Court's findings of a condition of segregation were limited to Detroit, the Court of Appeals approved the use of a metropolitan remedy largely on the grounds that it is:

> "impossible to declare 'clearly erroneous' the District Judge's conclusion that any Detroit only segre-

gation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a state in which the racial composition is 87 percent white and 13 percent black." 484 F. 2d, at 249.

Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals placed the primary focus on the means to achieve "racial balance" when it developed that total desegregation of Detroit would not produce racial balance in a city predominantly composed of Negro students, and this approach plainly equated desegregation with racial balance as a constitutionally required remedy. The statement of the Court of Appeals that school districts are no more than lines on a map "drawn for political convenience" is contrary to the established tradition of local autonomy in matters of education; of course "lines" are not sacrosanct, but they may be reasonably ignored or treated as a mere administrative convenience. In *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, the Court noted that

> "In an era that has witnessed a consistent trend toward centralization of the functions of government, local starting of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright* v. *Council of the City of Emporia*, 407 U. S. 451 (1972). MR. JUSTICE STEWART stated there that 'different control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society.' *Id.*, at 469. The . . . dissent agreed that 'local control is not

> only vital to continued public support of the schools, but is of overriding importance from an educational standpoint as well." *Id.* at 478.
>
> "MR. JUSTICE MARSHALL, in his dissenting opinion, also noted that, 'although policy decisionmaking and supervision in certain areas are reserved to the State, the day-to-day authority over the management and control of all public elementary and secondary schools is squarely placed on the local school boards.' 414 U. S. at 40, 52, n. 108."

To bar access to the boundaries of separate and autonomous school districts by merging them or by imposing

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[*] Under the Michigan Constitution of 1963, the local school district is a corporate political body corporate operating through a Board of Education (or Trustees). Mich. Comp. Laws Ann. §§ 340.27, 340.30, 340.37, 340.38, 340.88. As such, the local school district officers of the school district are charged with the duty to maintain, operate, and control the public schools, to acquire and dispose of real and personal property, Mich. Comp. Laws Ann. 1970 Cum. Supp. §§ 340.26, 340.77, 340.13, 340.15, 340.192, 340.752, to hire and discharge employees, MCLA § 340.560, § 340.574, to levy taxes for operations, MCLA § 340.561, to borrow against revenues, MCLA § 340.567, to determine the length of school years, MCLA § 340.575, to control the conduct and discipline of students, MCLA § 340.582, to determine courses of study, MCLA § 340.583, to provide for emergency powers, MCLA § 340.591, to establish and operate vocational schools, MCLA § 340.592, to provide for adult education programs, MCLA § 340.593, to establish procedures for suspension, MCLA § 340.594, to provide for the preservation of records of schools, MCLA § 340.601, to acquire facilities for the performing of the duties of school, MCLA § 340.602, to acquire facilities and equipment, MCLA § 340.604, to provide a fire and police force for school property, MCLA § 340.605, to make rules and regulations for the operation of schools, MCLA § 340.606, to contract for the use of facilities of public, MCLA § 340.607, to acquire property by eminent domain, MCLA § 340.611, to exercise all corporate powers, MCLA § 340.612, to prescribe textbooks, MCLA § 340.882.

cross-district remedies, as for example by moving pupils from one district to another, it must first be shown that there has been a constitutional violation within one district that produces a significant impact on constitutional rights of pupils in another district. Without an inter-district effect there is no wrong calling for an inter-district remedy. Moreover, as with all equitable remedies, the nature and scope of any such cross-district remedy imposed must relate to and be limited by the nature and scope of the violation. *Swann v. supra*, at 15–16.

In *Swann* we recognized that racially identifiable schools are often symptomatic of a segregated system and that:

> "[w]here [a system] . . . contemplates the continued existence of some schools that are all or predominantly of one race, [school authorities] have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U. S., at 26.

There has never been, however, a constitutional requirement that a school system reflect "any particular degree of racial balancing or mixing." *Id.*, at 24. Moreover, there is no constitutional requirement that each school in the system reflect—either precisely or substantially—the racial composition of the entire school system or that a remedial order guarantee that "no school, grade or classroom [be] substantially disproportionate to the overall racial composition" of the school system, as the District Court and Court of Appeals held. Here, it was asserted by both courts, without supporting evidence, that a number of a racial or ethnic minority who

See note on pg 20

attends a school in which his or her minority group is predominant is in some way injured and thereby receives a lesser quality of education. Assuming that racial balancing to avoid this presumed injury is desirable on broad social or educational grounds, school authorities can rationally make that choice but it is not a constitutional requirement. In *Wright v. Council of City of Emporia*, 407 U. S. 451, 457, we were constrained to affirm desegregation plans that resulted in racial ratios of 60% Negro and 34% White. Similarly, in *Swann* we noted that although the District Court had employed the racial composition of the entire system (71%–29%) as a starting point in developing a remedy, the court

> "went on to acknowledge that variation 'from that norm may be unavoidable.' This contains intimations that the 'norm' is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, *that approach would be disapproved and we would be obliged to reverse.* The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U. S., at 23-24 (emphasis added).

Here, in sharp contrast to *Swann*, the District Court expressly and frankly directed the use of a "fixed mathematical racial balance" which was to be based on the "overall pupil racial composition" of Detroit and the 53 outlying school districts to ensure that:

> "Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P. M. 12 so as to achieve the greatest degree of actual de-

> segregation to the end that upon implementation, *no school, grade or classroom* [would be] substantially disproportionate *to the overall pupil racial composition.*" Pet. App., at 101a–102a (emphasis added).

This is far from the use of the total racial composition as a "starting point" in the analysis of possible violations as envisioned in *Swann* and *Wright*, *supra*. Great disparity between the racial composition of the urban school districts and that of the central district may well constitute a signal to a district court at the outset, leading to inquiry into the cause accounting for the predominant racial identifiability of *schools within the school system*. We noted in *Swann*, for example, that:

> "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.
>
> "In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new *schools* in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a

new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into a mold of separation of the races. Upon a proper showing a district court may consider this an fashioning a remedy." 402 U. S., at 20–21.

Furthermore, while the presence of clearly racially identifiable schools in close proximity to one another does not automatically dictate a constitutionally required remedy, it may, as we said in *Swann*, *supra*, and restated in *Keyes* v. *School District No. 1*, 413 U. S. 189 (1973), serve to shift the burden of proof to the school authorities and thereby constitute

"a *prima facie* case of unlawful segregative design on the part of school authorities, [shifting] to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. . . . We hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious." *Keyes*, 413 U. S., at 208.

See also *Swann*, 402 U. S., at 26

However, 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 in the form of an order for some fixed racial balance accomplished by enlarging the relevant area until the hypothetically "desirable" racial mix is achieved. *Keyes*, *supra*, for example, involved a remedial order within a single autonomous school district.

rather than desegregation of school districts that operate dual school systems.

within some arbitrarily selected geographical area

Federal authority to impose a cross-district remedy presupposes a fair and reasoned determination that racially discriminatory acts of the State or local school districts or of a single local district, have been a direct and substantial cause of inter-district school segregation. Thus a cross-district remedy might be appropriate, for example, if it could be established that the segregatory practice of one or more districts created or maintained the segregated condition within the central city. Here, however, the record, as voluminous as it is, understandably contains proofs concerning only the segregated condition of the Detroit school district because that was the only theory upon which the case was brought and on which the court proceeded. The District Court went beyond this theory of the case and mandated a metropolitan area remedy before the intervenors were heard and without permitting any reference to the intervenors' claim that they were guilty of no violation which had created or maintained unconstitutional segregation within the Detroit system. To approve the remedy imposed by the District Court on these facts would make racial balance the constitutional objective and standard, a result not even hinted at in *Brown I* and *Brown II* which held that the operation of dual school systems, not some hypothetical level of racial imbalance in a geographical metropolitan area consisting of more than one school district, is the constitutional violation to be remedied. Unlike *Swann*, this case did not involve a "very limited use . . . of . . . mathematical ratios" as a "starting point" but on the contrary, the finding of racial imbalance became the controlling standard for determining the existence of a violation. This misread the explicit guidelines of *Swann* that "to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing" was to be reversible error.

Rather, there can't be

Put in note

What are limits of Met. Det. area? Change each year?

III

We recognize that the six-volume record presently under consideration contains language and some specific factual findings thought by the District Court to afford a basis for multidistrict relief. However, these comparatively isolated findings and brief comments concerning multidistrict violations are found in the context of a proceeding that, as the District Court conceded, included no proofs of segregation practiced by any of the 85 suburban school districts surrounding Detroit, and which did not provide for the participation of any of the outlying districts as parties. The Court of Appeals, for example, relied on five factors which it held amounted to unconstitutional state action with respect to the violations found in the Detroit system:

(1) It held the State derivatively responsible for the Detroit Board's violations on the theory that actions of Detroit as a political subdivision of the State were attributable to the State. Accepting, *arguendo*, the correctness of this finding of State responsibility for the segregated conditions within the city of Detroit, it does not follow that an inter-district remedy is constitutionally justified or required. With a single exception, discussed later, there has been no showing that either the State or any of the 85 outlying districts engaged in activity that had a cross-district effect. The boundaries of the Detroit School District, which are coterminous with the boundaries of the city of Detroit, were established over a century ago by central legislation when the city was incorporated; there is no evidence in the record, nor is there any suggestion by the respondents, that either the original boundaries of the Detroit School District, or any other school district in Michigan, were established for the purpose of creating, maintaining or perpetuating segregation of races. There is no claim and there is no evidence

hinting that petitioners and their predecessors, or the 40-odd other school districts in the tri-county area but outside the District Court's "desegregation area"—have ever maintained or operated anything but unitary school systems. Unitary school systems have been required for more than a century by the Michigan Constitution as implemented by state law. Where the *schools* of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts.

(2) There was evidence introduced at trial that, during the late 1960's, Carver School District, a predominantly Negro suburban district, contracted to have Negro high school students sent to a predominantly Negro school in Detroit. At the time, Carver was an independent school district that had no high school because, according to the trial evidence, "Carver District . . . did not have a place for adequate high school facilities." Pet. App., at 138a. Accordingly, arrangements were made with Northern High School, the abutting Detroit School District, so that the Carver high school students could obtain a secondary school education. In 1960 the Oak Park School District, a predominantly White suburban district, annexed the predominantly Negro Carver

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[1] By Act [illegible], PA Mich 100 [illegible], Art III, § 28 of Mich Pub Acts of 1867. The Michigan Constitution and laws provide that: "Every school district shall provide for the education, in its primary schools, of all persons between the ages of 5 and 21 years." Mich Const 1963, Art 8, § 2. "No person under school age or over the age of 20 shall be kept for any period of time, during regular school hours, in any primary school." Mich Comp Laws Ann § 340.356 (Supp 1973). "Any person who has graduated from a high school district shall have the right to attend high school in any other high school district." Mich Comp Laws Ann § 340.576. See also Act 319, Pub Acts of 1965, § 1, Mich Pub Acts of 1967.

School District, through the initiative of local officials. *Ibid.* There is, of course, no claim that the 1960 annexation had segregatory purpose or result or that Oak Park now maintains a dual system.

According to the Court of Appeals the arrangement during the late 1950's which allowed Carver students to be educated within the Detroit District was dependent upon the "tacit or express" approval of the State Board of Education and was the result of the refusal of the White suburban districts to accept the Carver students. Although there is nothing in the record supporting the Court of Appeal's supposition that suburban White schools refused to accept the Carver students, it appears that this situation, whether with or without the State's consent, may have had a segregatory effect on the school populations of the two districts involved. However, since "the nature of the violation determines the scope of the remedy," 402 U. S., at 15-16 this isolated instance affecting two of the school districts would not justify the broad metropolitan-wide remedy contemplated by the District Court and approved by the Court of Appeals, particularly since it embraced 84 districts having no responsibility for the arrangement and involved 503,000 students in addition to Detroit's 276,000 students.

(3) The Court of Appeals cited the enactment of state legislation—Act 48[1] which had the effect of restricting Detroit's voluntary desegregation plan (the April 7 Plan). That plan however, affected only 12 of 21 Detroit high schools and had no racial connection with the distribution of pupils by race between Detroit and any other school district within the tri-county area.

(4) It relied on the state's authority to supervise school site selection and to approve building construction as a basis for holding the State responsible for the segregative results of the school construction programs in

Detroit. Specifically, the Court of Appeals asserted that during the period between 1949 and 1962 the State Board of Education exercised general authority as overseer of site acquisitions by local school boards for new school construction, and suggested that this State approved school construction "fostered segregation throughout the Detroit Metropolitan area." Pet. App. at 157a. This brief comment however, is not supported by the evidence taken at trial since that evidence was specifically limited to proof that school site acquisition and school construction within the city of Detroit produced *de jure* segregation *within* the city itself. Pet. App., at 144a–151a. Thus, there was no evidence suggesting that the State's activities with respect to either school construction or site acquisition within Detroit affected the racial composition of the school population outside Detroit or, conversely, that the State's school construction and site acquisition activities within the outlying districts affected the racial composition of the schools within Detroit.

(5) The Court of Appeals also relied upon the District Court's finding that:

> "This and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated systematic educational inequalities." Pet. App. at 152a.

However, neither the Court of Appeals nor the District Court offered any indication in the record or in their opinions as to how, if at all, the availability of state-financed transportation for some Michigan students outside Detroit but not within Detroit, might have affected the racial character of any of the State's school districts. Furthermore, as the respondents recognize, the applica-

tion of our recent ruling in *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1, to the state education financing system is questionable, and this issue was not addressed by either the Court of Appeals or the District Court. This, again, underscores the crucial fact that the theory upon which the case proceeded related solely to the establishment of Detroit city violations as a basis for desegregating Detroit schools and that, at the time of trial, neither the parties nor the trial judge were concerned with a formulation, for inter-district relief.[31]

IV

We now turn to the claim that the proceedings in the District Court denied due process to the outlying school districts embraced within the District Court's order for a multidistrict, metropolitan area remedy. It is argued that even if the District Court had used the correct constitutional standard, which looks to the dismantling of a dual school system, the District Court's procedural steps denies the outlying districts an opportunity to present evidence that (a) they did not operate dual school systems and (b) they had committed no acts violative of the constitutional rights of Detroit pupils.

Thus even had the District Court applied the correct constitutional standard to find a violation, its misconception of the remedial requirements for the constitutional violations within the boundaries of Detroit was compounded by the failure, as soon as a multidistrict remedy was contemplated, to require that all interested parties be brought into the case. Only by so doing could they have been provided with a meaningful opportunity to

[31] Apparently, when the District Court, *sua sponte*, abruptly altered the theory of the case to include the possibility of multidistrict relief, neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory.

address their respective interests." As we have noted, the District Court first alluded to the possibility of a metropolitan remedy on June 24, 1971. App. Vol. IV, pp. 259-260. Thereafter, and in response to the suggestion of this wholly new remedial concept, the original defendants filed motions for joinder of the 85 outlying suburban districts on July 17, 1971. The District Court declined to rule on these motions for joinder, effectively stalling them until March 15, 1972, some eight months after the initial motions for joinder. Thus at the time intervention was finally allowed the court had already commenced hearings on the inadequacy of the Detroit-only plans and the petitioners were permitted less than one week to prepare briefs in response to the District Court's already scheduled hearings on a metropolitan-area remedy for the segregation found to exist in Detroit. The intervenors therefore found themselves faced with a ruling mandating a multi-district remedy two days after the date of submission of their

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"The respondents' claim is that the interests of the suburban school districts were adequately represented by "their 130 state defendants." Clearly, however, the state defendants were defending against the claims of the plaintiffs that the State had by its actions created racial segregation within the school district of the city of Detroit. An examination of the record indicates that none of the state defendants put on any case or cross-examined any witness in an endeavor to show that the existence of suburban school districts was, without other evidence, a violation of the constitutional rights of the students in the schools of the city of Detroit. Evidence of this supposition is the fact that the state defendants did not join in the original motion to join the outlying districts as parties defendant. Furthermore, the Court of Appeals expressly directed that on remand the intervening districts be joined as party defendants of right under Rule 19 (a) Fed. Rule Civ. Proc., thereby indicating its recognition that their "absence might as a practical matter impair [their] ability to protect that interest . . . ." 3 C. Wright, Handbook of the Law of Federal Courts, 301 (West Publishing Co. 1970).

briefs on the question. Further compounding this, the District Court's grant of intervention precluded submission of evidence and confined the petitioners to the presentation of briefs, but not oral argument: "(a) To advise the court, by briefs, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them . . ."

It is, of course, abundantly clear that "[a]n intervention of right under the amended rule [24 (a) F. R. Civ. Proc.] may be subject to appropriate conditions or restrictions responsive among other things to the requirement of efficient conduct of the proceedings." 3B J. Moore, Moore's Federal Practice ¶ 24.01 [10], at 24–18 (2d ed. 1968). It is equally certain, however, that "[i]t would be meaningless to give an intervenor an absolute right to intervene in order to protect his interest, if once in the proceeding he were barred from raising questions necessary to his own protection." *Id.*, at ¶ 24.16 [4], 24–63. Here, the suburban school districts have been denied any opportunity to be heard with respect to constitutional violations by them—which incidentally no one had alleged—or within their respective school districts or with respect to the placement of their respective school boundaries. The record of constitutional violations found in this case was made at a time when the respondents were seeking to establish only the existence of violations within the city of Detroit and, as we have noted, the pleadings made no allegations that any of the outlying districts committed any constitutional violations. This brings us full circle, for the District Court, with the approval of the Court of Appeals, has provided a multidistrict remedy in the face of a record which shows significant constitutional violations only within the city of Detroit. There

was thus no occasion for the parties to address, or for the District Court to consider whether there were racially discriminatory acts by the State or the 85 outlying districts which had direct and significant effect on schools in more than one district. We conclude that the relief ordered by the District Court and affirmed by the Court of Appeals was based upon an erroneous constitutional standard under *Brown* and *Swann*, *supra*, and was unsupported by record evidence that acts of the outlying districts affected the discrimination found to exist in the schools of Detroit. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion, including specifically prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970.

Reversed and remanded.