




10-1976

Milliken v. Bradley

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>

 Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [Education Law Commons](#)

Recommended Citation

Milliken v. Bradley. Supreme Court Case Files Collection. Box 43. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Grant
This represents an
impermissible assumption
by the DC of
S/Bd functions.

CA6 approved a DC desegregation
order in the Detroit case that
required - at a cost of \$11 million
~~per year~~ per year? - The School
Bd was ordered to initiate
several educational programs:
1. Reading & communicative skills
2. In-Service training of faculty
3. Non-discriminatory testing
4. Counseling & career guidance.

The DC found all 4 "necessary" to remedy
past effects of segregation, but apparently
there was no finding of
constitutional violation with respect
to these or other educational programs.

November 12, 1976 Conference
List 1, Sheet 3

No. 76-447

MILIKEN

BRADLEY

The DC also ^{ordered} the State (despite
Edleman) to pay ^{Federal Civil} half the cost. ^{Timely}

1. SUMMARY: Where the State and the local school board have been

found guilty of de jure segregation, (1) is the DC's power in remedying said segregation
limited simply to reassignment of pupils to achieve a desegregated environment, or may
the DC also impose additional programs which it thinks necessary to combat the effects
of earlier segregation and to assure success of the desegregation plan; and (2) may the
DC order the state to share equally with the school district the costs of such additional
programs?

2. PROCEDURAL BACKGROUND AND HOLDING BELOW: This case is before the Court for the third time. In the original DC action, the court found the State of Michigan and the Detroit Board of Education guilty of de jure racial discrimination. It directed the preparation of a school desegregation plan which included 53 school districts in addition to Detroit. 338 F.Supp. 582 (E.D. Mich. 1971). CA 6 affirmed, 484 F.2d 215 (6th Cir. 1973). This Court reversed and remanded, holding that a school desegregation plan could not include the districts surrounding Detroit, absent a showing that they had individually or in concert with Detroit been guilty of segregation. Miliken v. Bradley, 418 U.S. 717 (1974). The Court remanded the case for further proceedings directed toward development of a remedy for racial discrimination within the Detroit City school system.

to
On remand the DC ordered the school district/acquire 150 additional school buses, as an interim measure. The buses were to be used in implementing such plan as the DC might later approve. CA 6 affirmed, but modified the order by directing that the state bear 75% of the cost of those buses. 519 F.2d 679. This Court denied cert. 423 U.S. 930 (1975).

not
appeal
in
Starting August 15, 1975 and continuing through May 11, 1976, the DC entered orders approving and rejecting various submissions by the parties with respect to the implementation of a desegregation plan. The plan, as finally shaped, involved reassignment of pupils within 5 of the 8 regions within the Detroit district, the acquisition of 100 additional buses, and the bussing of 21,853 students. That portion of the order was affirmed by the CA, Appendix at 167a, but is not now before the Court as none of the parties petitioned cert. The DC also ordered the implementation of a number of "educational components" which are "comprehensive programs which were found to be essential to the success of the desegregation effort." Appx. at 168a. As to four of these

programs, it held that the state would be required to pay one half of the cost. These four programs are: (1) Reading and communication skills; (2) inservice training of faculty; (3) non-discriminatory testing; and (4) counseling and career guidance. The DC ordered that the Detroit school board disclose the highest budget allocated in any previous year for these programs and determined that and additionally \$11,645,000 would be required to implement the court-ordered programs. The state's share of that amount is \$5.8 million.

The State appealed and CA 6 AFFIRMED. As to the necessity for these programs, the CA held that:

The District Court found that these Educational Components are necessary to remedy effects of past segregation to assure a successful desegregation effort and to minimize the possibility of resegregation." [citation]. This finding of fact is not clearly erroneous, but to the contrary is supported by ample evidence.

Appx. at 170a. More specifically, the CA found that:

[educational training] is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. [Non-discriminatory testing] is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools.

.....

Without reading and counseling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish.

Id. at 170a-71a.

The CA also rejected the state's argument that the Eleventh Amendment barred the DC's order compelling the state to pay one half of the cost of the educational components. The CA held that this case was not controlled by Edelman v. Jordan, 415 U.S. 651 (1974) because the money here to be paid by the state was not compensation for a past wrong, but rather an adjunct to prospective declaratory and injunctive relief, falling

within the Rule of Ex parte Young, 209 U.S. 123, 150 (1908), see Edelman, 415 U.S. at 667-68. The CA concluded:

The eleventh amendment contention of the state defendant is without merit.

We hold that it is within the equitable powers of the court to require the State of Michigan to pay a reasonable part of the cost of correcting the effects of de jure segregation which State officials, including the Legislature, have helped to create. We reemphasize that it is the law of this case that the State of Michigan has been guilty of acts which have a causal relation to the de jure segregation that exists in Detroit. See 484 F.2d at 238-41.

Appx. at 178a. In justifying the DC's holding that the State was required to pay \$5.8 million in addition to funds it would otherwise pay for education in Detroit, the CA stated:

Since Michigan State officers and agencies were guilty of acts which contributed substantially to the unlawful de jure segregation that exists in Detroit, the State has an obligation not only to eliminate the unlawful segregation but also to insure that there is no diminution in the quality of education. This principle was stated in Hart v. Community School of Brooklyn, 383 F.Supp. 699 (E.D. N.Y. 1974), aff'd, 512 F.2d 37 (2d Cir. 1975)

Appx. at 179a. In affirming the DC, the CA noted the poor financial shape of the school district, stating that:

it will be difficult for the Detroit Board to pay its share of the costs Our affirmance of the District Court on this issue is not intended as a mandate for a cutback in essential educational programs in order to meet the expenses of implementing the desegregation plan. We affirm that part of the judgment relating to the costs of the plan, but without prejudice to the right of the District Court to require a larger proportionate payment by the State of Michigan if found to be required by future developments.

Appx. at 180a.

3. CONTENTIONS: (1) In the absence of a showing of a constitutional violation with respect to educational programs, the DC exceeded its authority in ordering the implementation of educational components as part of the desegregation plan. (2) The

-5-

tenth and eleventh amendments bar the DC's order requiring the state to pay \$5.8 million to finance the said education components.

4. DISCUSSION: (1) Petr relies on the following statement from this Court's prior opinion in the case, Miliken v. Bradley, 418 U.S. 717, 744 (1974):

The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Swann, 402 U.S., at 16.

Petr would therefore argue that since no segregation has been shown with respect to the educational programs in the district, the DC's power to fashion a remedy for past segregation cannot include the addition of education programs. However, the Court in Miliken was discussing the question of what individuals may be included within the scope of the remedy provided by the DC, and held that "[b]efore the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." Id. at 744-745. I am not persuaded that the same reasoning would apply in fashioning a remedy within a single district.

It seems to me that within broad limits, the DC should be able to order such educational programs within the district as are necessary to assure the success of the desegregation plan. At least two of the programs -- racially unbiased testing of students, and training of faculty to adjust to a desegregated environment -- would appear to be directly related to the desegregation task. I have more difficulty with reading enhancement and career planning programs for they are not specifically designed to deal with the problem of desegregation; but seem rather designed to generally enhance the quality of education in the district.

However, the DC found, and the CA affirmed the finding that all of the components were necessary to remedy the effects of past segregation. And, as quoted earlier, the CA concluded that the reading and counseling components are necessary to secure to black students, the motivation and achievement levels with the desegregation remedy is designed to accomplish. Appx. at 170a-171a. While it is difficult, on the facts presented and without a record, to determine the precise connection between these two educational components and the success of the desegregation plan, the problem is a fact specific one and the CA and DC did not seem to be applying the wrong legal standard. As the Court noted in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971) "a district court has [equity] power to fashion a remedy that will assure a unitary school system." Unless this court wants to fashion a rule that the only remedy for segregation in a district involves reassignment of students and/or teachers, this aspect of the case is probably not cert-worthy.^{1/}

(2) Petr's second contention seems more troublesome. I find the CA's distinguishing of Edelman v. Jordan, and its reliance on Ex parte Young unpersuasive. In dealing with the Ex parte Young precedent, the Court in Edelman rejected the motion

^{1/} An alleged conflict of this case with Keyes v. School District No. 1, 521 F.2d 465 (10th Cir. 1975), cert denied, 44 U.S.L.W. 3399 (U.S. Jan. 12, 1976) appears to turn on the facts of the two cases. In Keyes, the DC ordered the implementation of a plan overhauling "the [school] system's entire approach to education of minorities; its proposals extend[ed] to matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation, staffing, non-instructional service and community involvement." Id. at 480-81. The CA fully recognized the broad power of the DC's "to effectuate their remedial orders by removing all obstacles to meaningful desegregation, [but this order imposed] upon school authorities a pervasive and detailed system for the education of minority children." The CA concluded: "We believe this goes too far." Id. at 482. CA 6 distinguished Keyes, simply noting that the DC in this case had not gone too far.

that "any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature." 415 U.S. at 666. The Court then stated that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that between day and night." The Court noted that the "injunction issued in Ex parte Young was not totally without effect on the State's revenues" Such effect, however, was incurred by "state officials in order to shape their official conduct to the mandate of the Court's decess, [and thereby becoming] more likely to spend money from the state treasury than if they had been left free to pursue their previous course of conduct." Such permissible "ancillary effect upon the state treasury" was contrasted with impermissible "payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation" Id. at 668.

While I suppose in this case it could be argued that the State is not being required to shell out \$5.8 million as compensation for past action, but rather in order to comply with prospective orders of the DC in exercise of its equity power, that would appear to stretch Edelman quite a bit. The theory is undercut by the CA's own justification elsewhere in its opinion to the effect that the reason the State is called upon to pay for one half the cost of the programs is because it had been, in the past, guilty of promoting de jure segregation. Moreover, the CA left open the possibility that the DC charge the state for more than one half of the cost of the educational programs, should the school board be unable to pay. See p.4 supra. This all seems very difficult to fit into the mold of Edelman as simply the incidental effects upon the state treasury of compliance

2/

with a prospective injunction.

Petr raised a tenth amendment argument for the first time in his petn. In light of the fact that neither the CA nor the DC had an opportunity to consider the issue, petr cannot now raise it for the Court's consideration. Tacon v. Arizona, 410 U.S. 351, 352 (1973). His argument, in any case, does not seem to have merit. He relies on this Court's recent decision in National League of Cities v. Usery, 96 S.Ct. 2465 (1976) which seems inapposite since it deals with the powers of Congress under the commerce clause, and not with the power of courts to order redress for constitutional wrongs.

There are two responses.

11/2/76
SJG

Kozinski

All opns in
Appendix

*I imagine This will make The
discuss list. I don't find The Edehman
issue troublesome. I'd be inclined
to deny, gene.*

2/

Another aspect of the CA's opinion causes difficulty with the notion that this is merely relief ancillary to an injunction, rather than a money judgment. This is the provision, page 4, supra that the State may not reduce the amount of money it pays for other education services, but has to pay the \$5.8 million (or more) in addition to funds it would otherwise provide to the district. It seems to me that if this were truly an incidental expense connected with the injunction, the state should be permitted to adjust its own budget in whatever way it sees fit to compensate for this expense. The fact that it is not permitted to sacrifice other educational services to comply with the judgment makes the \$5.8 million look more and more like imposition of damages against the state for past wrongs.

A finding of "inadequacy" - ~~is not~~ is not
finding of Const. violation (discrimination) =

Kelly (AG of Mich)

On May 11 '76 DC entered a new order directing system wide expansion of "educational components".

\$75 million had been spent on these ^{four} programs before DC ordered expansion.

No finding of any const. violation w/respect to these components
- thus DC had no authority to enter this order.

March 23, 1977

BENCH MEMO

To: Mr. Justice Powell

From: Dave Martin

No. 76-447 Milliken v. Bradley

This is the latest round in the long-running Detroit school desegregation case. As it reaches us this time, there are a few important "givens" no longer at issue: Both the State officials and the Detroit Board were found to have fostered de jure segregation. ^{in the constitutional violation} The State participated/by, ^{among other things,} its role in school site decisions (it had a veto until ~~1962~~ 1962 over every such decision) and construction; by its failure to fund certain Detroit programs, particularly transportation, while it funded equivalent programs in all other parts of the state; and by Act 48, passed in 1970 to thwart the Board's own initial/^{voluntary} efforts to desegregate. It must be accepted for our purposes here that ^{both the Board and} the state ~~was~~ were constitutional wrongdoers.

The only questions here have to do with remedy. The DC's task ~~task~~ was clear in light of our past cases: (1) to eliminate the dual school system "root and branch" and assure the implementation of a unitary system, and (2) to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct," Milliken I, 418 U.S. 717, 746, or, as you put it in Austin this term, "to eliminate the effect of any official acts or omissions." Brown II, 349 U.S. 294, at 300, made it clear that ~~a~~ a DC

task is clear in light of our past cases: "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.'" Milliken I, 418 U.S., at 738, quoting from Swann. There are two specific sub-tasks^{or ~~sub~~ purposes to be served} that are also clear from our past cases: ~~the~~ (1) to eliminate the dual school system "root and branch" and assure the implementation of a unitary system, and (2) to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct," Milliken I, at 746, or, as you put ~~it~~ it in Austin this term, "to eliminate the effect^y of any [segregative] official acts or omissions." Brown II, 349 U.S. 294, at 300, made it clear that a DC

See also Davis v. School Commissioners, 402 U.S. 33, 37
("The measure of any desegregation plan is its
-2- effectiveness. ").

is to remain flexible and sensitive, to the end that any
obstacles to desegregation may be removed "in a systematic
and effective manner." (Emphasis added.) ^{And here it} ~~is~~ was certainly
reasonable that both constitutional tortfeasors--the State
and the Board--should take part in remedying the violations.

The DC undertook this task--a very difficult one in
light of the realities of the Detroit situation, ^{where} with almost
80% of the schoolchildren ^{are} ~~being~~ black. ^{The DC} ~~is~~ showed, in my
view, admirable restraint, especially with respect to busing
as a remedy. The pupil ~~moving~~ reassignment part of the remedy
concentrated on realigning attendance zones to achieve maximum
results, even if this meant crossing "region" boundaries. It
thought those eight ^{region} boundaries had to yield in the interest of
helping assure that children would attend schools near their
homes. There was some transportation, but it is minimized
by the DC's decision ~~now~~ to concentrate ~~on~~ its attention on
those schools that were identifiably white, leaving ^{unchanged the population of} ~~some~~ several
overwhelmingly black schools in the core city. ~~unchanged~~
This failure to make changes in the core city was troubling
to the CA, ^{and} is somewhat troubling for me, but I ~~am~~ think
it probably was a wise decision ~~in light of the realities~~
of Detroit demographics. The DC was right that added busing
in and out of the core city would mean a heavy burden on the
people involved for a relatively small gain in statistical
desegregation at each school affected; there simply are not
that many white students available in Detroit. In any event,
there is no ^{issue} ~~challenge~~ here now concerning the pupil reassign-
ment decision.

The other part of the DC's order concerned various "educational components" that the DC considered essential if the remedy were to be effective. Many of those components ~~are~~ have not been challenged by any party, but four are at issue here: ¹ in-service training for teachers and staff, ² an expanded counseling and guidance program, ³ altered testing program, and ⁴ remedial reading efforts.

(I might digress to say that the DC, in many respects, acted very "Powellian" in crafting the remedy. It worked hard to minimize transportation as a component of ~~the remedy~~ its order, displaying keen awareness of the toll that busing takes of the innocent individuals involved. At the same time it showed sensitivity to the importance of assuring that a school undergoing desegregation is ~~not~~ made to suffer educationally--hence the educational components. Cf. Keyes (your opinion), 413 U.S. , at 250, 253 (emphasizing "the paramount goal of quality in education" ^{with respect to}). Moreover, the education components, ~~ordered~~ "the major burden of remedial action falls on offending state officials" not on "children and parents who did not participate in any constitutional violation." ~~Quoting from~~ Id. at 249-250.)

The state challenges the four listed education components, arguing first that the DC exceeded its powers under the Constitution or at least abused its discretion when it included them in the remedy. The state seems to contend that the remedy must be limited ~~to~~ simply to pupil reassignment--i.e., redrawing attendance zones and busing. Second, the State argues that ~~it~~ even if the ^{educational} components were proper, the DC had no authority to order the State to shoulder

50% of the added cost. The first argument ~~is~~ is by far the more important. ~~and it will be the only one that will be considered~~

The question presented by the State's first contention is essentially whether the educational components were reasonably necessary to accomplishment of the accepted purposes of a school desegregation remedy--the two goals listed on p. 1, supra. I will consider them separately.

(1) Accomplishing desegregation (eliminating the dual school system). The educational components clearly are not needed for moving bodies around. If that is all that is contemplated by "desegregation," then the DC's educational components are superfluous and ~~unnecessary~~ should not have been ordered. But even if desegregation means little more than moving bodies around, Brown II ^{and Davis} still commands that that process be made effective. No one could say that the process is ~~was~~ effective if, once the children arrive at their new school, that school's educational mission is ~~completely~~ obscured by tensions and difficulties associated with the change. It's not just ~~an~~ a matter of desegregating, but of desegregating schools, and it is important that those institutions remain schools of at least equal quality after desegregation. Inevitably this means that some preparation of the students, staff, teachers and parents is ~~needed~~ reasonably necessary to make the desegregation process effective.

I might approach it from another angle. The great strength of your opinions in the school desegregation cases, especially Keyes and Austin perhaps, has been sensitivity to the human dynamics at work in the course of any remedy process.

It is this sensitivity which has caused you to emphasize that busing be kept to a reasoned minimum. Obviously another part of the human dynamics concerns what will happen at the schools ~~whenever~~ being desegregated. There will be students who have never attended classes with students of another race--or from another part of town or another socio-economic group. There will ^{perhaps} be teachers who have never taught whites before, or blacks, or who have never taught in a mixed classroom. Usually all this will take place in a setting of some community controversy and tension. Strains are inevitable even when all involved are working with the best of intentions, ~~as there would be in any comparable institutional change of any type.~~ It ~~is~~ seems to me eminently reasonable for a district court to be sensitive to these strains and to plan for modest measures that can help alleviate them. Indeed, the court would be derelict if it acted ~~as~~ as though such factors did not exist.

The problem, of course, is that any number of desirable programs could conceivably be linked in some fashion to relieving ~~of the~~ strains and making desegregation more attractive. Stretching too far to make this connection would of course be an abuse. But I do not think that is the case before us. ~~I examine each of the components separately.~~ The court's approach here did not stretch this justification beyond recognition. ^{separately:} I examine each of the components ^{separately:} A. In-service training. This seems to me the most readily ~~just~~ justifiable. Some modest effort to prepare faculty and

staff for the new situations they will face is almost indispensable. B. Counseling. I find this closely linked also. Where in-service training may help deal with some of the teacher's strains, counseling can contribute to relieving some of those that will be generated on the part of students. C. ~~and D. Testing and reading. These~~ ^{This is} ~~are ~~important~~~~ not too closely related to task (1), assuring effective desegregation, although ^{it is} ~~they are~~ not ^{significance.} totally without/~~importance~~. It is doubtless important to assure that students in newly integrated schools are treated equally. The changes in the testing program may be seen as serving that end. ^{D. Reading.} [^] The new reading program ~~can~~ can claim a connection only to the extent that an improved educational program helps keep students and parents within the Detroit public education system. (Fostering commitment to the Detroit public school system on the part of whites is especially important here, since there are so few remaining. ~~It could hardly be considered effective desegregation~~ It would be difficult to regard the result as effective desegregation if the DC's plan were to accentuate the current exit of whites to the point where Detroit schools became almost totally black. Cf. Keyes, 413 U.S., at 250, and Pasadena City Board v. Spangler, slip op. at 9 (manifesting some sensitivity to "white flight").) But having said this, I would have to conclude ^{purpose no.} that the reading program cannot be justified under ~~rational basis~~ (1)--promoting effective desegregation--because the only way to tie ~~it in~~ ^{the program} in is by a chain of reasoning so broad as to validate nearly any

conceivable DC order.

~~Restoring~~(2) Restoring the victims of discriminatory conduct. Obviously the problem with segregation is not simply that it offends our aesthetic sense to separate white-skinned people from black-skinned people. The problem is the human toll on the victims of discrimination. ~~This~~ ~~One~~ One of this Court's finest moments came when it announced its full awareness of that fact in Brown I, 347 U.S. 483. Following ~~the~~ Sweatt v. Painter, 339 U.S. 629, the Court emphasized certain intangible ~~burdens~~ burdens generated by a segregated system. It emphasized two factors: a "sense of inferiority [that] affects the motivation of the child to learn," and some tendency to retard educational development. 347 U.S., at 494, quoting from the lower court findings in the Kansas case. Restoring the victims of discrimination means dealing with lingering problems of motivation and development. Some of the educational components are closely related to serving this purpose.

Counseling probably has the closest relationship. A counselor can help the student find the right ~~course~~ course of studies, suggest necessary remedial programs, and help ~~discourage~~ discourage dropping-out. Depending on how the ~~in~~ in-service training is carried out, it too could serve this goal well. The DC's testing order required the Board to assure that its tests accurately measured students from all backgrounds. Having accurate information obviously serves the goal of restoration.

Reading again has the weakest tie to the goal. Or perhaps I should say that the connection is strong, but it is a connec-

tion shared by hundreds of other desirable programs. But the DC did seem to take care to select what it regarded as the single most important program for purposes of restoring those whose educational ~~attainments have~~^{has} suffered badly in Detroit's schools, ~~disseminating xxxxxxxx~~ And there was record testimony strongly supporting this finding.

In sum, I think it possible to say that the four educational components were reasonably necessary to achieving the two established goals of ~~xxx~~ desegregation. The ~~xxxx~~ ~~xxxxxxx~~ only component, in my view, with a questionable claim is the reading component. But we do have two courts that have expressly found, based on the record made in the DC, that these components were a "necessary" or "essential." I regard this as far short of an outrageous attempt by a court to impose its own educational goals on a school district, and so ~~xxxxxx~~ I would ~~xxxxxx~~ not regard this as an appropriate occasion to depart from the "two court rule" on fact findings. Even an opinion affirming could contain strong language emphasizing that courts are not to impose their own educational desires on systems undergoing desegregation.

that I could well accept ~~that~~ which
There is a second option/you may find more attractive. Since the reading component has the shakiest claim, the ~~xxxxx~~ Court could reverse as to it but approve the other three. This course would adequately convey that this Court is serious about performing considerable DC's ~~xxxxxx~~/xxxxxx their difficult remedial role with / restraint, but still leave room for DC's ~~xxxxxx~~ at the front be flexible in employing lines to ~~xxx~~ non-transportation options toward the end of

making desegregation effective.

There is a further question concerning why the DC's order has to be so specific when it is obvious that the Detroit Board is fully committed to making desegregation work. That is, detailed orders generally make the most sense only when a defendant drags his feet and does his best to avoid full compliance. The ~~Big~~ Board is not such a defendant.

The answer, ~~xxxxxxx~~ in my view, lies in the fact that the Board is not the only wrongdoer here. The state ~~xxx~~ contributed to the segregation, and ~~it~~ although it has cooperated in most of the steps ordered by the DC, it obviously is not willing to ^{help} fund all of them. Detroit cannot ~~fund~~ meet the full cost because of ~~xxxxxxx~~^a/financial plight not entirely of its own making (Detroit citizens have the state's highest tax rate, but ^{nonetheless} low per-student funding). A detailed order is one way to assure that both wrongdoers contribute to a reasonable remedy. The DC's course ~~xxxxxxx~~ does not strike me as an abuse of discretion. It is familiar doctrine to require contribution from joint tortfeasors. Moreover, the funding required by the DC closely parallels the usual sharing of costs between state and Board. (I think the state usually pays 47%.) A detailed order also permits the DC to ride herd on some of the more extreme ~~xxxxxxx~~ ideas of the Board (like many ~~xxxxxxx~~ "converts," occasionally its enthusiasms ^{no} know ^{no} bounds ²-especially when the State might foot the bill). A more important reason for a detailed order despite the

Board's ~~willingness~~ attitude arises from last term's decision
in Spangler. ~~In that case~~ ~~Even though the school board there was relatively~~
~~cooperative~~ Because violations of court orders may carry
heavy penalties, the Court ^{there} stressed that ^{desegregation orders} ~~such orders~~ must
in compliance with Rule 65 be specific and reasonably detailed."
Slip op. at 13.

What I have done in this memo is to state the ~~best~~ strongest
arguments on behalf of at least a partial affirmance ^{--the course I favor.} That's
not what I usually do in a bench memo, but here I think it
appropriate since I know you are closely familiar with
the arguments ~~on~~ pointing toward reversal.

--Dave

(Pre-Conference Notes)

In Millikan I, we remanded - directing "formulation of a decree directed to eliminating the segregation found to exist" in the city schools.

On this remand, the DC ordered the S/Board & the TTs to submit plans.

In addition to student reassignment, restructuring of districts & busing, the S/Board's Plan (but not TT's, that was limited to student assignment), included eleven (11) "educational components" (Pet. App. 35a):

In-service training of teachers
Counseling

School-Community Relations

Parental Involvement

Student Rights & Duties

Testing

Accountability (of whom?)

Curriculum Design

Bilingual education

Multi-Ethnic Curriculum

Co-Curricular Activities

Interesting point.

- S/Board, not TTs - originated these components

Note →

S/B had authority to imitate all of these

S/Bd
wanted
DC to
back
expanded
program

The DC did not buy this entire package. It found some of the programs were "unrelated" to desegregation & have been inserted with the hope that they could be implemented by court order" (Pst. A. 55a)

~~(Note)~~ The DC agreed that, as aids to desegregation, "the following components deserve special emphasis":

1. In-Service Training
2. Counseling
3. Students Rts & Responsibility
4. Parental Involvement
5. School-Community Relations
6. Curriculum Design
7. Multi-Ethnic Curriculum
8. Co-Curriculum Activities

School
jargon
- I've
heard it
all.

The DC ^{identified} ~~added~~ the following as ~~also~~ "essential":

- (a) Testing
- (b) Vocational education
- (c) Comprehensive Reading Program
(including "Remedial Reading")

~~Some~~
Apparently other
elements not
contested

But DC's ^{final} ~~order~~ ^{contested here} included only
(i) Reading & Communication Skills, (ii) Testing,
(iii) in-service training, & (iv) counseling

S/Bd
wanted
DC to
back
expanded
program

The DC did not buy this entire package. It found some ^{of} the programs were "unrelated" to desegregation & have been inserted with the hope that they could be implemented by court order" (Pet. A. 55a)

~~(Pet. A. 55a)~~ The DC agreed that, as aids to desegregation, "the following components deserve special emphasis":

1. In-Service Training
2. Counseling
3. Students Rts & Responsibilities
4. Parental Involvement
5. School-Community Relations
6. Curriculum Design
7. Multi-Ethnic Curriculum
8. Co-Curriculum Activities

The DC ^{identified} ~~added~~ the following as ~~also~~ "essential":

- (a) Testing
- (b) Vocational education
- (c) Comprehensive Reading Program (including "Remedial Reading")

But DC's ^{final} ~~order~~ ^{contained here} ~~included~~ only

- (i) Reading & Communication Skills, (ii) Testing,
- (iii) in-service training, & (iv) counseling & ~~care~~ career guidance.

~~But~~ Apparently other elements ~~in~~ not contested

School
Jargon
- I've
heard it
all.

Court of Appeals affirmed : (Read)

Its opinion is illuminating. It found that the need for the educational components was:

"amply supported by the evidence" - but no evidence (beyond opinion as to desirability by "experts") was identified.

CA 6 said : (Pet. App 170-171a)

"The need for in-service training of educational staff & development of non-discriminatory testing is obvious"

"... the reading & counseling programs are essential ... to combat the effects of segregation.

"Without the reading & counseling components, students might be deprived of motivation & achievement levels".

Tests
are
uniform
throughout
country

A Court says:
State has
constitutional
duty to
maintain a
quality

"... the State (as a guilty party) has an obligation not only to eliminate unlawful segregation, but also to insure

Court of Appeals affirmed : (Reed)

Its opinion is illuminating. It found that the need for the educational components was:

"amply supported by the evidence" - but no evidence (beyond opinions as to desirability by "experts") was identified.

CA 6 said : (Pet. App 170-171a)

"The need for in-service training of educational staff & development of non-discriminatory testing is obvious"

"... the reading & counseling programs are essential ... to combat the effects of segregation.

"Without the reading & counseling components, students might be deprived of motivation & achievement levels".

A Court says:
State has constitutional duty to maintain a quality education.

"... the State (as a guilty party) has an obligation not only to eliminate unlawful segregation but also to insure that there is no diminution in the quality of education".

Tests
are
uniform
throughout
country

What the DC really ordered,

(as shown in Brief of 5/8d

filed as Appendix to op. of CA6 - A 183a)

All of this in addition to business + reassignment

Between Aug 15 '75 + May 76, the DC ordered:

Aug 15 order: establishment of four vocational centers; two additional technical high schools; comprehensive programs for (a) in-service training, (b) bi-lingual & multi-ethnic studies, (c) counselling, (d) testing, (e) co-curricular activities; and a "comprehensive construction & restoration program" (A 188a)

Oct 29, 75 order: enlarged in-service training program

Nov 10, 75 order: S/B & State jointly to acquire sites & construct "as soon as possible" five vocational centers"

Dec 4, 75 order: implementation of reading instruction program

Jan 14, 76 Order: ordered "institution of the Bd's "Modernization Program".

May 11, 76 order: various sweeping changes & expenditures, including:

- (a) "equalization of all school facilities and buildings" before 1976-77 term
- (b) institution of the vocational education program (previously ordered)
- (c) "comprehensive program for bi-lingual/multi-ethnic studies"
- (d) and reiteration of most of other programs previously ordered.

The School Board's conclusion as to effect of the D.C.'s orders since Aug 15, 75:

"The financial impact of these orders could easily destroy the educational program of the Detroit School System. (Their) financing --- would only mean a concomitant elimination of existing programs" - A189a

x x x
Any attempt ~~to~~ to redistribute available resources will cause further deterioration in "on-going educational programs & will merely result in robbing Peter to pay Paul"

These orders "present a highly structured & effective desegregation plan. However, the judgment fails to establish" a plan of financing

[3/24/77?]

finding of inadequacy

Supreme Court of the United States

not a finding
of const. violation

Memorandum

19

X X X

any finding of
discrimination
in providing
testing, counseling,
remedial reading,
in service training.

The Chief Justice

Affirmed 5 Reverse 2 Pass 2
 Passed on 11th Amend. issue.
 Pass on Remedy after discussion.
 Did DC go beyond its powers in granting relief not requested by TTs.

Other cases have granted this kind of relief.

DC had power to order these "remedies".

But 11th Amend. issue is substantial. Query whether Bitzer or Edelman controls.

Mr. Justice Brennan

Affirm

Plan submitted by S/Bl + supported by ~~the~~ ev. put on by State.

Since State was guilty, it may be ordered to pay.

No order to pay money (What?!))

Easy case.

Mr. Justice Stewart

Pass

"Extremely difficult + troublesome case"

No problem with 11th Amend. The serious difficulty is "scope of remedy". Suppose DC had ordered doubling of teachers salaries:

~~The~~ The violation of Const was segregation - not failure to provide these programs.

Mr. Justice White

Affirm

Agree with C J & Bill
on correctness of remedy
No 11th amend problem.

Mr. Justice Marshall

Affirm

No problem. Counsel for
School Bd excellent.

~~NO~~

Mr. Justice Blackmun

No trouble with scope
of remedy. No as objectionable
as using.

No 11th amend prob.

Mr. Justice Powell

Reverie

See my notes.

Mr. Justice Rehnquist

Reverie

Serious 11th Q. There is a "sweet-heart suit." As bet. S/Bd + DC there is no controversy. This is different from any other desegregation case.

State ~~is~~ statute ~~is~~ which was held to ~~be~~ be discriminatory has been voided. Thus, the DC order is not prospective. We have here ~~no~~ damages for past action.

Agrees with me on merits. Scope of remedy goes to beyond violations.

Mr. Justice Stevens

Affirm

Absence of finding of specific violation is irrelevant. Like an Anti-Trust decree. No problem with scope of remedy.

This is a "rep-off" of State which could set a precedent for cities to pressure state gov't - but there may be only way to punish state.

There is tension
bet. Betiger + Ellman.
There is not a Betiger
case.

4/8/77

Milliken v. Bradley

If I write in this case I should make use of Rodriguez, especially 411 U.S., at p. 42.

Mulliken
Misch Water

6/1/77 *file*

I DC's Final Judge & Op - May 11, 76 (A 115a)
(For Order - see pp 145a-149a)

Centers (a) 5' Vocational Centers ordered in Nov 11 75
decrees - Detroit to issue bonds. 117a

Under "encouragement" from DC,
state & city agreed to 50/50 sharing of
costs for vocational centers - 119a

Code (b) DC boasts about Uniform Code
of Student Conduct - 120a

Ordered detailed reports
in all infractions - 121a

added

Ordered "in-service" training
program on the Code - 122a

"On-going responsibility" - 122a
(Threat to hold future hearings)

(c) The 8 District Regional Systems criticized.

"Chaotic" - 124a, 125a (-122a)

Supt. - "little authority" - 124a

"emeshed in politics" - 125a

"Political paralysis" - 126a

Bd members "engaged in

politics" - 126a

"Inefficiency bureaucracy" - 126a

Wow!

(d) Remedial Educational Components
(See formal Order - 146a)

8/15/75
order - 72a

✓ 1. Reading. "Comprehensive program" to "evaluate effects of past seg." (but no finding of any const. violation) - 127a, 72a

Immensely detailed program recommended by "Monitoring Commission" & ordered - 127a, 128a

Ordered
"today"
128a

✓ 2. In-Service Training - 128a
"essential to desegregation" 128a

(No indication whether there was such a program before & if so whether it was discriminatory)

✓ 3. Counseling & Career Guidance - 128a

✓ 4. Testing - 130a, 78a

No finding of discrimination - but ordered Bd. "forthwith (to) review all tests" to determine whether they are cultural-fair" - 130a

✓ 5. School-Community Relations - 131a

80a

Bel Ordered to "create &
implement" clatsco program:

Committee in each school - 132a

- 20 members, racial balance - 132a

Regional committee - 133a

City Wide Council - 133a

Ordered to organize

6 committees - 134a

✓ (2) Vocational education program
ordered - 147a, 74a

✓ (2) Comprehensive bilingual/multi-
ethnic studies ordered - 147a

II

DC Op. & Decree of Aug 15 '75 (7a)

Findings of Fact - 14a

A. Description of Dehoit system - 14a
Regional & Central Bd

Plan submitted by Bd on 4/1/75
- 9 blacks "for"; 4 whites "against" - 15a

B. Statistical Data - 16a

Population trends - 17a

(Clearly show demographic

changes primarily resp - 17a et seq

Schools
Bd not
responsible
for this!

17a	{ 1960/61 - 45.8% Black students
22a	{ 1976 - 75% " "
	{ 1992 - 100% (estimated)

C. II's Plan - racial bal - 24a
Busing of 77000 - 29a

D. Bd's Plan - 31a

Bus - 51,000 - 31a

Racial balance - 32a

40/60

DC not advised
which already

4 Vocational Centers - 34a

Educational components - 35a

Aug 15 op (p2)

Conclusions of Law - 43a

Both plans provide for
massive busing - 44a, 50a

→ S/Board, unlike Bds in
other cases, willing to implement
any plan - 49a

→ S/B's plan doesn't address
CT which of programs ~~already~~ already
existed - 51a

S/B's Plan defective - 51a

Racial quotas invalid - 51a
(but see below)
↓

"Remedial Guidelines" § - 62a

No school may remain more
than 70% white - 67a (~~There a~~ school may be
100% black)

Summary of Plan - 70a

30-55% to black - 70a

Reading - no specific funding - 72a

(Reason not related
to a violation - 73)

Aug 15 op (123)

✓ In-Service Training - 73a

"Essential" but no funding - 73a

must be "comprehensive" - 73a-74a

Board's plan OK - 74

Program must be "on-going" - 74

(no attention to

Paralel -

"on-going!"

✓ Vocational - 74, 147

"Compensate for past
discrimination" - "effective
tool", 75a

no funding - 75a

✓ 4 Vocational Centers required - 75a
76a

93a

✓ "Create" two new technical
Schools - 75a, 77a.

✓ Of highest quality - 76a

✓ Add Grade 13 - 76a

✓ must submit detailed
curriculum - 76a

Racial balance - 76a

✓ Testing - 78a, 130a

no funding - 79a

What
create
community
College?

8/15/75 - 104

Students Rts + Responsibilities - 79a
(Uniform Code of Conduct ^{148a})

Community Relz - 80a, 131

✓ Counseling - 81a

✓ Co-Curricular Activities - 82a

✓ Multi-ethnic Studies - 82a
^{147a}

Study curriculum - 94a

??
..

FN Contempt - force of order

X FN - correct Ct Op - p 8

X Ducta

X FN Blank check - DC may
order more. State Br p 17

FN. It's conceded no const violation - State
It's plan contained
no ed. components. Br 18
19

8/13 conceded no
specific violation - St's Br 19

move to this core
than speak in surface
debent
education

See how wide extension

June 1, 1977

PERSONAL

No. 76-447 Milliken v. Bradley

Dear Chief:

A first reading of your opinion in this case prompts me to write at once because of the importance, as I view it, of clearly preserving the sharpness and force of the central holding in Bill Rehnquist's opinion in Dayton.

We took Dayton, as you will recall, to give us the opportunity to afford specific guidance to the lower courts on the "scope of the remedy" issue. Swann, Milliken I and Gatreaux have repeated the familiar general rule. But, as you have often commented, some of our District and Court of Appeals courts have given the rule lip-service only in ordering system-wide remedies and massive busing.

Bill Rehnquist's opinion in Dayton articulated specifically for the first time a standard that is appropriate. See specifically pp. 12-14. The key sentence in Bill's opinion is to the effect that a District Court in the first instance "must determine how much incremental segregative effect" the specific constitutional violations have had "on the make up . . . of the school population as presently constituted, when that population is compared to what it would have been in the absence of such constitutional violation." (pp. 13, 14)

Although your opinion recognizes the general principal (e.g., p. 17), it may be read - I am afraid - as undercutting what Bill has written. I am disturbed by the paragraph the first few sentences of which read as follows:

"The 'condition' offensive to the Constitution is a de jure segregated school system. This condition which the District Court was obliged to eliminate,

Green v. County School Board (citation) is not, under the holdings of the Court, necessarily or invariably cured completely by simply establishing schools on a nonracial basis, although that is the key step in the remedial process. Our cases recognize that the evil is, more broadly, a dual school system infected with long-standing inequities." (pp. 17, 18).

The finding simply of a "de jure segregated school system," without more, does not justify in every case a system-wide remedy involving, as in the Dayton case, some degree of racial balance in every school plus system-wide busing. As Bill's opinion indicates, the District Court must ask whether the segregative conduct caused the degree of racial segregation in the schools or whether a significant part of it resulted from demographic conditions over which the school board had not the slightest influence or control.

We can be totally certain, for example, that the full extent of segregation in the Detroit school system was not occasioned by governmental action. To be sure, some of it was and rather sweeping generalizations (claimed to be findings) have been made to this effect. But to a large extent, Detroit is similar to Washington, D. C. Because of employment opportunities there, it has attracted hundreds of thousands of black citizens who more or less inevitably settled in predominantly black neighborhoods, with consequent and obvious results in the schools. The local board of education had no more to do with this than you or I.

Your opinion cites Green v. County School Board, 391 U.S. 430. As you will recall, however, this is an inapposite case. I know New Kent County intimately, having hunted in it for years. There are only two school buildings in the entire thinly populated rural county, and at the time of Green one was "black" and the other "white". The remedy ordered in Green was appropriate, but its language is wholly inappropriate to the city of Detroit as it would be to Chicago, New York, Washington, Newark, St. Louis and a host of other cities.

Believing - based on our several conversations over the years - that you and I are in accord on this issue, I hope you will consider favorably the conforming of your language to that of Bill Rehnquist's. This can be done without weakening your analysis or the conclusion you reach. I am afraid that if the paragraphs mentioned above (commencing

at the bottom of page 17) remains unchanged, the lower courts will feel free - in spite of Bill's opinion - to continue to impose system-wide remedies (with the accompanying busing) just as they have in the past, without regard to the scope of the constitutional violation and to the detriment of children of both races.

Perhaps I lack "standing" to write you, as I voted "the other way." I will write something separately but, in view of the approval by the Detroit School Board itself of the remedial action at issue, I may well end up joining the result.

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Justice Rehnquist

June 2, 1977

No. 76-447 Milliken v. Bradley

Dear Chief:

In due time I will circulate something
in this case.

It may concur in the results, but for
quite different reasons from those expressed in
your opinion.

Sincerely,

The Chief Justice

Copies to the Conference

LFP/lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1977

No. 76-447 Milliken v. Bradley

Dear Chief:

After spending several hours last night on this case, I now see it in a different perspective from the way the case was argued and discussed at the Conference. I had not previously read the several meandering decisions of the District Court in which it virtually assumes the role of School Superintendent of the Detroit school system.

In the context of conventional desegregation litigation, this is a noncase. The School Board, rather than opposing the extensive desegregation orders of the District Court, is enthusiastic about them. Indeed, the District Court's opinion of August 15, 1975, notes:

"The Defendant Board of Education Plan. The Detroit Board of Education, unlike the boards in other school desegregation cases, is willing to assume its constitutional duty to desegregate the Detroit School System. The President of the Board and the members of the bi-racial administrative staff have convinced the court they will willingly implement any desegregation order the court may issue." (App. 49a)

There were differences of opinion below between the School Board and original plaintiffs, as the former wanted more busing and a somewhat more sweeping racial balance decree. But the real contest before us is between the School Board and the State of Michigan over funding certain aspects of the wide-ranging programs ordered by the District Court. Not unexpectedly, the School Board is delighted to improve the quality of education provided it can do so at State expense.

Thus, it is the State - not the School Board - that makes the argument with respect to the "scope of the remedy". I am not even sure the State has standing beyond arguing that whatever constitutional violations may have been committed by the School Board, a district court cannot order the State to pay for enhanced educational programs. In addition, it has the 11th Amendment issue.

But whatever may be said as to the standing point (which I merely mention in passing), this is indeed a unique case and could be written as such. I am therefore concerned that the Court should write a rather sweeping desegregation decision (similar to Swann) that will be applied by the lower courts in different circumstances when school boards are resisting the assumption by federal courts of the duties and authority vested by law in elected school boards and professional educators. It would be extraordinary for the average school board to be willing - if not eager - to surrender its educational responsibilities to the extreme degree that is evidenced by the wide-ranging opinions of the District Judge in this case.

I realize that my new perception of the case comes rather late in the day. In any event, I now let you know, with apologies for not having done my homework carefully at a more appropriate time.

Sincerely,

The Chief Justice

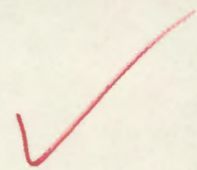
lfp/ss

cc: Mr. Justice Stewart
Mr. Justice Rehnquist

P.S. Potter and Bill Rehnquist discussed this case when we happened to be at lunch today. I expressed these views to them. I do not know to what extent, if any, that they share them.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



June 2, 1977

Re: 76-447 - Milliken v. Bradley

Dear Chief:

Please join me.

Respectfully,

A handwritten signature, likely "JP", is written below the word "Respectfully,".

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 2, 1977

Re: No. 76-447 - Milliken v. Bradley

Dear Chief:

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to Conference

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

✓

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 3, 1977

Re: No. 76-447 - Milliken v. Bradley

Dear Chief:

If you can see your way clear to omit the citation of Rizzo v. Goode on page 28 of the typed copy circulated June 1, I shall be glad to join your opinion. If you feel that it is necessary to include that citation, please note me as concurring in the result.

I do not wish to be "picky" about this, but I do not agree with the characterization of the Rizzo decision, and it is for this reason that I make the request.

Sincerely,

H. A. B.

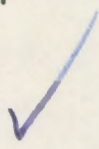
The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 7, 1977

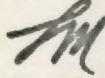


Re: No. 76-447, Milliken v. Bradley

Dear Chief:

Please join me.

Sincerely,



T. M.

The Chief Justice

cc: The Conference

File

I drafted this
for Bill Rehnquist
- after he
invited my
assistance

Milliken

Dear Chief:

Although I voted the other way at Conference, I am prepared at least to concur in the result in your case and with sufficient inducement could perhaps even be persuaded to join your opinion.

The inducement would consist primarily of changes that would clearly distinguish this case from the Dayton case in which I now have a Court. Unless so distinguished, the confused situation that prompted us to take these two cases could even be confounded. We have been concerned by the tendency of District Courts to make a general finding of de jure segregation, and then perceive no limitation on the scope of the remedy. The cases that have anguished so many people in our country (and often been seriously detrimental to public education itself) have been those in which extensive, long-distance busing - even of elementary children - has been decreed without any consideration of whether such a remedy exceeds the scope of the particular constitutional violations.

Our Dayton decision should clarify the law in that type of situation. Your Milliken opinion deals, however, with a different aspect of the same general problem. Apparently desegregation in Detroit was pervasive, and no one is now

challenging the conventional desegregation remedies - including reassignment and busing. The only challenge (and this by the state rather than the school board) is to four of about a dozen so-called "educational components". I am frank to say that the record is by no means clear to me that there was discrimination with respect to these components, but your opinion reaches a different conclusion and you may well be more familiar with the record than I am.

But there does seem to be a gap or hiatus in the opinion that could be confusing to the District Court, and indeed could be viewed as confining Dayton to rather narrow limits. Beginning on page 12 (printed draft No. 1) you properly identify the three principal factors to be considered in determining appropriate remedies. One of these is that the extent of the remedy must be determined by the "nature and scope of the constitutional violation". Another is that the remedy must be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." (p. 12).

The opinion then moves to the educational components, and the second paragraph beginning on page 14 commences as follows:

"The 'condition' offending the Constitution is Detroit's de jure segregated school system. This condition, which the District Court was obliged to correct, is not, under our holdings, necessarily or invariably cured completely by simply establishing schools on a nonracial basis, although that is the

key step in the remedial process. Our cases recognize that the evil is, more broadly, a dual school system with all its attending inequities."

It seems to me that further elaboration of these three sentences is necessary to clarify the opinion, by tying the violations more specifically to the remedy. If the only "condition" or "evil" found to exist is a de jure segregated system, it is entirely possible that there was no constitutional violation with respect to any one of these educational components. For example, testing - universally used - is done on the basis of standard tests prescribed by a national testing agency that are designed to be non-discriminatory. But your opinion views the record as containing findings of discrimination with respect to these components, and I will accept this. But it is essential, in my view, to tie these to the remedy. Accordingly, I suggest something along the following lines as a substitute for the first three sentences of this paragraph:

"The 'condition' offending the Constitution is Detroit's de jure segregated school system, one so pervasively and persistently segregated that the District Court found that the need for the educational components flowed directly from constitutional violations. Thus, these educational remedies - although normally and properly left to the discretion of the elected school board and professional educators - were deemed necessary to restore the victims of the discriminatory conduct to the position educationally they would have enjoyed with respect to testing, reading, counseling and in-service staff training had these components been provided or administered in a non-discriminatory manner."

Absent such a clarification, I would be concerned that whenever a District Court finds a segregated school system it will feel free - without any specific findings - to move in and run the system, as the District Judge in Detroit has done to a large extent with consent of the school board.

* * * *

As to the general finding of systemwide discrimination, my clerk has checked the record and found some rather serious examples of segregative action. My clerk will be glad to talk to your clerk about these with the view, if you think it worthwhile, to including these in a note.

Finally, with respect to participation by a state in the maintaining of a segregated system, it may prevent abuse by other District Judges if you were disposed to add a sentence to this effect:

"When the Detroit school board attempted to voluntarily initiate an intra-district remedy to ameliorate the effect of the past segregative practices, the Michigan Legislature enacted a law forbidding the carrying out of this remedy." 338 F. Supp. at 589.

Potter and Lewis, at my request have reviewed this letter and have authorized me to say that they agree generally with my suggestions, Lewis, however, is writing separately although he presently would be willing to join in the judgment if changes along the foregoing lines are made.

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

file

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

(This is letter 9
drafted for Bill)
June 8, 1977

Re: No. 76-447 - Milliken v. Bradley

Dear Chief:

Although I voted the other way at Conference, I am prepared at least to concur in the result in your case and with sufficient inducement could perhaps even be persuaded to join your opinion.

The inducement would consist primarily of changes that would clearly distinguish this case from the Dayton case in which I now have a Court. Unless so distinguished, the confused situation that prompted us to take these two cases could even be confounded. We have been concerned by the tendency of District Courts to make a general finding of de jure segregation, and then perceive no limitation on the scope of the remedy. The cases that have anguished so many people in our country (and often been seriously detrimental to public education itself) have been those in which extensive, long-distance busing -- even of elementary children -- has been decreed without any consideration of whether such a remedy exceeds the scope of the particular constitutional violations.

Our Dayton decision should clarify the law in that type of situation. Your Milliken opinion deals, however, with a different aspect of the same general problem. Apparently desegregation in Detroit was pervasive, and no one is now challenging the conventional desegregation remedies --

including reassignment and busing. The only challenge (and this by the state rather than the school board) is to four of about a dozen so-called "educational components". I am frank to say that the record is by no means clear to me that there was discrimination with respect to these components, but your opinion reaches a different conclusion and you may well be more familiar with the record than I am.

But there does seem to be a gap or hiatus in the opinion that could be confusing to the District Court, and indeed could be viewed as confining Dayton to rather narrow limits. Beginning on page 12 (printed draft No. 1) you properly identify the three principal factors to be considered in determining appropriate remedies. One of these is that the extent of the remedy must be determined by the "nature and scope of the constitutional violation". Another is that the remedy must be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." (p. 12.)

The opinion then moves to the educational components, and the second paragraph beginning on page 14 commences as follows:

"The 'condition' offending the Constitution is Detroit's de jure segregated school system. This condition, which the District Court was obliged to correct, is not, under our holdings, necessarily or invariably cured completely by simply establishing schools on a nonracial basis, although that is the key step in the remedial process. Our cases recognize that the evil is, more broadly, a dual school system with all its attending inequities."

It seems to me that further elaboration of these three sentences is necessary to clarify the opinion, by tying the violations more specifically to the remedy. If the only "condition" or "evil" found to exist is a de jure segregated

system, it is entirely possible that there was no constitutional violation with respect to any one of these educational components. For example, testing -- universally used -- is done on the basis of standard tests prescribed by a national testing agency that are designed to be non-discriminatory. But your opinion views the record as containing findings of discrimination with respect to these components, and I will accept this. But it is essential, in my view, to tie these to the remedy. Accordingly, I suggest something along the following lines as a substitute for the first three sentences of this paragraph:

"The 'condition' offending the Constitution is Detroit's de jure segregated school system, one so pervasively and persistently segregated that the District Court found that the need for the educational components flowed directly from constitutional violations. Thus, these educational remedies -- although normally and properly left to the discretion of the elected school board and professional educators -- were deemed necessary to restore the victims of the discriminatory conduct to the position educationally they would have enjoyed with respect to testing, reading, counseling and in-service staff training had these components been provided or administered in a non-discriminatory manner."

Absent such a clarification, I would be concerned that whenever a District Court finds a segregated school system it will feel free -- without any specific findings -- to move in and run the system, as the District Judge in Detroit has done to a large extent with consent of the school board.

*

*

*

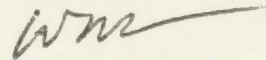
As to the general finding of systemwide discrimination, my clerk has checked the record and found some rather serious examples of segregative action. My clerk will be glad to talk to your clerk about these with the view, if you think it worthwhile, to including these in a note.

Finally, with respect to participation by a state in the maintaining of a segregated system, it may prevent abuse by other District Judges if you were disposed to add a sentence to this effect:

"When the Detroit school board attempted to voluntarily initiate an intra-district remedy to ameliorate the effect of the past segregative practices, the Michigan legislature enacted a law forbidding the carrying out of this remedy." 338 F. Supp., at 589.

Potter and Lewis, at my request, have reviewed this letter and have authorized me to say that they agree generally with my suggestions. Lewis, however, is writing separately although he presently would be willing to join in the judgment if changes along the foregoing lines are made.

Sincerely,



The Chief Justice

Copies to: Mr. Justice Stewart
Mr. Justice Powell

FileMilliken

*Drafted for
Rehuguent,
~~at~~ responding
to his
invitation*

Dear Chief:

Although I voted the other way at Conference, I am prepared at least to concur in the result in your case and with sufficient inducement could perhaps even be persuaded to join your opinion.

The inducement would consist primarily of changes that would clearly distinguish this case from the Dayton case in which I now have a Court. Unless so distinguished, the confused situation that prompted us to take these two cases could even be confounded. We have been concerned by the tendency of District Courts to make a general finding of de jure segregation, and then perceive no limitation on the scope of the remedy. The cases that have anguished so many people in our country (and often been seriously detrimental to public education itself) have been those in which extensive, long-distance busing - even of elementary children - has been decreed without any consideration of whether such a remedy exceeds the scope of the particular constitutional violations.

Our Dayton decision should clarify the law in that type of situation. Your Milliken opinion deals, however, with a different aspect of the same general problem. Apparently desegregation in Detroit was pervasive, and no one is now

challenging the conventional desegregation remedies - including reassignment and busing. The only challenge (and this by the state rather than the school board) is to four of about a dozen so-called "educational components". I am frank to say that the record is by no means clear to me that there was discrimination with respect to these components, but your opinion reaches a different conclusion and you may well be more familiar with the record than I am.

But there does seem to be a gap or hiatus in the opinion that could be confusing to the District Court, and indeed could be viewed as confining Dayton to rather narrow limits. Beginning on page 12 (printed draft No. 1) you properly identify the three principal factors to be considered in determining appropriate remedies. One of these is that the extent of the remedy must be determined by the "nature and scope of the constitutional violation". Another is that the remedy must be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." (p. 12).

The opinion then moves to the educational components, and the second paragraph beginning on page 14 commences as follows:

"The 'condition' offending the Constitution is Detroit's de jure segregated school system. This condition, which the District Court was obliged to correct, is not, under our holdings, necessarily or invariably cured completely by simply establishing schools on a nonracial basis, although that is the

Absent such a clarification, I would be concerned that whenever a District Court finds a segregated school system it will feel free - without any specific findings - to move in and run the system, as the District Judge in Detroit has done to a large extent with consent of the school board.

* * * *

As to the general finding of systemwide discrimination, my clerk has checked the record and found some rather serious examples of segregative action. My clerk will be glad to talk to your clerk about these with the view, if you think it worthwhile, to including these in a note.

Finally, with respect to participation by a state in the maintaining of a segregated system, it may prevent abuse by other District Judges if you were disposed to add a sentence to this effect:

"When the Detroit school board attempted to voluntarily initiate an intra-district remedy to ameliorate the effect of the past segregative practices, the Michigan Legislature enacted a law forbidding the carrying out of this remedy." 338 F. Supp. at 589.

Potter and Lewis, at my request have reviewed this letter and have authorized me to say that they agree generally with my suggestions. Lewis, however, is writing separately although he presently would be willing to join in the judgment if changes along the foregoing lines are made.

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

File

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 8, 1977

Re: No. 76-447 - Milliken v. Bradley

Dear Potter:

Herewith is a revised proposed letter to the Chief,
which includes some suggestions by Lewis.

Sincerely,

wm

Mr. Justice Stewart

Copy to Mr. Justice Powell

Re: No. 76-447 - Milliken v. Bradley

Dear Chief:


Although I voted the other way at Conference, I am prepared at least to concur in the result in your case and with sufficient inducement could perhaps even be persuaded to join your opinion.

The inducement would consist primarily of changes that would clearly distinguish this case from the Dayton case in which I now have a Court. Unless so distinguished, the confused situation that prompted us to take these two cases could even be confounded. We have been concerned by the tendency of District Courts to make a general finding of de jure segregation, and then perceive no limitation on the scope of the remedy. The cases that have anguished so many people in our country (and often been seriously detrimental to public education itself) have been those in which extensive, long-distance busing -- even of elementary children -- has been decreed without any consideration of

whether such a remedy exceeds the scope of the particular constitutional violations.

Our Dayton decision should clarify the law in that type of situation. Your Milliken opinion deals, however, with a different aspect of the same general problem. Apparently desegregation in Detroit was pervasive, and no one is now challenging the conventional desegregation remedies -- including reassignment and busing. The only challenge (and this by the state rather than the school board) is to four of about a dozen so-called "educational components". I am frank to say that the record is by no means clear to me that there was discrimination with respect to these components, but your opinion reaches a different conclusion and you may well be more familiar with the record than I am. -

But there does seem to be a gap or hiatus in the opinion that could be confusing to ~~the~~ District Court^s, and indeed could be viewed as confining Dayton to rather narrow limits. Beginning on page 12 (printed draft No. 1) you properly identify the three principal factors to be considered in determining appropriate remedies. One of these is that



the extent of the remedy must be determined by the "nature and scope of the constitutional violation". Another is that the remedy must be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." (p. 12.)

The opinion then moves to the educational components, and the second paragraph beginning on page 14 commences as follows:

"The 'condition' offending the Constitution is Detroit's de jure segregated school system. This condition, which the District Court was obliged to correct, is not, under our holdings, necessarily or invariably cured completely by simply establishing schools on a nonracial basis, although that is the key step in the remedial process. Our cases recognize that the evil is, more broadly, a dual school system with all its attending inequities."

It seems to me that further elaboration of these three sentences is necessary to clarify the opinion, by tying the violations more specifically to the remedy. If the only "condition" or "evil" found to exist is a de jure segregated system, it is entirely possible that there was no constitutional violation with respect to any one of these educational

components. For example, testing -- universally used -- is done on the basis of standard tests prescribed by a national testing agency that are designed to be non-discriminatory. [^] ~~But~~ ^{however,} your opinion views the record as containing findings of discrimination with respect to ^{testing and the other} ~~these~~ components,

and I will accept this. But it is essential, in my view, to tie these to the remedy. Accordingly, I suggest something along the following lines as a substitute for the first three sentences of this paragraph:

"The 'condition' offending the Constitution is Detroit's de jure segregated school system, one so pervasively and persistently segregated that the District Court found that the need for the educational components flowed directly from constitutional violations. Thus, these educational remedies -- although normally and properly left to the discretion of the elected school board and professional educators -- were deemed necessary to restore the victims of the discriminatory conduct to the position educationally they would have enjoyed with respect to testing, reading, counseling and in-service staff training had these components been provided or administered in a non-discriminatory manner."

Absent such a clarification, I would be concerned that whenever a District Court finds a segregated school

system it will feel free -- without any specific findings -- to move in and run the system, as the District Judge in Detroit has done to a large extent with consent of the school board.

* * *

As to the general finding of systemwide discrimination, my clerk has checked the record and found some rather serious examples of segregative action. My clerk will be glad to talk to your clerk about these with the view, if you think it worthwhile, to including these in a note.

Finally, with respect to participation by a state in the maintaining of a segregated system, it may prevent abuse by other District Judges if you were disposed to add a sentence to this effect:

"When the Detroit school board attempted to voluntarily initiate an intra-district remedy to ameliorate the effect of the past segregative practices, the Michigan legislature enacted a law forbidding the carrying out of this remedy." 338 F. Supp., at 589.

Potter and Lewis, at my request have reviewed this letter and have authorized me to say that they agree generally

- 6 -

with my suggestions. Lewis, however, is writing separately although he presently would be willing to join in the judgment if changes along the foregoing lines are made.

Sincerely,

The Chief Justice

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

file

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1977

Re: 76-447 - Milliken v. Bradley

Dear Bill:

Thank you for your memorandum of June 8 on this case. As you know, I urged Lewis to let me have comments particularly as to his stance as "detached" from both Milliken and Dayton. I am glad to have your collective observations. As I have a focus on Milliken, you have it on Dayton, and I agree on the need to harmonize to avoid more confusion to other courts.

I believe most, if not all your positions can be accommodated, but you will be the judge of that when I get back to you.

As with predecessor cases in this area, it is important we make every effort to present the "maximum front" possible, without, of course, sacrifice to substantive views.

More to follow.

Regards;

Mr. Justice Rehnquist

cc: Mr. Justice Stewart
Mr. Justice Powell

*The C of still has written far too sweepingly
in view of the wholly unique
facts in this case - where
School Board has requested the educational
remedies & wants now to force State to pay.*

WRB

June 11, 1977

No. 76-447 Milliken v. Bradley

Dear Chief:

Your letter to Bill Rehnquist refers to your having requested me "to let [you] have comments particularly" as to the tension between Milliken and Dayton.

I had thought that Bill's letter served this purpose. But I am happy to supplement it.

My profound concern about your first draft (that you commented to me was quite preliminary) is that it can be read far more broadly than necessary. It is likely to be read as holding that whenever a District Court makes a generalized finding of a de jure segregated school system, it then would have authority - without further specific findings - to order any "remedial educational" programs that it may think have educational merit. There would be no necessity to find a constitutional violation with respect to the particular programs.

You and I agree, I think, that before a court should assume the educational functions of the school board it must have found a constitutional violation with respect to the manner in which the particular function had been conducted in the past. Bill's letter mentioned "testing". The same can be said for many other educational components.

The District Court in this case required that five new vocational centers be provided, and prescribed the curriculum for such. This extraordinary action was not challenged before us. Yet, unless the court had found discrimination in the way vocational education had been taught (e.g., depriving black students of the same quality and amount of vocational education as white students), there would be no justification

for usurping the legislative function of deciding how many vocational schools were needed and prescribing the curriculum therefor.

If this is made clear, I will concur in the judgment. If you adopt the language Bill suggests (or its substance) this will harmonize the two cases.

I also will write in support of my view that we should DIG this case, as it is not a segregation case in the normal sense. It is simply a "row" over money between Detroit and the state.

I appreciate your willingness to consider suggestions. At this season of the year, I hesitate to make them even to the most tolerant of my Brothers.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 15, 1977

Re: No. 76-447 - Milliken v. Bradley

Dear Chief:

Please join me in your second draft opinion, which
was circulated on June 14th.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 17, 1977

76-447, Milliken v. Bradley

Dear Chief,

I am glad to join your opinion for
the Court in this case.

Sincerely yours,

PS.
✓

The Chief Justice

Copies to the Conference

June 18, 1977

No. 76-447 Milliken v. Bradley

MEMORANDUM TO THE CONFERENCE:

This is a note that I intended sending with the circulation yesterday of my opinion concurring in the judgment.

In the last paragraph, I refer to not being able to persuade my Brothers to DIG this case. There is a bit of "poetic license" in the statement, as I did not urge this result at our Conference. Although I was not entirely at rest, I was then inclined to agree with the state.

Further study persuaded me that I had not understood the case, which seems to me to be a "sport" in every respect.

As all of the votes were in except Harry's, I assume there is no great likelihood of a "Court" agreeing with me. Converts would, however, be doubly welcome at this time.

L.F.P., Jr.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

PERSONAL

June 17, 1977

Re: No. 76-447 Milliken v. Bradley

Dear Lewis:

I am writing you this in letter form since I plan to leave early this afternoon, and might not be able to see you before leaving. I think your concurring opinion is excellent, and properly serves to focus the attention of those who read the Court's opinion on how unusual a case this is. Indeed, with only the most minor changes, I think you could conclude the opinion by actually joining the Chief's opinion, though I realize you do not wish to do that.

If you want to talk about this, I will be at home later this afternoon.

Sincerely,

Bin

CHAMBERS OF
THE CHIEF JUSTICE

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

June 20, 1977

Re: 76-447 - Milliken v. Bradley

MEMORANDUM TO THE CONFERENCE:

In an abundance of caution I call your attention to changes on pages 19 and 20, as attached.

Absent dissent, these changes will be made in the hope that this case, Dayton and Hazelwood will all be ready for tomorrow. If Hazelwood is not ready, I would opt to let the other two come down. I see no nexus.

Regards,

WRB

milliken

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1977

Re: 76-447 - Milliken v. Bradley

MEMORANDUM TO THE CONFERENCE:

In an abundance of caution I call your attention to changes on pages 19 and 20, as attached.

Absent dissent, these changes will be made in the hope that this case, Dayton and Hazelwood will all be ready for tomorrow. If Hazelwood is not ready, I would opt to let the other two come down. I see no nexus.

Regards,

WRB

No
not
what
we
agreed to,

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 20, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-447 - Milliken v. Bradley

There is, I believe, a misunderstanding in Lewis' memorandum of June 18 about my vote being still "out." On June 3 I advised the Chief (with copies to the Conference) that I would join his opinion if he would remove the citation to Rizzo v. Goode. He immediately did so, and so my joinder became effective and my vote is not still outstanding.

I write this note to straighten out any confusion that might exist as to this.

H.A.B.

file copy

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 20, 1977

No. 76-447 Milliken v. Bradley

Dear Chief:

In view of your comment this morning that some minor changes were being made in the language of this troublesome case, I hope you will forgive me for making a suggestion.

One of the aspects of your opinion that troubles me particularly is the extensive citation of lower court decisions in desegregation cases, including some rather broad and sweeping excerpts from several of their opinions. I refer particularly to part C, page 15, et seq.

Would it not be prudent to add a footnote, keyed to the first sentence in the second paragraph on page 19, along the following lines:

"The citation above of numerous cases in which remedial education remedies have been decreed, including quotations from some of these, is not to be viewed as necessarily approving any of these cases. The facts and circumstances in desegregation cases tend to vary widely, and of course we have had no occasion to consider whether the remedies ordered in any one of these cases were in fact justified by the constitutional violations. We do think these cases are relevant, however, as demonstrating that--where the evidence supports the requisite findings--educational remedies are entirely appropriate."

Unless we include such a caveat, I am afraid the lower courts will assume that we approve the holdings in the various decisions cited and relied upon. We can be reasonably certain that in many of these cases there were

no specific findings of violations other than a general conclusion that a unitary system did not exist. Also, it is likely that none of these cases involved such a massive intrusion into the legislative and administrative functions of a school board as was ordered in Detroit.

For the reasons stated in your opinion, this degree of intrusion may have been justified in Detroit, especially where the School Board requested it. Even so, the Board emphasized that without additional state funding the remedies ordered by the District Court could "destroy" public education in Detroit. This possibility suggests the wisdom of not giving the lower courts a broad invitation to take charge.

This really is my last word in this case. You have been tolerant and patient. But my understanding--from what you have said both recently and in the past--is that you share my view that lower courts often have been too eager to impose remedies beyond any proven specific violation. The Detroit situation was unique, and your opinion reaches the correct result. My concern goes only to the way it may be read by our brothers in the lower federal courts.

In view of the relationship of Dayton to Bradley, I am sending a copy to Bill Rehnquist.

Sincerely,

Levin

June 20, 1977

No. 76-447 Milliken v. Bradley

MEMORANDUM TO THE CONFERENCE:

This refers to the Chief's memorandum to the effect that the above case is ready, so far as he is concerned, for tomorrow.

As I mentioned at the Conference, I am considering making some changes in my concurring opinion. Indeed, I have not yet had available a printed copy of my opinion.

Also, I may circulate this afternoon a brief concurring statement in Hazelwood.

In these circumstances, I would appreciate the cases being carried over. I will do my best to be finally "at rest" by tomorrow.

L.F.P., Jr.

[illegible]

Approved by School Bd 23

To: Mr. Justice Brennan
Mr. Justice ~~Marshall~~
Mr. Justice ~~White~~
Mr. Justice ~~Marshall~~
Mr. Justice ~~Black~~
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

"Bound to conclude that Plan was apply tailored to fit the Court. violation" - 24

"Role of school authorities maintained inviolate" - 24 (Wew?)

From: The Chief Justice

Circulated: JUN 1 1977

Does not impair or jeopardize school system - 24 (must not have read Appendix to CA 6 op!)

Re-circulated:

"Eschewing ratios" - 4

No. 76-447 - Milliken v. Bradley

DC declined to substitute its judge for School authorities - 8

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court. DC found testing discriminatory - 9

We granted certiorari in this case to consider two questions concerning the remedial powers of federal district courts in school desegregation cases, namely, whether a District Court can, as a part of a desegregation decree, order compensatory or remedial educational and administrative programs for school children subjected to past acts of de jure segregation, and whether, consistent with the Eleventh Amendment, federal courts can require state officials found responsible for constitutional violations to bear part of the costs of those programs.

No ev. supporting central holding - 18

This case is before the Court for the second time following our remand, 418 U.S. 717 (1974); it marks the culmination of seven years of litigation over de jure school segregation in the Detroit Public School System. For almost six years, the litigation has focused exclusively on the appropriate remedy to correct official acts of racial

The violation - p 2

The sweeps of their opinion is wholly unnecessary. It is another Swann - that will confuse rather than enlighten lower courts.

discrimination committed by both the Detroit School Board and the State of Michigan.^{1/}

A

In the first stage of the remedy proceedings, the District Court, after reviewing several "Detroit-only" desegregation plans, concluded that "'relief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city'" 345 F.Supp. 914, 916 (E.D. Mich. 1972). Based on that conclusion, the District Court ordered the parties to submit plans for "metropolitan desegregation" and appointed a nine-member panel to formulate a desegregation plan, which would encompass a "desegregation area" consisting of 54 school districts.

In June 1973, a divided Court of Appeals, sitting en banc, upheld the District Court's determination that a metropolitan-wide plan was essential to bring about what the District Court had described as "the greatest degree of actual

^{1/} The violations of the Detroit Board of Education, which included the improper use of optional attendance zones, racially-based transportation of school children, improper creation and alteration of attendance zones, grade structures, and feeder school patterns, are described in the District Court's initial "Ruling on Issue of Segregation." 338 F.Supp. 582, 587-588 (ED Mich. 1971). The District Court further found that "[t]he State and its agencies...have acted directly to control and maintain the pattern of segregation in the Detroit schools." Id., at 589. Those conclusions as to liability were affirmed on appeal, 484 F.2d 215, 221-241 (CA6 1973), and were not challenged in this Court. 418 U.S. 717 (1974) (Milliken I).

desegregation to the end that, upon implementation, no school, grade or classroom [will be] substantially disproportionate to overall pupil racial composition." 345 F.Supp., at 918.

This Court reversed, holding that the order exceeded appropriate limits of federal equitable authority by concluding that "as a matter of substantive constitutional right, [a] particular degree of racial balance" is required, and by subjecting other school districts, uninvolved with and unaffected by constitutional violations, to the Court's remedial powers. 418 U.S. 717 (1974). Relying upon the principle enunciated in Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 16 (1971), that the scope of the remedy is determined by the nature and extent of the constitutional violation, we held that, on the record before us, there was no inter-district violation calling for an interdistrict remedy.

Because the District Court's "metropolitan remedy" went beyond the constitutional violation, we remanded the case for further proceedings "leading to prompt formulation of a decree directed to eliminating the segregation found to exist in the Detroit city schools, a remedy which has been delayed since 1970."

Id., at 753.^{2/}

^{2/}
Five separate opinions were filed in Milliken I. Mr. Justice Stewart, in concurring, stated that the metropolitan-wide remedy contemplated by the District Court was "in error for the simple reason that the remedy...was not commensurate with the constitutional violation found." Id., at 754. Dissenting opinions were filed by Mr. Justice Douglas, Mr. Justice White, and Mr. Justice Marshall. The dissenting opinions took the position, in brief, that the remedy was appropriate, given the State's undisputed constitutional violations, the control of local education by state authorities, and the manageability of any necessary administrative modifications to effectuate a metropolitan-wide remedy.

B

On remand, due to the intervening death of Judge Stephen J. Roth, who had presided over the litigation from the outset, the case was reassigned to Judge Robert E. DeMascio. Judge DeMascio promptly ordered respondent Bradley and the Detroit Board to submit desegregation plans limited to the Detroit school system. On April, 1975, both parties submitted their proposed plans. Respondent Bradley's plan was limited solely to pupil reassignment; the proposal called for extensive transportation of students to achieve the plan's ultimate goal of assuring that every school within the district reflected, within 15 percentage points, the racial ratio of the school district as a whole.^{3/} In contrast to respondent Bradley's proposal, the Detroit Board's plan provided for sufficient pupil reassignment to eliminate "racially identifiable white schools," while ensuring that "every child will spend at least a portion of his education in either a neighborhood elementary school or a neighborhood junior and senior high school." Id., at 1116. By eschewing racial ratios for each school, the Board's plan contemplated transportation of fewer students for shorter distances

^{3/} According to the then-most recent statistical data, as of Sept. 27, 1974, 257,396 students were enrolled in the Detroit public schools, a figure which reflected a decrease of 28,116 students in the system since the 1960-1961 school year. 402 F.Supp. 1096, 1106-1107. Of this total student population, 71.5% were Negro and 26.4% were white. The remaining 2.1% was comprised of students of other ethnic groups. Id., at 1106.

Not so - see 70a, 70a

*Just ?
True ?
See
note
4*

than respondent Bradley's proposal.^{4/}

In addition to student reassignments, the Board's plan called for implementation of 13 remedial or compensatory programs, referred to in the record as "educational components." These compensatory programs, which were proposed in addition to the plan's provisions for magnet schools and vocational high schools, included three of the four components at issue in this case -- in-service training for teachers and administrators, guidance and counseling programs, and revised testing procedures.^{5/} Pursuant to the District Court's direction, the State Department of Education^{6/} on April 21, 1975 submitted a

^{4/} Under respondent Bradley's proposed plan, 71,349 students would require transportation; the Detroit Board's plan, however, provided for transportation of 51,000 students, 20,000 less than the Bradley plan. The Board's plan, which the District Court found infirm because of an "arbitrary" use of racial quotas, contemplated achieving a 40%-60% representation of Negro students in the identifiably white schools, while leaving untouched, in terms of pupil reassignment, schools in three of the Detroit system's eight regions. Those three regions were located in the central city and contained schools which were overwhelmingly Negro in racial composition.

^{5/} The fourth component, a remedial reading and communications skills program, was proposed later and was endorsed by the Bradley respondents in a critique of the Detroit Board's proposed plan. See n. 7, infra. The Board's plan also called for the following "educational components": School-community relations, parental involvement, student rights and responsibilities, accountability, curriculum design, bilingual education, multi-ethnic curriculum, and co-curricular activities. 402 F.Supp., at 1118.

^{6/} In addition to the State Board of Education, the state defendants include the Governor of Michigan, the Attorney General, the State Superintendent of Public Instruction, and the State Treasurer.

State Bd's view

critique of the Detroit Board's desegregation plan; in its report, the Department opined that, although "[i]t is possible that none of the thirteen 'quality education' components is essential...to correct the constitutional violation....", eight of the 13 proposed programs nonetheless deserved special consideration in the desegregation setting. Of particular relevance here, the State Board said:

"Within the context of effectuating a pupil desegregation plan, the in-service training [and] guidance and counseling...components appear to deserve special emphasis." Id., at 38-39. ^{7/}

After receiving the State Board's critique, ^{8/} the District Court conducted extensive hearings on the two plans over a two-month period. Substantial testimony was adduced with respect to the proposed educational components, including testimony by petitioners' expert witnesses. ^{9/} Based on this

^{7/} Two months later, the Bradley respondents also submitted a critique of the Board's plan; while criticizing the Board's proposed educational components on several grounds, respondents nonetheless suggested that a remedial reading program was particularly needed in a desegregation plan. See n.5., supra. The Bradley respondents claimed more generally that the Board's plan failed to inform the court of the then-current extent of such programs or components in the school system and that the plan failed to assess "the relatedness of the particular component to desegregation."

^{8/} The other state defendants likewise filed objections to the Detroit Board's plan on April 21, 1975. They contended, in brief, that the court's remedy was limited to pupil reassignment to achieve desegregation; hence, the proposed inclusion of educational components was, under their view, excessive.

^{9/} For example, Dr. Charles P. Kearney, Associate Superintendent for Research and School Administration for the Michigan Department of Education gave the following testimony:
(Footnote 9/ continued)

evidence and on reports of court-appointed experts, the District Court on Aug. 11, 1975, approved, in principle, the Detroit Board's inclusion of remedial and compensatory educational components in the desegregation plan. ^{10/}

"We find that the majority of the educational components included in the Detroit Board plan are essential for a school district undergoing desegregation. While it is true that the delivery of quality desegregated educational services is the obligation of the school board, nevertheless this court deems it essential to mandate educational components where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation." 402 F.Supp., at 1118.

9/ Continued

"[T]he State Board and the Superintendent indicated that guidance and counselling appeared to deserve special emphasis in a desegregation effort." * * * *

"We support the notion of a guidance and counselling effort. We think it certainly does have a relationship in the desegregation effort, we think it deserves special emphasis."

As to in-service training, Dr. Kearney testified that, in his opinion, such a program was required to implement effectively a desegregation plan in Detroit. Transcript Vol. XXX, at 179, 187. Finally, even though the State's critique did not deem testing as deserving of "special emphasis" in the desegregation plan, Dr. Kearney stated as follows:

"Q: [D]o you see a direct relationship between testing and desegregation?

"A: If test results were inappropriately used, ...I think it would have certainly a discriminatory affect [sic] and it would have a negative affect, I'm sure on any kind of desegregation plan being implemented." Id., at 184.

10/

The District Court did not approve of all aspects of the Detroit Board's plan. With respect to educational components, the court said: "The plan as submitted...does not distinguish between those components that are necessary to the successful implementation of a desegregation plan and those that are not."

DC did
exactly what
it disclaimed
doing

The District Court expressly found that the two components of testing and counseling, as then administered in **No** Detroit's schools, were infected with the discriminatory bias of a segregated school system:

"In a segregated system many techniques deny equal protection to black students, such as discriminatory testing [and] discriminatory counseling...." Ibid.

The District Court also found that, to make desegregation work, it was necessary to include remedial reading programs and in-service training for teachers and administrators:

"In a system undergoing desegregation, teachers will require orientation and training for desegregation. *** Additionally, we find that...comprehensive reading programs are essential...to a successful desegregative effort." Ibid.

Having established these general principles, the District Court formulated several "remedial guidelines" to govern the Detroit Board's development of a final plan. Declining "to substitute its authority for the authority of elected state and local officials to decide which educational components are beneficial to the school community," id., at 1145, the court laid down the following guidelines with respect to each of the four educational components at issue here: order

(a) Reading. Concluding that "[t]here is no educational component more directly associated with the process of desegregation than reading," id., at 1138, the District Court directed the General Superintendent of Detroit's schools to institute a remedial reading and communications skills program "[t]o eradicate the effects of past discrimination...." Ibid.

There is
not a
finding

Check
this

Did DC so
find

The content of the required program was not prescribed by the court; rather, formulation and implementation of the program was left to the Superintendent and to a committee to be selected by him.

(b) In-Service Training. The court also directed the Detroit Board to formulate a comprehensive in-service teacher training program, an element "essential to a system undergoing desegregation." Id., at 1139. In the District Court's view, an in-service training program for teachers and administrators, to train professional and instructional personnel to cope with the desegregation process in Detroit, would tend to ensure that all students in a desegregated system would be treated equally by teachers and administrators able, by virtue of special training, to cope with special problems presented by desegregation, and thereby facilitate Detroit's conversion to a unitary system.

(c) Testing. Because it found, based on record evidence, that Negro children "are especially affected by biased testing procedures," the District Court determined that, frequently, minority students in Detroit were adversely affected by discriminatory testing procedures. Unless the school system's tests were administered in a way "free from racial, ethnic or cultural bias," the District Court concluded that Negro children in Detroit might thereafter be impeded in their educational growth. Id., at 1142. Accordingly, the court directed the Detroit Board and the State Department

Where
Check
Rui's

True

But was only part of notes

of Education to institute a testing program along the lines proposed by the local school board in its original desegregation plan. Ibid.

(d) Counseling and Career Guidance. Finally, the District Court addressed what expert witnesses had described as psychological pressures on Detroit's students in a system undergoing desegregation. Counselors were required, the court concluded, both to solve the numerous problems and tensions arising in Detroit's dismantling its dual system, and, more concretely, to counsel students concerning the vocational and technical schools created under the plan through the cooperation of state and local officials. 11/

Nine months later, on May 11, 1976,³ the District Court entered its final order. Emphasizing that it had "been careful to order only what is essential for a school district undergoing desegregation," Appendix, at 117a, the court ordered the Detroit Board and the state defendants to institute comprehensive programs as to the four educational components by the start of the September 1976 school term. The cost of these four programs,

11/

In contrast to their position before the District Court with respect to the four educational components at issue here, the state defendants, through the State Department of Education, voluntarily entered into a stipulation with the Detroit Board on Feb. 24, 1976, under which the State agreed to provide 50% of the construction costs of five vocational centers which the District Court ordered to be established. Appendix, at 141a.

the court concluded, was to be equally borne by the Detroit School Board and the State. Accordingly, the court directed the local board to calculate its highest budget allocation in any prior year for the several educational programs and, from that base, any excess cost attributable to the desegregation plan was to be paid equally by the two groups of defendants responsible for prior constitutional violations, i.e., the Detroit Board and the state defendants.

C

On appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court's order concerning the implementation of and payment for the four educational components.^{12/} The Court of Appeals expressly approved the District Court's findings as to the necessity for these compensatory programs:

"This finding...is not clearly erroneous, but to the contrary is supported by ample evidence.

"The need for in-service training of the educational staff and development of non-discriminatory testing is obvious. The former is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. The latter is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools.

"We agree with the District Court that the reading and counseling programs are essential to the effort to combat the effects of segregation.*** Without the reading and counseling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish." 540 F.2d 229, 241 (CA6 1976).

^{12/}

The Court of Appeals disapproved, however, of the District Court's failure to include three of Detroit's eight regions in the pupil assignment plan. See n.4, supra. The Court of Appeals remanded the case to the District Court for further consideration of the three omitted regions, but declined to set forth guidelines, given the practicabilities

(Footnote 12/ continued)

After reviewing the record, the Court of Appeals concluded:

"This is not a situation where the District Court 'appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution.'" Id., at 241-242, quoting Keyes v. School District, 521 F.2d 465, 483 (CA10 1975), cert. denied, 423 U.S. 1066 (1976).

After upholding the remedial-components portion of the plan, the Court of Appeals likewise sustained the District Court's allocation of costs between the state and local officials. Analyzing this Court's decision in Edelman v. Jordan, 415 U.S. 651 (1974), which reaffirmed the rule that the Eleventh Amendment provides a bar against an ordinary suit for money damages against the State without its consent, the Court of Appeals held that the District Court's order

"...imposes no money judgment on the State of Michigan for past de jure segregation practices. Rather, the order is directed toward the State defendants as a part of a prospective plan to comply with a constitutional requirement to eradicate all vestiges of de jure segregation." 540 F.2d, at 245. (Emphasis supplied.)

The Court of Appeals remanded the case for further consideration of the three central city regions untouched by the District

12/ (continued) ..

of the situation, for the District Court's benefit. Further proceedings were deemed appropriate, however, particularly since the Bradley respondents had previously been granted leave to file a second amended complaint to allege interdistrict violations on the part of the state and local defendants.

Court's pupil reassignment plan. See n. 12, supra.

The state defendants then sought review in this Court, challenging only those portions of the District Court's comprehensive remedial order dealing with the four educational components providing compensatory educational programs and with the State's obligation to defray the costs of those programs. We granted certiorari, 429 U.S. ____ (1976), and we affirm.

II

This Court has never addressed directly the question whether federal courts can order remedial education programs as part of a school desegregation decree.^{13/} However, the general principles governing our resolution of this issue are well settled by the prior decisions of this Court. In the first case concerning federal courts' remedial powers in eliminating de jure school segregation, the Court laid down the basic rule which governs to this day: "In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." Brown v. Board of Education, 349 U.S. 294, 300 (1955) (Brown II)

A

Application of those "equitable principles", we have held, requires federal courts to focus upon three factors. In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. Swann v.

13/

In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), the Court affirmed an order of the District Court which included a requirement of in-service training programs. 318 F.Supp. 786, 803 (W.D.N.C. 1970). However, this Court's opinion did not treat the precise point. In Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973), the Court expressly avoided passing on the District Court's holding that called for, among other things, "compensatory education in an integrated environment." Id., at 214 n.18.

*no w.
whatever
of this*

Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16

(1971). The remedy must therefore be related to "the con-
dition alleged to offend the Constitution....." Milliken v.

Bradley, 418 U.S. 717, 738 (1974).^{14/} Second, the decree

must indeed be remedial in nature, that is, it must be

designed "to restore the victims of discriminatory conduct to

the position they would have occupied in the absence of such

conduct." Id., at 746.^{15/} Third, the federal courts in

^{14/}

Thus, the Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more. Pasadena City Board of Educ. v. Spangler, 427 U.S. 424, 434 (1976); Milliken I, supra, at 763 (White, J., dissenting); Swann, supra, at 26. An order contemplating the "'substantive right [to a] particular degree of racial balance or mixing'" is therefore infirm as a matter of law. Spangler, supra, at 434.

^{15/}

Since the purpose of the remedy is to make whole the victims of unlawful conduct, this Court declared nine years ago that federal courts are obliged to implement plans that promise "realistically to work now." Green v. County School Board of New Kent County, 391 U.S. 430, 439 (1968). At the same time, the Court has carefully stated that, to ensure that federal court decrees are characterized by the flexibility and sensitivity required of equitable decrees, consideration must be given to burdensome effects resulting from a decree that could "either risk the health of the children or significantly impinge on the educational process." Swann, supra, at 30-31. Our function, as stated by Mr. Justice White, is "to desegregate an educational system in which the races have been kept apart without, at the same time, losing sight of the central educational function of the schools. Milliken I, supra, at 764 (dissenting opinion) (Emphasis in original). In a word, "There are undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases." Id., at 763. Compare Austin Independent School Dist. v. United States, ___ U.S. ___ (1976) (Powell, J. (concurring)).

devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. In Brown II the Court squarely held that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems...." 349 U.S., at 299. If, however, "school authorities fail in their affirmative obligations...judicial authority may be invoked." Swann, supra, at 15. Once invoked, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Ibid.

B

In challenging the order before us, petitioners do not specifically question that the District Court's mandated programs are designed, at least in part, to restore the schoolchildren of Detroit to the position they would have enjoyed absent constitutional violations by state and local officials. And, petitioners do not contend, nor could they, that the prerogatives of the Detroit School Board have been abrogated by the decree, since of course the Detroit School Board itself proposed incorporation of these programs in the first place. Petitioners' sole contention is that, under Swann's teaching, the District Court's order exceeds the scope of the constitutional violation. Invoking our holding in Milliken I, supra, petitioners claim that, since the constitutional violation found by the District Court was the unlawful

absent
fiction.
These
conditions
for most
part
would
have
existed
any
way.

yes

Only finding
of significance &
this is totally
general

segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments. This contention misconceives the principle they seek to invoke, and we reject their argument.

The well-settled principle that the nature and scope of the remedy is to be determined by the violation means simply that federal court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, see Pasadena City Board of Education v. Spangler, supra, or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in Milliken I, supra. Hills v. Gautreaux, 425 U.S. 284, 292-296 (1976). But where, as here, a constitutional violation has been found, the remedy imposed upon the violators does not "exceed" the violation, if the remedy is tailored to cure the "condition that offends the Constitution."

The "condition" offensive to the Constitution is a de jure segregated school system. This condition, which the District Court was obliged to eliminate, Green v. County School Board of New Kent County, 391 U.S. 430, 438 (1968), is not, under the holdings of this Court, necessarily or

close
to
Dayton

The
antecedent
system

invariably cured completely by simply establishing schools on a nonracial basis, although that is the key step in the remedial process. Our cases recognize that the evil is, more broadly, a dual school system infected with long-standing inequities. Twenty-three years ago a unanimous Court speaking through Chief Justice Warren held in Brown I: "Separate educational facilities are inherently unequal." Brown v. Board of Education, 347 U.S. 483, 495 (1954). And in United States v. Montgomery County Board of Education, 395 U.S. 225 (1969), the Court concerned itself not with pupil assignment, but with the desegregation of faculty and staff. In doing so, the Court, there speaking through Mr. Justice Black, focused on the reason for judicial concerns going beyond pupil assignment: "The dispute...deals with faculty and staff desegregation, a goal that we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." 395 U.S., at 231-232 (Emphasis supplied).

Montgomery County therefore stands firmly for the proposition that matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation. Similarly, in Swann, we reaffirmed the principle laid down in Green v. County School Board, supra, that "existing policy and practice with respect to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system."

402 U.S., at 18. In a word, discriminatory student assignment policies can themselves breed and manifest other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a long-standing segregated system.

C

In light of the mandate of Brown I and Brown II, federal courts have, over the years, often required the inclusion of compensatory or remedial programs in desegregation plans to overcome the inequalities inherent in dual school systems. In 1966, for example, the District Court for the District of South Carolina directed the inclusion of remedial courses to overcome the effects of a segregated system:

"Because the weaknesses of a dual school system may have already affected many children, the court would be remiss in its duty if any desegregation plan were approved which did not provide for remedial education courses. They shall be included in the plan." Miller v. School District Number 2, Clarendon, S.C., 256 F.Supp. 370, 377 (D.S.C. 1966). (Emphasis supplied.)

In 1967, the Fifth Circuit Court of Appeals, then engaged in overseeing the desegregation of numerous school districts in the South, laid down the following requirement in an en banc decision:

"The defendants shall provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education." United States v. Jefferson County

Board of Education, 380 F.2d 385, 394
(CA 5), cert. denied, 389 U.S. 840 (1967).
(Emphasis supplied.)

See also Stell v. Board of Public Education for City of Savannah, 387 F.2d 486, 492, 496-497 (CA 5 1967); Hill v. LaFourche Parish School Board, 291 F.Supp. 819, 823 (ED La. 1967); Redman v. Terrebone Parish School Board, 293 F.Supp. 376, 379 (ED La. 1967); Lee v. Macon County Board of Education, 267 F.Supp. 458, 489 (MD Ala. 1967); Graves v. Walton County Board of Education, 300 F.Supp. 188, 200 (MD Ga. 1968), aff'd, 410 F.2d 1153 (CA 5 1969). Two years later, the Fifth Circuit again adhered to the rule that District Courts could properly seek to overcome the built-in inadequacies of an unconstitutionally unequal educational system:

"The trial court concluded that the school board must establish remedial programs to assist students who previously attended all-Negro schools when those students transfer to formerly all-white schools....The remedial programs...are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged by the inequities and discrimination inherent in the dual system. The requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the court's discretion." Plaquemines Parish School Bd. v. United States, 415 F.2d 817, 831 (CA 5 1969). (Emphasis supplied.)

In the same year the United States District Court for the Eastern District of Louisiana required school authorities to come forward with a compensatory educational program as part of a desegregation plan. "The defendants shall provide remedial education programs which permit students * * * who have previously attended all-Negro schools to overcome past

inadequacies in their education." Smith v. St. Tammany Parish School Board, 302 F.Supp. 106, 110 (ED La. 1969), aff'd, 448 F.2d 415 (CA 5 1971). See also Moore v. Tangipahoa Parish School Board, 304 F.Supp. 244, 253 (ED La. 1969); Moses v. Washington Parish School Board, 302 F.Supp. 362, 367 (ED La. 1969).

In the 1970's, the pattern has been essentially the same. The Fifth Circuit has, when the fact situation warranted, continued to call for remedial education programs in desegregation plans. In 1971, for example, the Fifth Circuit affirmed a District Court's order designed, among other things, "to compensate for the abiding scars of past discrimination." United States v. State of Texas, 447 F.2d 441, 443 (CA 5 1971), application for stay denied, 404 U.S. 1205 (1971) (Black, J. sitting as Circuit Justice). To that end, the approved plan required the following:

"[C]urriculum offerings and programs shall include specific educational programs designed to compensate minority group children for unequal educational opportunities resulting from past or present racial and ethnic isolation...." Id., at 448.16/

16/

In denying the stay application, Mr. Justice Black was untroubled by the underlying order of the District Court:

"It would be very difficult for me to suspend the order of the District Court that, in my view, does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch." 404 U.S., at 1206.

See also George v. O'Kelly, 448 F.2d 145, 150 (CA 5 1971). And, as school desegregation litigation emerged in other regions of the country, federal courts have likewise looked in part to compensatory programs, when the record supported an order to that effect. See, e.g., Morgan v. Kerrigan, 401 F.Supp. 216, 235 (D.Mass. 1975), aff'd, 530 F.2d 401 (CA 1 1976), cert. denied, ___ U.S. ___ (1976); Hart v. Community School Board of Brooklyn, 383 F.Supp. 699, 757 (EDNY 1974), aff'd, 512 F.2d 37 (CA 2 1975); cf. Booker v. Special School Dist. Number 1, Minneapolis, Minn., 351 F.Supp. 799 (D.Minn. 1972).
17/

Finally, in addition to other remedial programs, which could, of course, if circumstances warranted, specifically include programs to remedy deficiencies in reading and communication skills, federal courts have expressly ordered special in-service training for teachers, see, e.g., United States v. State of Missouri, 523 F.2d 885, 887 (CA 8 1975); Smith v. St. Tammany Parish School Board, supra, at 110; Moore v. Tanig-pahoa Parish School Board, supra, at 253, and have altered or even suspended testing programs employed by school systems

17/
We do not, of course, pass upon the correctness of the particular holdings of cases we did not review. We simply note that these holdings support the broader proposition that, when the record warrants, remedial or compensatory programs may be, in the exercise of equitable discretion, appropriate remedies to treat the condition that offends the Constitution. Of course, it must be shown that the constitutional violation caused the condition for which remedial programs are mandated.

undergoing desegregation. See, e.g., Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211, 1219 (CA 5 1969), cert. denied, 396 U.S. 1032 (1970); Lemon v. Bossier Parish School Board, 444 F.2d 1400, 1401 (CA 5 1971); Arvizu v. Waco Independent School Dist., 373 F.Supp. 1264 (WD Tex. 1973), rev'd in part on other issues, 495 F.2d 499 (CA 5 1974).

Where? ¹¹ These cases demonstrate that the District Court in the case before us did not break new ground in approving the School Board's proposed plan. Quite the contrary, acting on abundant evidence in this record, the District Court approved a remedial plan going beyond mere pupil assignments, as expressly approved by Swann and Montgomery County, supra.

→ In so doing, the District Court was adopting specific programs, proposed by local school authorities who must be presumed to be familiar with the problems and the needs of a system undergoing desegregation. ^{18/}

We do not, of course, imply that the order here is a blueprint for other cases. That cannot be; in school

18/

This Court has from the beginning looked to the District Courts in desegregation cases, familiar as they are with the local situations coming before them, to appraise the efforts of local school authorities to carry out their constitutionally required duties. "Because of their proximity to local conditions...the [federal district] courts which originally heard these cases can best perform this judicial appraisal." Brown II, supra, at 299.

desegregation cases, "[t]here is no universal answer to complex problems...; there is obviously no plan that will do the job in every case." Green, supra, at 439. Nevertheless, on this record we are bound to conclude that the remedial decree before us was aptly tailored to fit the constitutional violation. Nor do we find any other reason to believe that the broad and flexible equity powers of the court were abused in this case. The established role of local school authorities was maintained inviolate; and, the remedy is indeed remedial. The order does not punish anyone, nor does it impair or jeopardize the educational system in Detroit.^{19/} The District Court, in short, was true to the principles laid down in Brown II:

"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. These cases call for the exercise of these traditional attributes of equity power." 349 U.S., at 300.

^{19/} Indeed, the District Judge took great pains to devise a workable plan. For example, he sought carefully to eliminate burdensome transportation of Negro children to predominantly Negro schools and to prevent the disruption, by massive pupil reassignment, of racially mixed schools in stable neighborhoods which had successfully undergone residential and educational change.

Appendix !

subject only
to liability for
content -

not
yet

III

Petitioners also contend that the District Court's order, even if otherwise proper, violates the Eleventh Amendment. In their view, the requirement that the state defendants pay one-half the additional costs attributable to the four educational components is, "in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials." Brief, at 34. Arguing from this premise, petitioners conclude that the "award" in this case is barred under this Court's holding in Edelman v. Jordan, 415 U.S. 651 (1974).

Edelman involved a suit for money damages against the State, as well as for prospective injunctive relief.^{20/} The suit was brought by an individual who claimed that Illinois officials had improperly withheld disability benefit payments to him and to the members of his class. Applying traditional Eleventh Amendment principles, we held that the suit was barred to the extent the suit sought "the award of an accrued monetary liability..." which represented "retroactive payments." Id., at 663-664. (Emphasis supplied.) Conversely, the Court

^{20/}

Although the complaint in Edelman ostensibly sought only equitable relief, the plaintiff expressly requested "'a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all [disability] benefits wrongfully withheld.'" 415 U.S., at 656.

upheld the suit to the extent it sought "payment of state funds...as a necessary consequence of compliance in the future with a substantive federal-question determination...." Id., at 668. (Emphasis supplied.)

The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by Edelman. That exception, which had its genesis in Ex parte Young, 209 U.S. 123 (1908), permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. 415 U.S., at 15. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct in findings which are not challenged, to eliminate a de jure segregated school system. More precisely, the burden of state officials is that set forth in Swann -- to take the necessary steps "to eliminate from the public schools all vestiges of state-imposed segregation." 402 U.S., at 15. The educational components, which the District Court ordered into effect prospectively, are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit.

^{21/}
^{21/} No bright line can be drawn for Eleventh Amendment purposes on the basis that these programs were "compensatory" in nature. Unlike the award in Edelman, the injunction entered here could not instantaneously restore the victims of unlawful conduct to their rightful condition. Thus, the (footnote continued next page)

These programs were not, and as a practical matter could not be, intended by one bold stroke to wipe the slate clean, as could a retroactive award of money in Edelman.^{22/} Rather, by the nature of the antecedent violation, the victims of Detroit's de jure segregated system presently experience some of the effects of segregation and will continue to do so until such future time as the remedial programs make amends to dissipate those continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skills of specially trained teachers. That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates prospectively to bring about the benefits of a unitary school system. Prospective relief of this nature is not barred by the Eleventh Amendment.^{23/}

^{21/} (continued) injunction here looks to the future, not simply to presently compensating victims for conduct and consequences completed in the past.

^{22/} In contrast to Edelman, there was no money award here in favor of respondent Bradley or any members of his class. This case simply does not involve individual citizens' conducting a raid on the state treasury for accrued monetary liability. It is wholly prospective in the same manner that the decree mandates vocational schools and assignments, for example.

^{23/} Because of our conclusion, we do not reach either of the two alternative arguments in support of the District Court's judgment, namely that the State of Michigan expressly waived its Eleventh Amendment immunity by virtue of Mich. Stat. Annot. § 15.1023(7), and that the Fourteenth Amendment, ex proprio vigore, works a pro tanto repeal of the Eleventh Amendment. Cf. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Neither question was addressed by the Court of Appeals, and we therefore do not pass on either issue.

Finally, there is no merit to petitioners' claims that the relief ordered here violates the Tenth Amendment and general principles of federalism. The Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. Cf. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Nor are principles of federalism abrogated by the decree. The District Court has neither attempted to restructure local governmental entities, compare Rizzo v. Goode, 423 U.S. 362 (1972), nor to mandate a particular method or structure of state or local financing. Cf. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). The District Court has, instead, properly enforced the constitutional guarantees of the Fourteenth Amendment consistent with our prior holdings, and in a manner that does not jeopardize the integrity of the structure or functions of state and local government.

The judgment of the Court of Appeals is therefore affirmed.

Affirmed.

File

CHAMBERS DRAFT

Dave -
I want to
shorten and
tighten-up this
rather rambling
first draft.
LJP.

No. 76-447 MILLIKEN v. BRADLEY

MR. JUSTICE POWELL, concurring in the judgment.

The Court's opinion addresses this as if it were conventional desegregation litigation. The wide-ranging opinion reiterates the familiar general principles drawn from the line of ^gthe precedents commencing with Brown.

One has to read the opinion closely to understand that the case, as it finally reaches us, is wholly unique. Indeed, it is largely a non-case in terms of desegregation principles.

Normally, the ^{plaintiffs} [^]in this type of litigation are students, parents and supporting organizations who desire to desegregate a school system alleged to be the product, in whole or in part, of de jure segregative action by the public school authorities. ~~The plaintiffs are students, parents and supporting organizations.~~ ^g The principal defendant is the local board of education or school board. Occasionally, the state board of education and public officials are joined as defendants. This protracted litigation commenced in 1970 in this conventional mold. In the intervening

years, however, the posture of the litigation has changed so drastically as to leave it largely a friendly suit between the plaintiffs ^(respondents Bradley, et al.) and the original principal defendant, the Detroit School Board. These parties [^] antagonistic for years, have now joined forces apparently for the purpose of extracting funds from the state treasury. As between the original principal parties - the plaintiffs and the Detroit School Board - no case or controversy remains. The Board enthusiastically supports the entire desegregation decree even though the decree intrudes deeply on the Board's own decisionmaking powers. The plaintiffs favored a desegregation plan that would have required more extensive transportation of pupils, but they did not oppose the remedial educational components once they were proposed by the School Board. ^{1/} In this Court ^{ee} they, like the School Board, now support the decree of the District Court as affirmed by the Court of Appeals.

The only complaining party here is the State of Michigan (acting through state officials), and its basic

concerns
 complaint ~~is over~~ money, not ~~over~~ desegregation. It has
 been ordered to pay about \$5,800,000 to the Detroit School
 Board. This is one half the estimated "excess cost" of
 four of the eleven educational components included in the
 desegregation decree: remedial reading, in-service
 training of teachers, testing, and counseling (see
 Appendix hereto). The State, understandably anxious to
 preserve the state budget from federal court control or
 interference, now contests the decree on two grounds.

First, it is argued that the order to pay state
 funds violates the Eleventh Amendment and principles of
 federalism. Ordinarily a federal court's order that a
 state pay unappropriated funds to a locality would raise
 the gravest constitutional issues. See generally
San Antonio Independent School Dist. v. Rodriguez, 411
 U.S. 1, 40-42 (1973); National League of Cities v. Usery,
 426 U.S. 833 (1976). But here, in a finding no longer
 subjected to review, the State has been adjudged a
 participant in the constitutional violation, and the State
 therefore may be ordered to participate prospectively in a
 remedy otherwise appropriate.

The State's second argument is one that normally
 Q. c. would be advanced vigorously by the school board. Relying
 on the established principle that the scope of the remedy
 in a desegregation case is determined and limited by the

extent of the constitutional violation, Milliken v.

Bradley, 418 U.S. 717, 744 (1974), the State argues that

the District Court erred in ordering the system-wide

expansion of the four educational components mentioned

above. It ^dcontains that there has been no finding of a

constitutional violation with respect to the past

operation of any of these programs, and it insists that

without carefully focused findings of this sort, the

decree exceeded the court's power^s. 2/

This argument is by no means a frivolous one.^{3/}

But the context in which it is presented is so unusual

that it would be appropriate to dismiss the writ as

improvidently granted. The argument is advanced by the

State and not by the party primarily concerned. The

educational programs at issue are standard and universally

approved in public education.^{4/} The State Board

normally would be enthusiastic over enhancement of these

programs so long as the local school board could fund them

without requiring financial aid from the State. It is

equally evident that the State probably would resist a

federal court order requiring it to pay unappropriated

state funds to the local school board regardless of

whether violations by the local board justified the

remedy. The State's interest in protecting its own budget

- limited by legislative appropriations - is a genuine

one. But it is not an interest that arises, or exists, because the desegregation remedy may have exceeded the extent of the violations.

The State's reliance on the remedy issue contains a further weakness making this case a sport, the decision of which hardly can have general application. There is no indication that the State objected - certainly, it does not object here - to the inclusion in the District Court's decree of the seven other educational components.5/

Indeed, the State expressly agreed to one of the most expensive components, the establishment of vocational education centers, in a stipulation obligating it to share the cost of construction equally with the Detroit Board.

Moreover,
See App. 139a-141a. [^] Since the District Court's decree largely embodies the original recommendation of the Detroit Board, and since local school boards "have the primary responsibility for elucidating, assessing, and solving [the] problems" generated by "[f]ull implementation of . . . constitutional principles^e" in the local setting, Brown v. Board of Education, 349 U.S. 294, 299 (1955), the State's limited challenge here is particularly lacking in force.

There are other aspects of this case ignored by the Court but which, in my opinion, undercut the relevancy

of most of its opinion. First, a look at the District Court's perception of its problem. It found the structure of the Detroit school system "chaotic and incapable of effective administration." App. 124a. Its "general superintendent has little direct authority." Ibid. Each of the eight regional boards may be preoccupied with [#] "distribut[ing] local board patronage." App. 125a. The "local boards have diverted resources that would otherwise have been available for educational purposes to build new offices and other facilities to house this administrative overload" Ibid. The District Court continued:

"In addition to the administrative chaos, we know of no other school system that is so enmeshed in politics. *** Rather than devoting themselves to the educational system and the desegregative process, board members are busily engaged in politics not only to assure their own re-election but also to defeat others with whom they disagree." App. 125a-126a (footnote omitted).

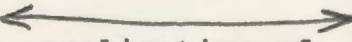
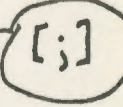
Referring again to the "political paralysis" and "inefficient bureaucracy" of the system, the court also noted - discouragingly - that the election then approaching "may well [result in] a board of education consisting of members possessing no experience in education." App. 126a. Yet, it was a compliant Board. The District Court had complimented its "willingness" of ~~the Board~~ to "implement any desegregation order the court may issue." App. 49a.

or
it is
perhaps
understandable


In these quite remarkable circumstances, ^{it is understandable,} ~~there is~~
^{although not on that basis legally justifiable,}
~~little wonder~~ ²¹ that the District Court virtually assumed
the role of school superintendent and, with the four
"expert advisers" whom it engaged, preempted major
segments of the School Board's responsibility. The
Appendix to this opinion summarizes the 11 principal
educational elements in the court's desegregation plan.
Clearly they constitute a deep intrusion upon the lawful
duties and responsibilities of elected school board
members. It is evident from the 150 printed pages of
opinions and orders ^{issued /} from August 15, 1975, through May 11,
1976, App. 1a-150a, that the District Court felt compelled
to fill the void created by the "political paralysis,"
"inefficient bureaucracy," and "administrative chaos"
found to exist in the Detroit school system at this
critical juncture. ² In consequence, ³ The District Court
moved strongly and broadly to rehabilitate what it viewed
as a school system in serious disarray. In so acting the
court ² (- Judge DeMasico -) may well have made a major
contribution to public education in Detroit. But the
constitutional authority for assuming legislative and
administrative functions was dubious. The court made only
the most generalized and tenuous findings of
constitutional default as to the eleven remedial

programs. The default, one of large proportions as outlined by the District Court, was political and bureaucratic.

There is, however, a document in the record making clear that at one point the Detroit School Board was conscious of the possible consequences of abdicating its responsibility. In its brief in the Court of Appeals, the Board expressed grave concern as to what the District Court's assumption of the Board's powers would do to the school system financially:

"[O]n May 11, 1976, . . .  the District Court ordered equalization of all school facilities and buildings preparatory to the 1976-77 school term; continuance of the comprehensive construction and renovation program; the institution of a reading and communication skills program together with the necessary in-service training therefore;  the institution of the testing program with the accompanying in-service training; institution of the counseling and career guidance program with the accompanying in-service training; the application of a formula for equal sharing of excess cost of implementing the educational components by the Detroit Board and the State Defendants; institution of the vocational education program; institution of a comprehensive program for bi-lingual/multi-ethnic studies; and institution of the in-service training program for implementation of the Uniform Code of Conduct.

"Even without actual dollar figures, the financial impact of these orders could easily destroy the educational program of the Detroit School system. The financing of these components by the Detroit school system would only mean a concomitant elimination of existing programs.

"It is virtually impossible for the Detroit Board of Education to re-order its priorities when it is already operating on a woefully inadequate budget that cannot provide a minimal quality educational program. Any attempt to redistribute available resources will cause further deterioration in on-going educational programs and will merely result in robbing Peter to pay Paul." App. 189a (emphasis added) 

This is an extraordinary statement as to the potential consequences of the District Court's actions. Only one consideration can account for its presence in a brief filed by a party supporting the decree: the financially pressed Detroit Board evidently was willing to surrender a substantial portion of its decisionmaking authority in return for the prospect of enhanced funding - even while recognizing that the decree could endanger the city's educational program. The District Court had exercised its power to do what the state legislature has chosen not to do - appropriate funds from the state treasury for these particular programs of the Detroit

l.c. / Schools. The statement quoted above was part of the Board's effort to persuade the Court of Appeals that it should sustain that portion of the District Court's order. Also there was hope for more financial aid. Only about \$5,800,000 are at issue on this appeal, but the District Court retained jurisdiction and the Court of Appeals specified that its affirmance of the decree was "without prejudice to the right of the District Court to require a larger proportionate payment by the State of Michigan if found to be required by future developments." App. 180a.

Given all these unusual circumstances, it seems to me that the proper disposition of this case is to dismiss the writ of certiorari as improvidently granted. But being unable to persuade my Brothers to this prudential view, I join in the judgment as a result less likely to prolong the disruption of education in Detroit than a reversal or remand. In doing so, I emphasize the irrelevance of much of an opinion that for the most part addresses a case "that never was."

Review
Evidence

Until the case reached this Court

1. Apparently the plaintiffs did not view, ~~until~~

~~the case reached this Court,~~ the educational components as

necessary or even important elements of a desegregation

plan. These components were never included in plans

submitted by the plaintiffs, and in briefs filed below

there were indications that the plaintiffs viewed some -

if not all - of these components as being "wholly

unrelated to ^{de} segregation of students and faculty in

schools." See plaintiff's brief in the Court of Appeals,

n.
p. 5, 6.

2. The Court's opinion states that the District Court "expressly found that the two components of testing

and counseling, as then administered in Detroit's

schools, were infected with the discriminatory bias of a

segregated school system⁷. Ante, at 8. But the statement

of the District Court relied upon did not make such a

finding with respect to this case. It merely observed:

[to] "In a segregated system many techniques deny equal protection ~~of~~ black students, such as discriminatory testing [and] discriminatory counseling. . . ." App. 36a, quoted ante, at 8. ⁷

The District Court indulged in similar generalizations as

justification for each of the educational components. I

have been unable to identify a single, specific finding of

de jure discrimination in the testing, counseling, guidance or in-service training programs of the Detroit system. Certainly none has been identified that would justify the extent of the remedies ordered [^] had those remedies been imposed by the court sua sponte, rather than at the suggestion of the local school board.

3. There is language in the Court's opinion to the effect that the general finding, made in the initial stage of this litigation, of a de jure segregated school system is sufficient to justify the ordering of the educational components summarized in the Appendix hereto. If so read, it would be difficult to limit the authority of a court - once a school system was found to be segregated - to substitute its judgment for that of the school authorities as to all aspects of school operations. In this case, for example, the District ^{Court} ~~Court~~ has assumed control over the creation, operation, and curriculum of five vocational education ^{centers} and two technical schools. There was no finding of any specific constitutional violation with respect to Detroit's programs in vocational and technical education. Those programs may have been inadequate, but that does not make them unconstitutional. If the Court could assume this

educational role with respect to vocational and technical education, would there be any less justification for restructuring the entire curriculum?

Once federal courts are allowed to enter the thicket of educational policy and practice, where can a principled line be drawn? The answer, I suggest, may be found in today's opinion in Dayton Board of Education v. Brinkman, No. 76-539, ante, at __, which reiterates the settled doctrine that specific violations must be found, and that the Court must attempt to determine "how much incremental segregative effect these violations [have] had" on the particular school function at issue. Slip op., at 13-14.

4. It is clear that the four educational components at issue had not been neglected. The Detroit Board's budget allocations for the 1975-76 school year included a total of \$75,989,000 for the four programs. The additional cost of the expanded programs was estimated to be \$11,645,000, an increase of only 15%. Brief of Petitioners 12, 13.

5. The appendix to this opinion identifies the 11 "educational ^{units} ~~components~~" and indicates the expansive degree to which the District Court assumed responsibility

*g'ee probably
eliminate
Appendix*

for operating the school system. In almost every case, the court required that these programs be "comprehensive" and that plans for implementation ^{to} be reviewed by the court. As the court retains continuing jurisdiction, there is no end ⁱⁿ sight to judicial - rather than legislative and administrative - operation of the Detroit schools. In my view, this is a denigration and weakening of the democratic process.

*Do Not Use**File*Appendix to Concurring Opinion of POWELL, J.

This Appendix identifies and summarize^s the remedial educational and administrative programs ordered by the District Court in its desegregation decrees of August 11, 1975, November 4 and 20, 1975, and May 11, 1976. ^{1/} The order appealed from is that of May 11, 1976, but it specifically provides that "all previous orders of the court, not inconsistent with this judgment, shall remain in full force and effect" App. 148a. These "educational components" were ordered in addition to the customary elements of a desegregation decree, including pupil reassignment the transportation of some 22,000 pupils (to achieve a figure of not less than 30% black students in each school, with two minor exceptions², magnet schools, and provisions with respect to faculty.

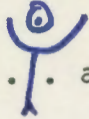
close paren

1. Reading. A "comprehensive program of reading instruction," including "in-service training of reading instructors, the necessary administrative staff to supervise a comprehensive reading program, and the evaluation, monitoring, record-keeping, and reporting

^{1/} In addition to the reported decisions, referred to in the Court's opinion, all of the District Court's opinions and orders discussing and setting forth these remedies³ are contained in the Appendix filed with this case. References herein are to that Appendix.

2/2

necessary to ensure the successful functioning of such a program." App. 127a.

The foregoing program was supplemented in accordance with a recommendation from a "Monitoring Commission" previously appointed by the Court. As supplemented, it provided for "means to deal with the discovery of perceptual difficulties among school children, .. adequate professional vision and hearing screening, and in-service training enabling teachers, first, to determine, whether such screening is necessary for students and second, to apply appropriate teaching strategies to accommodate perceptual difficulties."

Ibid. The Court further ordered "the Board to specify how the mass media and community components will be utilized to reinforce the reading process Ibid.

2. In-service Training. A "comprehensive in-service training program" was ordered, requiring "in-service training in such fields as teacher expectations, human relations, minority culture, testing, the student code of conduct and the administration of discipline in a desegregated system for all school personnel," including staff. App. 73a, 128a.

3. Counseling and Career Guidance. In its opinion and order of August 15, 1975, the Court ordered the school board to develop a "comprehensive program" for counselling and career guidance services "to the junior and senior high students in the Detroit system." App. 81a, 95a. A plan was submitted and, although not fully described except by reference, was ordered by the decree of May 11, 1976, to "be implemented by the joint efforts of the defendants Detroit Board of Education and the State Board of Education." App. 128a, 146a.

4. Testing. The Court ordered that the Detroit Board "shall ^{to} forthwith review all tests currently in use in the Detroit public schools, shall determine whether such tests are 'culture ^{to} fair,' and shall eliminate any racial, ethnic and/or cultural bias inherent in any testing apparatus used in the Detroit school system." App. 130a. In addition, the Board was ordered to "review and revise all instructions and procedures" to assure nondiscriminatory testing; to "develop and institute a program to train teachers and administrators in test administration procedures designed to ensure nondiscriminatory treatment of students"; ^{to} establish evaluation programs with ^{to} "systemwide

performance objectives and the development of objective testing procedures to measure growth for each performance objective." Ibid; see App. 78a-79a.

5. Vocational Education Centers. The city and state Boards were ordered to "create [five] vocational centers devoted to in-depth occupational preparation in the construction trades, transportation and health services." App. 75a. 2/ In order to hasten implementation, two existing facilities were ordered to be converted promptly to use as vocational centers. App. 75a-78a; 139a; 142a.

6. Vocational Education. In connection with the new centers, the Detroit Board was ordered to "institute a vocational education program consistent with all of the memoranda and orders heretofore issued by the court and pursuant to the stipulations and resolutions submitted" in accordance with the court's orders. ~~pursuant to court order~~ App. 147a. See App. 74a, 75a-76. 12/ With respect to the two existing facilities p.c. to be converted to vocational centers, the look court required

2. The August 15, 1975, opinion speaks of the creation of four vocational centers. Apparently these plans were modified, for all later papers look to construction of five such centers. See, e.g., App. 117a.

that the plan "contain detailed curricula"; that the two centers operate on a "city-wide" basis, with a "racial mix . . . approach[ing] a ratio of 60% black and 40% white."

App. 76a. Each of the vocational centers was ordered by *P.C.* the court to add an additional "grade 13 providing advanced offerings both for those students presently enrolled and for other students who have left the system within the past three years." Ibid.

7. Technical Schools. The city and state Boards also were ordered to "create two new technical high schools in which business education will be the central part of the curriculum." App. 75a. The Detroit Board was required to "commission a study of the curricula to be established at the two technical high schools." App. 77a.

Upon the "recommendation of the court-appointed experts," of whom there were four advising the court, the Board was directed to "undertake a study evaluating an alternate form of education following the Parkway Concept." App. 77a-78a.

8. Bilingual/Multi-ethnic Studies. Finding that "[m]ulti-ethnic studies are essential elements of the curriculum of any outstanding school system," the court's *deseg*regation order provided for the inclusion of such

studies in the school curriculum. The Board was "directed to reapply" to the federal government for funds, the application to "include provisions for in-service training for teachers involved in such programs." App. 82a, 147a.

9. Uniform Code of Student Conduct. The Board was directed in some detail to develop and implement a "Uniform Code of Conduct" relating to student rights and responsibilities. App. 79a, 148a.

10. Co-Curricular Activities. The court's order required "the Board [to] develop for the court's approval a specific plan for co-curricular activities including an analysis of the costs involved." It was said that such a program "can acquaint students with the many fine institutions available in the Detroit area, which have indicated their interest in aiding the court in providing quality education to Detroit school children." App. 82a.

11. School-Community Relations. Viewed as an important remedial component of the desegregation program, the Board was ordered "to submit a detailed

plan for a community relations program." App. 80a. In its May 11, 1976, opinion and decree, the court outlined in some detail the structure of the community relations program that it required the Board to implement. A "local school community relations committee [must be established] in each school." App. 132a (emphasis in original). Careful not to leave ~~important~~ matters to chance, the court further required that "each committee shall elect a chairperson and develop procedural rules to govern its sessions." Ibid. In addition to the 20-member committee in each school, with its racial composition paralleling that of the school population, the court ordered a "regional school-community relations committee to coordinate the efforts of the local committees." These committees also must have a chairperson; "[m]eetings shall be held monthly in a facility selected by the regional board, and the regional board shall provide a secretary." App. 133a. Then, a "city-wide school-community relations council" was ordered by the court to "oversee the entire program." Ibid. In addition to prescribing the responsibilities, the court made sure that the citywide council was appropriately structured. It ordered subcommittees to be created as follows:

(i) Public Information; (ii) Monitoring; (iii) Local Committee Liaison; (iv) Community Liaison; (v) Parental Involvement; and (vi) Executive Committee. These subcommittees were ordered to convene twice a month, and the council must "meet in open session at least once a month." App. 131a-135a.

~~92~~

1/ Apparently the plaintiffs did not view, until the case reached this Court, the educational components as necessary or even important elements of a des^gegregation plan. These components were never included in plans submitted by the plaintiffs, and in briefs filed below there were indications that the plaintiff^s viewed some - if not all - of these components as being "wholly unrelated to desegregation of students and faculty in schools".

See plaintiff's brief in the Court of Appeals, p. 5, n. 6.

~~See also their brief pp. 18-19.~~

Dave - Check these Briefs

~~1A~~

2/ The State asserts that the District Court made no ^{specific} finding of constitutional violation (i.e., discriminatory de jure action) with respect to any of the four educational components at issue. My reading of the record comports with the State's position. The Court's opinion, ~~however~~², states that the District Court "expressly found that the two components of testing and counseling, as then administered in Detroit's schools, were infected with the discriminatory bias of a segregated school system" Ante at 8. But the statement of the District Court relied upon did not make such a finding with respect to this case. It merely observed:

"In a segregated system many techniques deny equal protection of black students, such as discriminatory testing [and] discriminatory counseling..."
~~See Ante at~~ App. 36a, quoted ante, at 8.

The District Court indulged in similar generalizations as justification for each of the educational components. ⁹
~~But~~ I have been unable to identify a single, specific finding of de jure discrimination in the testing, counseling, guidance or in-service training programs of the Detroit system. Certainly none has been

identified that would justify the extent of the

(had those remedies been imposed by
remedies ordered, See No. __, supra.

✓ the court sua sponte, rather than at the
suggestion of the local school board.

3/

There is language in the Court's opinion to the effect that the general finding, made in the initial stage of this litigation, of a de jure segregated school system is sufficient to justify the ordering of the educational components summarized in the Appendix hereto. If so read, it would be difficult to limit the authority of a court--once a school system was found to be segregated--to substitute its judgment for that of the school authorities as to all aspects of school operations. In this case, for example, the District Court has assumed control over the creation, operation, and curriculum of ~~four~~^{five} vocational education and two technical schools. There was no finding of any specific constitutional violation with respect to ^{Detroit's programs in} vocational and technical education. ^{Those programs} ~~it~~^{may} have been inadequate, but that does not make ^{them} ~~it~~^{un}constitutional. If the Court could assume this educational role with respect to vocational and technical education, would there be any less justification for restructuring the entire curriculum?

2.

The content and teaching of the social sciences, for example, could well be viewed as supportive of the desegregation process. And if a thirteenth grade is properly added in vocational education (as the court decreed), could the court not have added grades in other courses as well? The District Court was dissatisfied with the counseling and ordered a more comprehensive program. Educators differ as to the appropriate ratio of counselors to pupils, just as they do as to teacher-pupil ratio. Are these professional judgments now to be made by federal courts?

Once federal courts are allowed to enter the "thicket" of educational policy and practice, ~~decision making~~, where can a principled line be drawn? The answer, I suggest, ^{may be found in /} is today's opinion in Dayton Board of Education v. Brinkman, ^{No. 76-539,} ante at __, which reiterates the settled doctrine that specific violations must be found, and that the Court must attempt to determine "how much incremental segregative effect these violations [have] had" on ~~the composition of the school population or on the particular school function~~ at issue. ^{Slip op., at 13-14.}

4/ It is clear that the four educational components
at issue had not been neglected. The ^{Detroit} Board's budget
allocations for the 1975-76 school year included a total
of \$75,989,000 for the four programs. The additional
cost of the expanded programs was estimated to be
\$11,645,000, an increase of only 15%. ^{Brief of Petitioners} ~~Pet. Br. p. 12, 13.~~

54/5 The appendix to this opinion ^{identifying} ~~lies~~ ^{and} ~~only~~ the 11 "educational components" ^{indicates} the expansive degree to which the District Court assumed responsibility for operating the school system.

In addition to the four programs at issue ⁱⁿ this case (reading, in-service training of teachers, counseling and testing), the District Court has assumed effective operational control over vocational education (including the curriculum and the addition of a 13th grade); bi-lingual and multi-ethnic studies; the creation of new vocational education centers and two new technical high schools, ^{and} ongoing oversight over ^{their} curriculum; a code of conduct for students; a co-curricular activities program; and notably detailed instructions as to school-community relations.

no 9 \longleftrightarrow In almost ^{every} ~~each~~ case, the court required that these programs be "comprehensive", and that plans for implementation be reviewed by the court. As the

2.

court retains continuing jurisdiction, there is no
end in sight to judicial -- rather than legislative
and administrative--operation of the Detroit schools.

In my view, this is a denigration and weakening
of the democratic process.

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

file

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 7, 1977

Re: No. 76-447 Milliken v. Bradley

Dear Potter:

I am sending to you and Lewis herewith a proposed rough draft of a letter to the Chief suggesting fairly modest changes in his present circulating opinion in Milliken v. Bradley. My main object has been to differentiate the two cases from one another, and to make the Chief's opinion in Milliken less subject to over-broad construction by overly eager District Judges. I shall be available at almost any time on Wednesday, Thursday, or Friday to jointly discuss these or any counter proposals you may have.

Sincerely,

WHR

Mr. Justice Stewart
Copy to Mr. Justice Powell

WHR:Rough:6/7/77

Dear Chief:

the confusion that prompted us to take these two cases could even be confounded

Although I voted the other way at Conference in this case, I am prepared to at least concur in the result of your opinion in Milliken v. Bradley, and with sufficient inducement could perhaps be persuaded to join it. *The* ~~that~~ inducement would consist of ~~some~~ *that* changes ~~which would differentiate this case~~ *clearly distinguish* from the Dayton case, ~~which unless they are differentiated~~ *so distinguished* ~~and I am concerned~~ from one another may cause confusion coming down about the same time. I think my purpose could be served by adding a sentence or two in text or footnote to your present opinion setting out a little more of the factual background of the "gory details" as originally found by the District Court, so as to show that in Detroit we have the "system-wide" violation which was not proven in Dayton. I would also like to

see a sentence or two of explicit reference to the actions
taken by the state in perpetuating the discriminatory system
in Detroit.

You refer briefly to these violations in your footnote
1, on p. 2, and summarize accurately the extent of what was
found. But I would appreciate seeing you add, either to this
footnote or some other place you deem more appropriate, explicit
reference to the District Court's language describing these
violations:

(1) Extensive use of racially significant
optional attendance zones. 338 F.Supp at
587, 593;

(2) The practice of busing black students
past white schools to a black school further
away, and vice verse. Id., at 588, 593.

(3) The various construction decisions which
certainly had the effect, and permitted the
inference of an intent, to maintain the "dual"
school system in Detroit. Id., at 588-589, 592-593.

I think it would be helpful if in the same footnote, or

somewhere else, you could expressly say that these findings, together with those to which you already refer, described by the District Court as "a de jure segregated public school system", id., at 594, ⁴where a classical example of a "system-wide" violation within a school district, in contrast to the findings of the District Court in the Dayton case.

With respect to the participation of the state in the maintenance of the segregated system, I think it would not only strengthen the opinion, but make it less subject to misuse by District Judges, if you used a sentence to this effect:

"When the Detroit school board attempted to voluntarily initiate an intra-district remedy to ameliorate the effect of the past segregative practices, the Michigan legislature enacted a law forbidding the carrying out of this remedy." 338 F.Supp. at 589.

Sincerely,

STYLISTIC CHANGES

* P. 22
(omission)

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

From: The Chief Justice

Circulated: _____

Recirculated: JUN 7 1977

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-447

William G. Milliken, Governor of the State of Michigan, et al., Petitioners, v. Ronald Bradley et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
---	---	---

[June —, 1977]

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

We granted certiorari in this case to consider two questions concerning the remedial powers of federal district courts in school desegregation cases, namely, whether a District Court can, as part of a desegregation decree, order compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of *de jure* segregation, and whether, consistent with the Eleventh Amendment, a federal court can require state officials found responsible for constitutional violations to bear part of the costs of those programs.

I

This case is before the Court for the second time following our remand, *Milliken v. Bradley*, 418 U. S. 717 (1974) (*Milliken I*); it marks the culmination of seven years of litigation over *de jure* school segregation in the Detroit Public School System. For almost six years, the litigation has focused exclusively on the appropriate remedy to correct official acts of racial discrimination committed by both the Detroit School Board and the State of Michigan. No chal-

lenge is now made by the State or the local school board to the prior findings of *de jure* segregation.¹

A

In the first stage of the remedy proceedings, which we reviewed in *Milliken I, supra*, the District Court, after reviewing several "Detroit-only" desegregation plans, concluded that an interdistrict plan was required to "'achieve the greatest degree of actual desegregation . . . [so that] no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition.'" 345 F. Supp. 914, 918 (ED Mich. 1972), quoted in *Milliken I, supra*, at 734. On those premises, the District Court ordered the parties to submit plans for "metropolitan desegregation" and appointed a nine-member panel to formulate a desegregation plan, which would encompass a "desegregation area" consisting of 54 school districts.

In June 1973, a divided Court of Appeals, sitting en banc, upheld the District Court's determination that a metropolitan-wide plan was essential to bring about what the District Court had described as "the greatest degree of actual desegregation. . . ." 345 F. Supp., at 918. We reversed, holding that the order exceed appropriate limits of federal equitable authority as defined in *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U. S. 1, 24 (1971), by concluding that "as a

¹ The violations of the Detroit Board of Education, which included the improper use of optional attendance zones, racially based transportation of schoolchildren, improper creation and alteration of attendance zones, grade structures, and feeder school patterns, are described in the District Court's initial "Ruling on Issue of Segregation." 338 F. Supp. 582, 587-588 (ED Mich. 1971). The District Court further found that "[t]he State and its agencies . . . have acted directly to control and maintain the pattern of segregation in the Detroit schools." *Id.*, at 589. Those conclusions as to liability were affirmed on appeal, 484 F. 2d 215, 221-241 (CA6 1973), and were not challenged in this Court. 418 U. S. 717 (1974) (*Milliken I*).

matter of substantive constitutional right, [a] particular degree of racial balance" is required, and by subjecting other school districts, uninvolved with and unaffected by any constitutional violations, to the court's remedial powers. 418 U. S. 717 (1974). Proceeding from the *Swann* standard "that the scope of the remedy is determined by the nature and extent of the constitutional violation," we held that, on the record before us, there was no interdistrict violation calling for an interdistrict remedy. Because the District Court's "metropolitan remedy" went beyond the constitutional violation, we remanded the case for further proceedings "leading to prompt formulation of a decree directed to eliminating the segregation found to exist in the Detroit city schools, a remedy which has been delayed since 1970." *Id.*, at 753.²

B

Due to the intervening death of Judge Stephen J. Roth, who had presided over the litigation from the outset, the case on remand was reassigned to Judge Robert E. DeMascio. Judge DeMascio promptly ordered respondent Bradley and the Detroit Board to submit desegregation plans limited to the Detroit school system. On April 1, 1975, both parties submitted their proposed plans. Respondent Bradley's plan was limited solely to pupil reassignment; the proposal called for extensive transportation of students to achieve the plan's

²Separate opinions were filed in *Milliken I*. Mr. Justice STEWART, concurring, stated that the metropolitan-wide remedy contemplated by the District Court was "in error for the simple reason that the remedy . . . was not commensurate with the constitutional violation found." *Id.*, at 754. Dissenting opinions were filed by Mr. Justice Douglas, Mr. Justice WHITE, and Mr. Justice MARSHALL. The dissenting opinions took the position, in brief, that the remedy was appropriate, given the State's undisputed constitutional violations, the control of local education by state authorities, and the manageability of any necessary administrative modifications to effectuate a metropolitan-wide remedy.

ultimate goal of assuring that every school within the district reflected, within 15 percentage points, the racial ratio of the school district as a whole.³ In contrast to respondent Bradley's proposal, the Detroit Board's plan provided for sufficient pupil reassignment to eliminate "racially identifiable white schools," while ensuring that "every child will spend at least a portion of his education in either a neighborhood elementary school or a neighborhood junior and senior high school." *Id.*, at 1116. By eschewing racial ratios for each school, the Board's plan contemplated transportation of fewer students for shorter distances than respondent Bradley's proposal.⁴

In addition to student reassignments, the Board's plan called for implementation of 13 remedial or compensatory programs, referred to in the record as "educational components." These compensatory programs, which were proposed in addition to the plan's provisions for magnet schools and vocational high schools, included three of the four components at issue in this case—in-service training for teachers and administrators, guidance and counseling programs, and revised testing procedures.⁵ Pursuant to the District Court's

³ According to the then most recent statistical data, as of September 27, 1974, 257,396 students were enrolled in the Detroit public schools, a figure which reflected a decrease of 28,116 students in the system since the 1960-1961 school year. 402 F. Supp. 1096, 1106-1107. Of this total student population, 71.5% were Negro and 26.4% were white. The remaining 2.1% was comprised of students of other ethnic groups. *Id.*, at 1106.

⁴ Under respondent Bradley's proposed plan in the remand proceedings, 71,349 students would have required transportation; the Detroit Board's plan, however, provided for transportation of 51,000 students, 20,000 less than the Bradley plan. The Board's plan, which the District Court found infirm because of an impermissible use of "arbitrary" racial quotas, contemplated achieving a 40%-60% representation of Negro students in the identifiably white schools, while leaving untouched in terms of pupil reassignment schools in three of the Detroit system's eight regions. Those three regions, which were located in the central city, were overwhelmingly Negro in racial composition.

⁵ The fourth component, a remedial reading and communications skills

direction, the State Department of Education⁶ on April 21, 1975, submitted a critique of the Detroit Board's desegregation plan; in its report, the Department opined that, although "[i]t is possible that none of the thirteen 'quality education' components is essential . . . to correct the constitutional violation. . . .", eight of the 13 proposed programs nonetheless deserved special consideration in the desegregation setting. Of particular relevance here, the State Board said:

"Within the context of effectuating a pupil desegregation plan, the in-service training [and] guidance and counseling . . . components appear to deserve special emphasis." *Id.*, at 38-39.⁷

After receiving the State Board's critique,⁸ the District Court conducted extensive hearings on the two plans over a

program, was proposed later and was endorsed by the Bradley respondents in a critique of the Detroit Board's proposed plan. See n. 7, *infra*. The Board's plan also called for the following "educational components": school-community relations, parental involvement, student rights and responsibilities, accountability, curriculum design, bilingual education, multiethnic curriculum, and cocurricular activities. 402 F. Supp., at 1118.

⁶ In addition to the State Board of Education, the state defendants include the Governor of Michigan, the Attorney General, the State Superintendent of Public Instruction, and the State Treasurer.

⁷ Two months later, the Bradley respondents also submitted a critique of the Board's plan; while criticizing the Board's proposed educational components on several grounds, respondents nonetheless suggested that a remedial reading program was particularly needed in a desegregation plan. See n. 5, *supra*. The Bradley respondents claimed more generally that the Board's plan failed to inform the court of the then current extent of such programs or components in the school system and that the plan failed to assess "the relatedness of the particular component to desegregation."

⁸ The other state defendants likewise filed objections to the Detroit Board's plan on April 21, 1975. They contended, in brief, that the court's remedy was limited to pupil reassignment to achieve desegregation; hence, the proposed inclusion of educational components was, under their view, excessive.

two-month period. Substantial testimony was adduced with respect to the proposed educational components, including testimony by petitioners' expert witnesses.⁹ Based on this evidence and on reports of court-appointed experts, the District Court on August 11, 1975, approved, in principle, the Detroit Board's inclusion of remedial and compensatory educational components in the desegregation plan.¹⁰

"We find that the majority of the educational components included in the Detroit Board plan are essential for a school district undergoing desegregation. While it is true that the delivery of quality desegregated educational

⁹ For example, Dr. Charles P. Kearney, Associate Superintendent for Research and School Administration for the Michigan Department of Education, gave the following testimony:

"[T]he State Board and the Superintendent indicated that guidance and counselling appeared to deserve special emphasis in a desegregation effort."

"We support the notion of a guidance and counselling effort. We think it certainly does have a relationship in the desegregation effort, we think it deserves special emphasis."

As to in-service training, Dr. Kearney testified that, in his opinion, such a program was required to implement effectively a desegregation plan in Detroit. Transcript, Vol. XXX, at 179, 187. Finally, even though the State's critique did not deem testing as deserving of "special emphasis" in the desegregation plan, Dr. Kearney stated as follows:

"Q: . . . [D]o you see a direct relationship between testing and desegregation?"

"A: If test results were inappropriately used, . . . I think it would have certainly a discriminatory affect [sic] and it would have a negative affect, I'm sure on any kind of desegregation plan being implemented." *Id.*, at 184.

¹⁰ The District Court did not approve of all aspects of the Detroit Board's plan. With respect to educational components, the court said: "The plan as submitted . . . does not distinguish between those components that are necessary to the successful implementation of a desegregation plan and those are not." 402 F. Supp., at 1118. (Emphasis supplied.)

services is the obligation of the school board, nevertheless this court deems it essential to mandate educational components where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation." 402 F. Supp., at 1118.

The District Court expressly found that the two components of testing and counseling, as then administered in Detroit's schools, were infected with the discriminatory bias of a segregated school system:

"In a segregated system many techniques deny equal protection to black students, such as discriminatory testing [and] discriminatory counseling. . . ." *Ibid.*

The District Court also found that, to make desegregation work, it was necessary to include remedial reading programs and in-service training for teachers and administrators:

"In a system undergoing desegregation, teachers will require orientation and training for desegregation. . . . Additionally, we find that . . . comprehensive reading programs are essential . . . to a successful desegregative effort." *Ibid.*

Having established these general principles, the District Court formulated several "remedial guidelines" to govern the Detroit Board's development of a final plan. Declining "to substitute its authority for the authority of elected state and local officials to decide which educational components are beneficial to the school community," *id.*, at 1145, the District Judge laid down the following guidelines with respect to each of the four educational components at issue here:

(a) *Reading.* Concluding that "[t]here is no educational component more directly associated with the process of desegregation than reading," *id.*, at 1138, the District Court directed the General Superintendent of Detroit's schools to institute

a remedial reading and communications skills program "[t]o eradicate the effects of past discrimination. . . ." *Ibid.* The content of the required program was not prescribed by the court; rather, formulation and implementation of the program was left to the Superintendent and to a committee to be selected by him.

(b) *In-Service Training.* The court also directed the Detroit Board to formulate a comprehensive in-service teacher training program, an element "essential to a system undergoing desegregation." *Id.*, at 1139. In the District Court's view, an in-service training program for teachers and administrators, to train professional and instructional personnel to cope with the desegregation process in Detroit, would tend to ensure that all students in a desegregated system would be treated equally by teachers and administrators able, by virtue of special training, to cope with special problems presented by desegregation, and thereby facilitate Detroit's conversion to a unitary system.

(c) *Testing.* Because it found, based on record evidence, that Negro children "are especially affected by biased testing procedures," the District Court determined that, frequently, minority students in Detroit were adversely affected by discriminatory testing procedures. Unless the school system's tests were administered in a way "free from racial, ethnic or cultural bias," the District Court concluded that Negro children in Detroit might thereafter be impeded in their educational growth. *Id.*, at 1142. Accordingly, the court directed the Detroit Board and the State Department of Education to institute a testing program along the lines proposed by the local school board in its original desegregation plan. *Ibid.*

(d) *Counseling and Career Guidance.* Finally, the District Court addressed what expert witnesses had described as psychological pressures on Detroit's students in a system undergoing desegregation. Counselors were required, the court concluded, both to deal with the numerous problems and |

tensions arising in the change from Detroit's dual system, and, more concretely, to counsel students concerning the new vocational and technical school programs available under the plan through the cooperation of state and local officials.¹¹

Nine months later, on May 11, 1976, the District Court entered its final order. Emphasizing that it had "been careful to order only what is essential for a school district undergoing desegregation," Appendix, at 117a, the court ordered the Detroit Board and the state defendants to institute comprehensive programs as to the four educational components by the start of the September 1976 school term. The cost of these four programs, the court concluded, was to be equally borne by the Detroit School Board and the State. To carry out this cost-sharing, the court directed the local board to calculate its highest budget allocation in any prior year for the several educational programs and, from that base, any excess cost attributable to the desegregation plan was to be paid equally by the two groups of defendants responsible for prior constitutional violations, *i. e.*, the Detroit Board and the state defendants.

C

On appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court's order concerning the implementation of and cost-sharing for the four educational components.¹² The Court of Appeals expressly approved the

¹¹ In contrast to their position before the District Court with respect to the four educational components at issue here, the state defendants, through the State Department of Education, voluntarily entered into a stipulation with the Detroit Board on February 24, 1976, under which the State agreed to provide 50% of the construction costs of five vocational centers which the District Court ordered to be established. Appendix, at 141a.

¹² The Court of Appeals disapproved, however, of the District Court's failure to include three of Detroit's eight regions in the pupil assignment plan. See n. 4, *supra*. The Court of Appeals remanded the case to the District Court for further consideration of the three omitted regions,

District Court's findings as to the necessity for these compensatory programs:

"This finding . . . is not clearly erroneous, but to the contrary is supported by ample evidence.

"The need for in-service training of the educational staff and development of non-discriminatory testing is obvious. The former is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. The latter is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools.

"We agree with the District Court that the reading and counseling programs are essential to the effort to combat the effects of segregation. . . . Without the reading and counseling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish." 540 F. 2d 229, 241 (CA6 1976).

After reviewing the record, the Court of Appeals confirmed that the District Court relied largely on the Detroit School Board in formulating the decree:

"This is not a situation where the District Court 'appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution.'" *Id.*, at 241-242, quoting *Keyes v. School District*, 521 F. 2d 465, 483 (CA10 1975), cert. denied, 423 U. S. 1066 (1976).

After upholding the remedial-components portion of the

but declined to set forth guidelines, given the practicabilities of the situation, for the District Court's benefit. Further proceedings were deemed appropriate, however, particularly since the Bradley respondents had previously been granted leave to file a second amended complaint to allege interdistrict violations on the part of the state and local defendants.

plan, the Court of Appeals went on to affirm the District Court's allocation of costs between the state and local officials. Analyzing this Court's decision in *Edelman v. Jordan*, 415 U. S. 651 (1974), which reaffirmed the rule that the Eleventh Amendment bars an ordinary suit for money damages against the State without its consent, the Court of Appeals held that the District Court's order

"... imposes no money judgment on the State of Michigan for past de jure segregation practices. Rather, the order is directed toward the State defendants as a part of a *prospective* plan to comply with a constitutional requirement to eradicate all vestiges of de jure segregation." 540 F. 2d, at 245. (Emphasis supplied.)

The Court of Appeals remanded the case for further consideration of the three central city regions untouched by the District Court's pupil reassignment plan. See n. 12, *supra*.

The state defendants then sought review in this Court, challenging only those portions of the District Court's comprehensive remedial order dealing with the four educational components and with the State's obligation to defray the costs of those programs. We granted certiorari, 429 U. S. — (1976), and we affirm.

II

This Court has not previously addressed directly the question whether federal courts can order remedial education programs as part of a school desegregation decree.¹³ However,

¹³ In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), the Court affirmed an order of the District Court which included a requirement of in-service training programs. 318 F. Supp. 786, 803 (WDNC 1970). However, this Court's opinion did not treat the precise point. In *Keyes v. School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973), the Court expressly avoided passing on the District Court's holding that called for, among other things, "compensatory education in an integrated environment." *Id.*, at 214 n. 18.

the general principles governing our resolution of this issue are well settled by the prior decisions of this Court. In the first case concerning federal courts' remedial powers in eliminating *de jure* school segregation, the Court laid down the basic rule which governs to this day: "In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Brown v. Board of Education*, 349 U. S. 294, 300 (1955) (*Brown II*).

A

Application of those "equitable principles," we have held, requires federal courts to focus upon three factors. In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, at 16. The remedy must therefore be related to "the condition alleged to offend the Constitution. . . ." *Milliken I*, *supra*, at 738.¹⁴ Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.*, at 746.¹⁵ Third, the federal courts in devising a remedy must

¹⁴ Thus, the Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more. *Pasadena City Board of Educ. v. Spangler*, 427 U. S. 424, 434 (1976); *Milliken I*, *supra*, at 763 (WHITE, J., dissenting); *Swann*, *supra*, at 26. An order contemplating the "'substantive right [to a] particular degree of racial balance or mixing'" is therefore infirm as a matter of law. *Spangler supra*, at 434.

¹⁵ Since the ultimate objective of the remedy is to make whole the victims of unlawful conduct, federal courts are authorized to implement plans that promise "realistically to work now." *Green v. County School Board of New Kent County*, 391 U. S. 430, 439 (1968). At the same time, the Court has carefully stated that, to ensure that federal court decrees are characterized by the flexibility and sensitivity required of equitable decrees, consideration must be given

take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. In *Brown II* the Court squarely held that “[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving these problems. . . .” 349 U. S., at 299. (Emphasis supplied.) If, however, “school authorities fail in their affirmative obligations . . . judicial authority may be invoked.” *Swann, supra*, at 15. Once invoked, “the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.” *Ibid.*

B

In challenging the order before us, petitioners do not specifically question that the District Court’s mandated programs are designed, as nearly as practicable, to restore the school-children of Detroit to the position they would have enjoyed absent constitutional violations by state and local officials. And, petitioners do not contend, nor could they, that the prerogatives of the Detroit School Board have been abrogated by the decree, since of course the Detroit School Board itself proposed incorporation of these programs in the first place. Petitioners’ sole contention is that, under *Swann*, the District Court’s order exceeds the scope of the constitutional violation. Invoking our holding in *Milliken I, supra*, petitioners claim that, since the constitutional violation found

to burdensome effects resulting from a decree that could “either risk the health of the children or significantly impinge on the educational process.” *Swann, supra*, at 30-31. Our function, as stated by Mr. JUSTICE WHITE, is “to desegregate an *educational* system in which the races have been kept apart without, at the same time, losing sight of the central *educational* function of the schools.” *Milliken I, supra*, at 764 (dissenting opinion). (Emphasis in original.) In a word, “There are undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases.” *Id.*, at 763. Cf. *Austin Independent School Dist. v. United States*, — U. S. — (1976) (POWELL, J., concurring).

by the District Court was the unlawful segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments. This contention misconceives the principle petitioners seek to invoke, and we reject their argument.

The well-settled principle that the nature and scope of the remedy is to be determined by the violation means simply that federal court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, see *Pasadena City Board of Education v. Spangler*, *supra*, or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in *Milliken I*, *supra*. *Hills v. Gautreaux*, 425 U. S. 284, 292-296 (1976). But where, as here, a constitutional violation has been found, the remedy does not "exceed" the violation, if the remedy is tailored to cure the "condition that offends the Constitution." *Milliken I*, *supra*, at 738. (Emphasis supplied.)

The "condition" offending the Constitution is Detroit's *de jure* segregated school system. This condition, which the District Court was obliged to correct, is not, under our holdings, necessarily or invariably cured completely by simply establishing schools on a nonracial basis, although that is the key step in the remedial process. Our cases recognize that the evil is, more broadly, a dual school system with all its attending inequities. A unanimous Court speaking through Chief Justice Warren held in *Brown I*: "Separate educational facilities are inherently unequal." *Brown v. Board of Education*, 347 U. S. 483, 495 (1954). And in *United States v. Montgomery County Board of Education*, 395 U. S. 225 (1969), the Court concerned itself not with pupil assignment, but with the desegregation of faculty and staff. In doing so, the Court,

there speaking through Mr. Justice Black, focused on the reason for judicial concerns going beyond pupil assignment: "The dispute . . . deals with faculty and staff desegregation, a goal that we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." 395 U. S., at 231-232. (Emphasis supplied.)

Montgomery County therefore stands firmly for the proposition that matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation. Similarly, in *Swann*, we reaffirmed the principle laid down in *Green v. County School Board, supra*, that "existing policy and practice with respect to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system." 402 U. S., at 18. In a word, discriminatory student assignment policies can themselves breed and manifest other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system.

C

In light of the mandate of *Brown I* and *Brown II*, federal courts have, over the years, often required the inclusion of remedial programs in desegregation plans to overcome the inequalities inherent in dual school systems. In 1966, for example, the District Court for the District of South Carolina directed the inclusion of remedial courses to overcome the effects of a segregated system:

"Because the weaknesses of a dual school system may have already affected many children, the court would be remiss in its duty if any desegregation plan were approved which did not provide for remedial education courses. They shall be included in the plan." *Miller v. School*

District Number 2, Clarendon, S. C., 256 F. Supp. 370, 377 (D. S. C. 1966). (Emphasis supplied.)

In 1967, the Fifth Circuit Court of Appeals, then engaged in overseeing the desegregation of numerous school districts in the South, laid down the following requirement in an en banc decision:

"The defendants shall provide remedial education programs which permit students attending or who have previously attended segregated schools *to overcome past inadequacies* in their education." *United States v. Jefferson County Board of Education*, 380 F. 2d 385, 394 (CA5), cert. denied, 389 U. S. 840 (1967). (Emphasis supplied.)

See also *Stell v. Board of Public Education for City of Savannah*, 387 F. 2d 486, 492, 496-497 (CA5 1967); *Hill v. LaFourche Parish School Board*, 291 F. Supp. 819, 823 (ED La. 1967); *Redman v. Terrebone Parish School Board*, 293 F. Supp. 376, 379 (ED La. 1967); *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 489 (MD Ala. 1967); *Graves v. Walton County Board of Education*, 300 F. Supp. 188, 200 (MD Ga. 1968), aff'd, 410 F. 2d 1153 (CA5 1969). Two years later, the Fifth Circuit again adhered to the rule that District Courts could properly seek to overcome the built-in inadequacies of a past segregated educational system:

"The trial court concluded that the school board must establish remedial programs to assist students who previously attended all-Negro schools when those students transfer to formerly all-white schools The remedial programs . . . are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged by the inequities and discrimination inherent in the dual system. The requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the

court's discretion." *Plaquemines Parish School Bd. v. United States*, 415 F. 2d 817, 831 (CA5 1969). (Emphasis supplied.)

In the same year the United States District Court for the Eastern District of Louisiana required school authorities to come forward with a remedial educational program as part of a desegregation plan. "The defendants shall provide remedial education programs which permit students . . . who have previously attended all-Negro schools to overcome past inadequacies in their education." *Smith v. St. Tammany Parish School Board*, 302 F. Supp. 106, 110 (ED La. 1969), aff'd, 448 F. 2d 415 (CA5 1971). See also *Moore v. Tangipahoa Parish School Board*, 304 F. Supp. 244, 253 (ED La. 1969); *Moses v. Washington Parish School Board*, 302 F. Supp. 362, 367 (ED La. 1969).

In the 1970's, the pattern has been essentially the same. The Fifth Circuit has, when the fact situation warranted, continued to call for remedial education programs in desegregation plans. *E. g.*, *United States v. State of Texas*, 447 F. 2d 441, 443 (CA5 1971), application for stay denied, 404 U. S. 1205 (1971) (Black, J., sitting as Circuit Justice). To that end, the approved plan in *United States v. Texas* required:

"[C]urriculum offerings and programs shall include specific educational programs designed to compensate minority group children for unequal educational opportunities resulting from past or present racial and ethnic isolation. . . ." *Id.*, at 448.¹⁶

See also *George v. O'Kelly*, 448 F. 2d 145, 150 (CA5 1971).

¹⁶ In denying the stay application, Mr. Justice Black was untroubled by the underlying order of the District Court:

"It would be very difficult for me to suspend the order of the District Court that, in my view, does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch." 404 U. S., at 1206.

OMISSION

And, as school desegregation litigation emerged in other regions of the country, federal courts have likewise looked in part to remedial programs, when the record supported an order to that effect. See, *e. g.*, *Morgan v. Kerrigan*, 401 F. Supp. 216, 235 (Mass. 1975), *aff'd*, 530 F. 2d 401 (CA1 1976), *cert. denied*, — U. S. — (1976); *Hart v. Community School Board of Brooklyn*, 383 F. Supp. 699, 757 (EDNY 1974), *aff'd*, 512 F. 2d 37 (CA2 1975); *cf. Booker v. Special School Dist. Number 1, Minneapolis, Minn.*, 351 F. Supp. 799 (Minn. 1972).¹⁷

Finally, in addition to other remedial programs, which could, if circumstances warranted, include programs to remedy deficiencies particularly in reading and communication skills, federal courts have expressly ordered special in-service training for teachers, see, *e. g.*, *United States v. State of Missouri*, 523 F. 2d 885, 887 (CA8 1975); *Smith v. St. Tammany Parish School Board*, *supra*, at 110; *Moore v. Tanigpahoa Parish School Board*, *supra*, at 253, and have altered or even suspended testing programs employed by school systems undergoing desegregation. See, *e. g.*, *Singleton v. Jackson Municipal Separate School District*, 419 F. 2d 1211, 1219 (CA5 1969), *cert. denied*, 396 U. S. 1032 (1970); *Lemon v. Bossier Parish School Board*, 444 F. 2d 1400, 1401 (CA5 1971); *Arvizu v. Waco Independent School Dist.*, 373 F. Supp. 1264 (WD Tex. 1973), *rev'd in part on other issues*, 495 F. 2d 499 (CA5 1974).

These cases demonstrate that the District Court in the case before us did not break new ground in approving the School Board's proposed plan. Quite the contrary, acting on abun-

¹⁷ We do not, of course, pass upon the correctness of the particular holdings of cases we did not review. We simply note that these holdings support the broader proposition that, when the record warrants, remedial programs may be, in the exercise of equitable discretion, appropriate remedies to treat the condition that offends the Constitution. Of course, it must be shown that the constitutional violation caused the condition for which remedial programs are mandated.

dant evidence in this record, the District Court approved a remedial plan going beyond mere pupil assignments, as expressly approved by *Swann* and *Montgomery County, supra*. In so doing, the District Court was adopting specific programs proposed by local school authorities, who must be presented to be familiar with the problems and the needs of a system undergoing desegregation.¹⁸ uned

We do not, of course, imply that the order here is a blueprint for other cases. That cannot be; in school desegregation cases, "[t]here is no universal answer to complex problems . . . ; there is obviously no plan that will do the job in every case." *Green, supra*, at 439. Nevertheless, on this record, we are bound to conclude that the degree before us was aptly tailored to remedy the consequences of the constitutional violation. Nor do we find any other reason to believe that the broad and flexible equity powers of the court were abused in this case. The established role of local school authorities was maintained inviolate, and the remedy is indeed remedial. The order does not punish anyone, nor does it impair or jeopardize the educational system in Detroit.¹⁹ The District Court, in short, was true to the principles laid down in *Brown II*:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally,

¹⁸ This Court has from the beginning looked to the District Courts in desegregation cases, familiar as they are with the local situations coming before them, to appraise the efforts of local school authorities to carry out their constitutionally required duties. "Because of their proximity to local conditions . . . the [federal district] courts which originally heard these cases can best perform this judicial appraisal." *Brown II, supra*, at 299.

¹⁹ Indeed, the District Judge took great pains to devise a workable plan. For example, he sought carefully to eliminate burdensome transportation of Negro children to predominantly Negro schools and to prevent the disruption, by massive pupil reassignment, of racially mixed schools in stable neighborhoods which had successfully undergone residential and educational change.

equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." 349 U. S., at 300.

III

Petitioners also contend that the District Court's order, even if otherwise proper, violates the Eleventh Amendment. In their view, the requirement that the state defendants pay one-half the additional costs attributable to the four educational components is, "in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials." Brief, at 34. Arguing from this premise, petitioners conclude that the "award" in this case is barred under this Court's holding in *Edelman v. Jordan*, 415 U. S. 651 (1974).

Edelman involved a suit for money damages against the State, as well as for prospective injunctive relief.²⁰ The suit was brought by an individual who claimed that Illinois officials had improperly withheld disability benefit payments to him and to the members of his class. Applying traditional Eleventh Amendment principles, we held that the suit was barred to the extent the suit sought "the award of an *accrued* monetary liability . . ." which represented "retroactive payments." *Id.*, at 663-664. (Emphasis supplied.) Conversely, the Court held that the suit was proper to the extent it sought "payment of state funds . . . as a necessary consequence of compliance *in the future* with a substantive federal-question determination. . . ." *Id.*, at 668. (Emphasis supplied.)

The decree to share the future costs of educational com-

²⁰ Although the complaint in *Edelman* ostensibly sought only equitable relief, the plaintiff expressly requested "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all [disability] benefits wrongfully withheld." 415 U. S., at 656.

ponents in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman*. That exception, which had its genesis in *Ex parte Young*, 209 U. S. 123 (1908), permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. 415 U. S., at 15. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a *de jure* segregated school system. More precisely, the burden of state officials is that set forth in *Swann*—to take the necessary steps “to eliminate from the public schools all vestiges of state-imposed segregation.” 402 U. S., at 15. The educational components, which the District Court ordered into effect *prospectively*, are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit.²¹

These programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke, as could a retroactive award of money in *Edelman*.²² Rather, by the nature of the antecedent violation, which on this record caused significant deficiencies in communications skills—reading and speaking—the victims of Detroit’s *de jure* segregated system will continue to experience the effects of segrega-

²¹ Unlike the award in *Edelman*, the injunction entered here could not instantaneously restore the victims of unlawful conduct to their rightful condition. Thus, the injunction here looks to the future, not simply to presently compensating victims for conduct and consequences completed in the past.

²² In contrast to *Edelman*, there was no money award here in favor of respondent Bradley or any members of his class. This case simply does not involve individual citizens’ conducting a raid on the state treasury for accrued monetary liability. It is wholly prospective in the same manner that the decree mandates vocational schools and assignments, for example.

tion until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skills of specially trained teachers. That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.²³

Finally, there is no merit to petitioners' claims that the relief ordered here violates the Tenth Amendment and general principles of federalism. The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. Cf. *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976). Nor are principles of federalism abrogated by the decree. The District Court has neither attempted to restructure local governmental entities, nor to mandate a particular method or structure of state or local financing. Cf. *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1 (1973). The District Court has, rather, properly enforced the guarantees of the Fourteenth Amendment consistent with our prior holdings, and in a manner that does not jeopardize the integrity of the structure or functions of state and local government.

The judgment of the Court of Appeals is therefore affirmed.

Affirmed.

²³ Because of our conclusion, we do not reach either of the two alternative arguments in support of the District Court's judgment, namely that the State of Michigan expressly waived its Eleventh Amendment immunity by virtue of Mich. Stat. Annot. § 15.1023 (7), and that the Fourteenth Amendment, *ex proprio vigore*, works a *pro tanto* repeal of the Eleventh Amendment. Cf. *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976). Neither question was addressed by the Court of Appeals, and we therefore do not pass on either issue.

(omission)

Pg. 2, (14), 15, (19-20)

On p. 14, the Chief has added the passage from the WHR letter, almost verbatim except for the final clause — and I think the final clause is OK. The passage on 19-20 is puzzling, but I think the last sentence makes it acceptable as well.
— D.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-447

William G. Milliken, Governor of
the State of Michigan, et al.,
Petitioners,
v.
Ronald Bradley et al.

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

[June —, 1977]

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

We granted certiorari in this case to consider two questions concerning the remedial powers of federal district courts in school desegregation cases, namely, whether a District Court can, as part of a desegregation decree, order compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of *de jure* segregation, and whether, consistent with the Eleventh Amendment, a federal court can require state officials found responsible for constitutional violations to bear part of the costs of those programs.

I

This case is before the Court for the second time following our remand, *Milliken v. Bradley*, 418 U. S. 717 (1974) (*Milliken I*); it marks the culmination of seven years of litigation over *de jure* school segregation in the Detroit Public School System. For almost six years, the litigation has focused exclusively on the appropriate remedy to correct official acts of racial discrimination committed by both the Detroit School Board and the State of Michigan. No chal-

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

From: The Chief Justice

Circulated: _____

Recirculated: JUN 14 1977

lenge is now made by the State or the local school board to the prior findings of *de jure* segregation.¹

A

In the first stage of the remedy proceedings, which we reviewed in *Milliken I, supra*, the District Court, after reviewing several "Detroit-only" desegregation plans, concluded that an interdistrict plan was required to "'achieve the greatest degree of actual desegregation . . . [so that] no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition.'" 345 F. Supp. 914, 918 (ED Mich. 1972), quoted in *Milliken I, supra*, at 734. On those premises, the District Court ordered the parties to submit plans for "metropolitan desegregation" and appointed a nine-member panel to formulate a desegregation plan, which would encompass a "desegregation area" consisting of 54 school districts.

In June 1973, a divided Court of Appeals, sitting en banc, upheld the District Court's determination that a metropolitan-wide plan was essential to bring about what the District Court had described as "the greatest degree of actual desegregation. . . ." 345 F. Supp., at 918. We reversed, holding that

¹ The violations of the Detroit Board of Education, which included the improper use of optional attendance zones, racially based transportation of schoolchildren, improper creation and alteration of attendance zones, grade structures, and feeder school patterns, are described in the District Court's initial "Ruling on Issue of Segregation." 338 F. Supp. 582, 587-588 (ED Mich. 1971). The District Court further found that "[t]he State and its agencies . . . have acted directly to control and maintain the pattern of segregation in the Detroit schools." *Id.*, at 589. Indeed, the court expressly found: "When the Detroit school board attempted to voluntarily initiate an intra-district remedy to ameliorate the effect of the past segregation practices, the Michigan legislature enacted a law forbidding the carrying out of this remedy." *Ibid.* Those conclusions as to liability were affirmed on appeal, 484 F. 2d 215, 221-241 (CA6 1973), and were not challenged in this Court, 418 U. S. 717 (1974) (*Milliken I*).

the order exceeded appropriate limits of federal equitable authority as defined in *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U. S. 1, 24 (1971), by concluding that "as a matter of substantive constitutional right, [a] particular degree of racial balance" is required, and by subjecting other school districts, uninvolved with and unaffected by any constitutional violations, to the court's remedial powers. 418 U. S. 717 (1974). Proceeding from the *Swann* standard "that the scope of the remedy is determined by the nature and extent of the constitutional violation," we held that, on the record before us, there was no interdistrict violation calling for an interdistrict remedy. Because the District Court's "metropolitan remedy" went beyond the constitutional violation, we remanded the case for further proceedings "leading to prompt formulation of a decree directed to eliminating the segregation found to exist in the Detroit city schools, a remedy which has been delayed since 1970." *Id.*, at 753.²

B

Due to the intervening death of Judge Stephen J. Roth, who had presided over the litigation from the outset, the case on remand was reassigned to Judge Robert E. DeMascio. Judge DeMascio promptly ordered respondent Bradley and the Detroit Board to submit desegregation plans limited to the Detroit school system. On April 1, 1975, both parties submitted their proposed plans. Respondent Bradley's plan was

² Separate opinions were filed in *Milliken I*. Mr. Justice STEWART, concurring, stated that the metropolitan-wide remedy contemplated by the District Court was "in error for the simple reason that the remedy . . . was not commensurate with the constitutional violation found." *Id.*, at 754. Dissenting opinions were filed by Mr. Justice Douglas, Mr. Justice WHITE, and Mr. Justice MARSHALL. The dissenting opinions took the position, in brief, that the remedy was appropriate, given the State's undisputed constitutional violations, the control of local education by state authorities, and the manageability of any necessary administrative modifications to effectuate a metropolitan-wide remedy.

limited solely to pupil reassignment; the proposal called for extensive transportation of students to achieve the plan's ultimate goal of assuring that every school within the district reflected, within 15 percentage points, the racial ratio of the school district as a whole.³ In contrast to respondent Bradley's proposal, the Detroit Board's plan provided for sufficient pupil reassignment to eliminate "racially identifiable white schools," while ensuring that "every child will spend at least a portion of his education in either a neighborhood elementary school or a neighborhood junior and senior high school." *Id.*, at 1116. By eschewing racial ratios for each school, the Board's plan contemplated transportation of fewer students for shorter distances than respondent Bradley's proposal.⁴

In addition to student reassignments, the Board's plan called for implementation of 13 remedial or compensatory programs, referred to in the record as "educational components." These compensatory programs, which were proposed in addition to the plan's provisions for magnet schools and vocational high schools, included three of the four components at issue in this case—in-service training for teachers and

³ According to the then most recent statistical data, as of September 27, 1974, 257,396 students were enrolled in the Detroit public schools, a figure which reflected a decrease of 28,116 students in the system since the 1960-1961 school year. 402 F. Supp. 1096, 1106-1107. Of this total student population, 71.5% were Negro and 26.4% were white. The remaining 2.1% was comprised of students of other ethnic groups. *Id.*, at 1106.

⁴ Under respondent Bradley's proposed plan in the remand proceedings, 71,349 students would have required transportation; the Detroit Board's plan, however, provided for transportation of 51,000 students, 20,000 less than the Bradley plan. The Board's plan, which the District Court found infirm because of an impermissible use of "arbitrary" racial quotas, contemplated achieving a 40%-60% representation of Negro students in the identifiably white schools, while leaving untouched in terms of pupil reassignment schools in three of the Detroit system's eight regions. Those three regions, which were located in the central city, were overwhelmingly Negro in racial composition.

administrators, guidance and counseling programs, and revised testing procedures.⁵ Pursuant to the District Court's direction, the State Department of Education⁶ on April 21, 1975, submitted a critique of the Detroit Board's desegregation plan; in its report, the Department opined that, although "[i]t is possible that none of the thirteen 'quality education' components is essential . . . to correct the constitutional violation. . . .", eight of the 13 proposed programs nonetheless deserved special consideration in the desegregation setting. Of particular relevance here, the State Board said:

"Within the context of effectuating a pupil desegregation plan, the in-service training [and] guidance and counseling . . . components appear to deserve special emphasis." *Id.*, at 38-39.⁷

After receiving the State Board's critique,⁸ the District

⁵ The fourth component, a remedial reading and communications skills program, was proposed later and was endorsed by the Bradley respondents in a critique of the Detroit Board's proposed plan. See n. 7, *infra*. The Board's plan also called for the following "educational components": school-community relations, parental involvement, student rights and responsibilities, accountability, curriculum design, bilingual education, multiethnic curriculum, and cocurricular activities. 402 F. Supp., at 1118.

⁶ In addition to the State Board of Education, the state defendants include the Governor of Michigan, the Attorney General, the State Superintendent of Public Instruction, and the State Treasurer.

⁷ Two months later, the Bradley respondents also submitted a critique of the Board's plan; while criticizing the Board's proposed educational components on several grounds, respondents nonetheless suggested that a remedial reading program was particularly needed in a desegregation plan. See n. 5, *supra*. The Bradley respondents claimed more generally that the Board's plan failed to inform the court of the then current extent of such programs or components in the school system and that the plan failed to assess "the relatedness of the particular component to desegregation."

⁸ The other state defendants likewise filed objections to the Detroit Board's plan on April 21, 1975. They contended, in brief, that the court's remedy was limited to pupil reassignment to achieve desegregation;

Court conducted extensive hearings on the two plans over a two-month period. Substantial testimony was adduced with respect to the proposed educational components, including testimony by petitioners' expert witnesses.⁹ Based on this evidence and on reports of court-appointed experts, the District Court on August 11, 1975, approved, in principle, the Detroit Board's inclusion of remedial and compensatory educational components in the desegregation plan.¹⁰

"We find that the majority of the educational components included in the Detroit Board plan are essential

hence, the proposed inclusion of educational components was, under their view, excessive.

⁹ For example, Dr. Charles P. Kearney, Associate Superintendent for Research and School Administration for the Michigan Department of Education, gave the following testimony:

"[T]he State Board and the Superintendent indicated that guidance and counselling appeared to deserve special emphasis in a desegregation effort."

"We support the notion of a guidance and counselling effort. We think it certainly does have a relationship in the desegregation effort, we think it deserves special emphasis."

As to in-service training, Dr. Kearney testified that, in his opinion, such a program was required to implement effectively a desegregation plan in Detroit. Transcript, Vol. XXX, at 179, 187. Finally, even though the State's critique did not deem testing as deserving of "special emphasis" in the desegregation plan, Dr. Kearney stated as follows:

"Q: . . . [D]o you see a direct relationship between testing and desegregation?"

"A: If test results were inappropriately used, . . . I think it would have certainly a discriminatory affect [sic] and it would have a negative affect, I'm sure on any kind of desegregation plan being implemented." *Id.*, at 184.

¹⁰ The District Court did not approve of all aspects of the Detroit Board's plan. With respect to educational components, the court said: "The plan as submitted . . . does not distinguish between those components that are necessary to the successful implementation of a desegregation plan and those are not." 402 F. Supp., at 1118. (Emphasis supplied.)

for a school district undergoing desegregation. While it is true that the delivery of quality desegregated educational services is the obligation of the school board, nevertheless this court deems it essential to mandate educational components where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation." 402 F. Supp., at 1118.

The District Court expressly found that the two components of testing and counseling, as then administered in Detroit's schools, were infected with the discriminatory bias of a segregated school system:

"In a segregated system many techniques deny equal protection to black students, such as discriminatory testing [and] discriminatory counseling. . . ." *Ibid.*

The District Court also found that, to make desegregation work, it was necessary to include remedial reading programs and in-service training for teachers and administrators:

"In a system undergoing desegregation, teachers will require orientation and training for desegregation. . . . Additionally, we find that . . . comprehensive reading programs are essential . . . to a successful desegregative effort." *Ibid.*

Having established these general principles, the District Court formulated several "remedial guidelines" to govern the Detroit Board's development of a final plan. Declining "to substitute its authority for the authority of elected state and local officials to decide which educational components are beneficial to the school community," *id.*, at 1145, the District Judge laid down the following guidelines with respect to each of the four educational components at issue here:

(a) *Reading.* Concluding that "[t]here is no educational component more directly associated with the process of desegregation than reading," *id.*, at 1138, the District Court directed

the General Superintendent of Detroit's schools to institute a remedial reading and communications skills program "[t]o eradicate the effects of past discrimination. . . ." *Ibid.* The content of the required program was not prescribed by the court; rather, formulation and implementation of the program was left to the Superintendent and to a committee to be selected by him.

(b) *In-Service Training.* The court also directed the Detroit Board to formulate a comprehensive in-service teacher training program, an element "essential to a system undergoing desegregation." *Id.*, at 1139. In the District Court's view, an in-service training program for teachers and administrators, to train professional and instructional personnel to cope with the desegregation process in Detroit, would tend to ensure that all students in a desegregated system would be treated equally by teachers and administrators able, by virtue of special training, to cope with special problems presented by desegregation, and thereby facilitate Detroit's conversion to a unitary system.

(c) *Testing.* Because it found, based on record evidence, that Negro children "are especially affected by biased testing procedures," the District Court determined that, frequently, minority students in Detroit were adversely affected by discriminatory testing procedures. Unless the school system's tests were administered in a way "free from racial, ethnic or cultural bias," the District Court concluded that Negro children in Detroit might thereafter be impeded in their educational growth. *Id.*, at 1142. Accordingly, the court directed the Detroit Board and the State Department of Education to institute a testing program along the lines proposed by the local school board in its original desegregation plan. *Ibid.*

(d) *Counseling and Career Guidance.* Finally, the District Court addressed what expert witnesses had described as psychological pressures on Detroit's students in a system undergoing desegregation. Counselors were required, the court concluded, both to deal with the numerous problems and

tensions arising in the change from Detroit's dual system, and, more concretely, to counsel students concerning the new vocational and technical school programs available under the plan through the cooperation of state and local officials.¹¹

Nine months later, on May 11, 1976, the District Court entered its final order. Emphasizing that it had "been careful to order only what is essential for a school district undergoing desegregation," Appendix, at 117a, the court ordered the Detroit Board and the state defendants to institute comprehensive programs as to the four educational components by the start of the September 1976 school term. The cost of these four programs, the court concluded, was to be equally borne by the Detroit School Board and the State. To carry out this cost-sharing, the court directed the local board to calculate its highest budget allocation in any prior year for the several educational programs and, from that base, any excess cost attributable to the desegregation plan was to be paid equally by the two groups of defendants responsible for prior constitutional violations, *i. e.*, the Detroit Board and the state defendants.

C

On appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court's order concerning the implementation of and cost-sharing for the four educational components.¹² The Court of Appeals expressly approved the

¹¹ In contrast to their position before the District Court with respect to the four educational components at issue here, the state defendants, through the State Department of Education, voluntarily entered into a stipulation with the Detroit Board on February 24, 1976, under which the State agreed to provide 50% of the construction costs of five vocational centers which the District Court ordered to be established. Appendix, at 141a.

¹² The Court of Appeals disapproved, however, of the District Court's failure to include three of Detroit's eight regions in the pupil assignment plan. See n. 4, *supra*. The Court of Appeals remanded the case to the District Court for further consideration of the three omitted regions,

District Court's findings as to the necessity for these compensatory programs:

"This finding . . . is not clearly erroneous, but to the contrary is supported by ample evidence.

"The need for in-service training of the educational staff and development of non-discriminatory testing is obvious. The former is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. The latter is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools.

"We agree with the District Court that the reading and counseling programs are essential to the effort to combat the effects of segregation. . . . Without the reading and counseling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish." 540 F. 2d 229, 241 (CA6 1976).

After reviewing the record, the Court of Appeals confirmed that the District Court relied largely on the Detroit School Board in formulating the decree:

"This is not a situation where the District Court 'appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution.'" *Id.*, at 241-242, quoting *Keyes v. School District*, 521 F. 2d 465, 483 (CA10 1975), cert. denied, 423 U. S. 1066 (1976).

After upholding the remedial-components portion of the

but declined to set forth guidelines, given the practicabilities of the situation, for the District Court's benefit. Further proceedings were deemed appropriate, however, particularly since the Bradley respondents had previously been granted leave to file a second amended complaint to allege interdistrict violations on the part of the state and local defendants.

plan, the Court of Appeals went on to affirm the District Court's allocation of costs between the state and local officials. Analyzing this Court's decision in *Edelman v. Jordan*, 415 U. S. 651 (1974), which reaffirmed the rule that the Eleventh Amendment bars an ordinary suit for money damages against the State without its consent, the Court of Appeals held that the District Court's order

"... imposes no money judgment on the State of Michigan for past de jure segregation practices. Rather, the order is directed toward the State defendants as a part of a *prospective* plan to comply with a constitutional requirement to eradicate all vestiges of de jure segregation." 540 F. 2d, at 245. (Emphasis supplied.)

The Court of Appeals remanded the case for further consideration of the three central city regions untouched by the District Court's pupil reassignment plan. See n. 12, *supra*.

The state defendants then sought review in this Court, challenging only those portions of the District Court's comprehensive remedial order dealing with the four educational components and with the State's obligation to defray the costs of those programs. We granted certiorari, 429 U. S. — (1976), and we affirm.

II

This Court has not previously addressed directly the question whether federal courts can order remedial education programs as part of a school desegregation decree.¹³ However,

¹³ In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), the Court affirmed an order of the District Court which included a requirement of in-service training programs. 318 F. Supp. 786, 803 (WDNC 1970). However, this Court's opinion did not treat the precise point. In *Keyes v. School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973), the Court expressly avoided passing on the District Court's holding that called for, among other things, "compensatory education in an integrated environment." *Id.*, at 214 n. 18.

the general principles governing our resolution of this issue are well settled by the prior decisions of this Court. In the first case concerning federal courts' remedial powers in eliminating *de jure* school segregation, the Court laid down the basic rule which governs to this day: "In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Brown v. Board of Education*, 349 U. S. 294, 300 (1955) (*Brown II*).

A

Application of those "equitable principles," we have held, requires federal courts to focus upon three factors. In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, at 16. The remedy must therefore be related to "the condition alleged to offend the Constitution. . . ." *Milliken I*, *supra*, at 738.¹⁴ Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.*, at 746.¹⁵ Third, the federal courts in devising a remedy must

¹⁴ Thus, the Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more. *Pasadena City Board of Educ. v. Spangler*, 427 U. S. 424, 434 (1976); *Milliken I*, *supra*, at 763 (WHITE, J., dissenting); *Swann*, *supra*, at 26. An order contemplating the "'substantive right [to a] particular degree of racial balance or mixing'" is therefore infirm as a matter of law. *Spangler supra*, at 434.

¹⁵ Since the ultimate objective of the remedy is to make whole the victims of unlawful conduct, federal courts are authorized to implement plans that promise "realistically to work now." *Green v. County School Board of New Kent County*, 391 U. S. 430, 439 (1968). At the same time, the Court has carefully stated that, to ensure that federal court decrees are characterized by the flexibility and sensitivity required of equitable decrees, consideration must be given

take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. In *Brown II* the Court squarely held that “[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving these problems. . . .” 349 U. S., at 299. (Emphasis supplied.) If, however, “school authorities fail in their affirmative obligations . . . judicial authority may be invoked.” *Swann, supra*, at 15. Once invoked, “the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.” *Ibid.*

B

In challenging the order before us, petitioners do not specifically question that the District Court’s mandated programs are designed, as nearly as practicable, to restore the school-children of Detroit to the position they would have enjoyed absent constitutional violations by state and local officials. And, petitioners do not contend, nor could they, that the prerogatives of the Detroit School Board have been abrogated by the decree, since of course the Detroit School Board itself proposed incorporation of these programs in the first place. Petitioners’ sole contention is that, under *Swann*, the District Court’s order exceeds the scope of the constitutional violation. Invoking our holding in *Milliken I, supra*, petitioners claim that, since the constitutional violation found

to burdensome effects resulting from a decree that could “either risk the health of the children or significantly impinge on the educational process.” *Swann, supra*, at 30-31. Our function, as stated by Mr. JUSTICE WHITE, is “to desegregate an *educational* system in which the races have been kept apart without, at the same time, losing sight of the central *educational* function of the schools.” *Milliken I, supra*, at 764 (dissenting opinion). (Emphasis in original.) In a word, “There are undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases.” *Id.*, at 763. Cf. *Austin Independent School Dist. v. United States*, — U. S. — (1976) (POWELL, J., concurring).

by the District Court was the unlawful segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments. This contention misconceives the principle petitioners seek to invoke, and we reject their argument.

The well-settled principle that the nature and scope of the remedy is to be determined by the violation means simply that federal court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, see *Pasadena City Board of Education v. Spangler*, *supra*, or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in *Milliken I*, *supra*. *Hills v. Gautreaux*, 425 U. S. 284, 292-296 (1976). But where, as here, a constitutional violation has been found, the remedy does not "exceed" the violation, if the remedy is tailored to cure the "condition that offends the Constitution." *Milliken I*, *supra*, at 738. (Emphasis supplied.)

The "condition" offending the Constitution is Detroit's *de jure* segregated school system, which was so pervasively and persistently segregated that the District Court found that the need for the educational components flowed directly from constitutional violations by both state and local officials. These specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive *de jure* racial segregation.

In the first case invalidating a *de jure* system, a unanimous Court, speaking through Chief Justice Warren, held in *Brown*

I: "Separate educational facilities are inherently unequal." *Brown v. Board of Education*, 347 U. S. 483, 495 (1954). And in *United States v. Montgomery County Board of Education*, 395 U. S. 225 (1969), the Court concerned itself not with pupil assignment, but with the desegregation of faculty and staff as part of the process of dismantling a dual system. In doing so, the Court, there speaking through Mr. Justice Black, focused on the reason for judicial concerns going beyond pupil assignment: "The dispute . . . deals with faculty and staff desegregation, a goal that we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." 395 U. S., at 231-232. (Emphasis supplied.)

Montgomery County therefore stands firmly for the proposition that matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation. Similarly, in *Swann* we reaffirmed the principle laid down in *Green v. County School Board*, *supra*, that "existing policy and practice with respect to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system." 402 U. S., at 18. In a word, discriminatory student assignment policies can themselves breed and manifest other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system.

C

In light of the mandate of *Brown I* and *Brown II*, federal courts have, over the years, often required the inclusion of remedial programs in desegregation plans to overcome the inequalities inherent in dual school systems. In 1966, for example, the District Court for the District of South Carolina

directed the inclusion of remedial courses to overcome the effects of a segregated system:

"Because the weaknesses of a dual school system may have already affected many children, the court would be remiss in its duty if any desegregation plan were approved which did not provide for remedial education courses. They shall be included in the plan." *Miller v. School District Number 2, Clarendon, S. C.*, 256 F. Supp. 370, 377 (D. S. C. 1966). (Emphasis supplied.)

In 1967, the Fifth Circuit Court of Appeals, then engaged in overseeing the desegregation of numerous school districts in the South, laid down the following requirement in an en banc decision:

"The defendants shall provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education." *United States v. Jefferson County Board of Education*, 380 F. 2d 385, 394 (CA5), cert. denied, 389 U. S. 840 (1967). (Emphasis supplied.)

See also *Stell v. Board of Public Education for City of Savannah*, 387 F. 2d 486, 492, 496-497 (CA5 1967); *Hill v. LaFourche Parish School Board*, 291 F. Supp. 819, 823 (ED La. 1967); *Redman v. Terrebone Parish School Board*, 293 F. Supp. 376, 379 (ED La. 1967); *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 489 (MD Ala. 1967); *Graves v. Walton County Board of Education*, 300 F. Supp. 188, 200 (MD Ga. 1968), aff'd, 410 F. 2d 1153 (CA5 1969). Two years later, the Fifth Circuit again adhered to the rule that District Courts could properly seek to overcome the built-in inadequacies of segregated educational system:

"The trial court concluded that the school board must establish remedial programs to assist students who previ-

ously attended all-Negro schools when those students transfer to formerly all-white schools The *remedial programs . . . are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged* by the inequities and discrimination inherent in the dual system. The requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the court's discretion." *Plaquemines Parish School Bd. v. United States*, 415 F. 2d 817, 831 (CA5 1969). (Emphasis supplied.)

In the same year the United States District Court for the Eastern District of Louisiana required school authorities to come forward with a remedial educational program as part of a desegregation plan. "The defendants shall provide remedial education programs which permit students . . . who have previously attended all-Negro schools to overcome past inadequacies in their education." *Smith v. St. Tammany Parish School Board*, 302 F. Supp. 106, 110 (ED La. 1969), *aff'd*, 448 F. 2d 415 (CA5 1971). See also *Moore v. Tangipahoa Parish School Board*, 304 F. Supp. 244, 253 (ED La. 1969); *Moses v. Washington Parish School Board*, 302 F. Supp. 362, 367 (ED La. 1969).

In the 1970's, the pattern has been essentially the same. The Fifth Circuit has, when the fact situation warranted, continued to call for remedial education programs in desegregation plans. *E. g.*, *United States v. State of Texas*, 447 F. 2d 441, 443 (CA5 1971), application for stay denied, 404 U. S. 1205 (1971) (Black, J., sitting as Circuit Justice). To that end, the approved plan in *United States v. Texas* required:

"[C]urriculum offerings and programs shall include specific educational programs designed to compensate minority group children for unequal educational oppor-

tunities resulting from past or present racial and ethnic isolation. . . ." *Id.*, at 448.¹⁶

See also *George v. O'Kelly*, 448 F. 2d 145, 150 (CA5 1971). And, as school desegregation litigation emerged in other regions of the country, federal courts have likewise looked in part to remedial programs, when the record supported an order to that effect. See, e. g., *Morgan v. Kerrigan*, 401 F. Supp. 216, 235 (Mass. 1975), aff'd, 530 F. 2d 401 (CA1 1976), cert. denied, — U. S. — (1976); *Hart v. Community School Board of Brooklyn*, 383 F. Supp. 699, 757 (EDNY 1974), aff'd, 512 F. 2d 37 (CA2 1975); cf. *Booker v. Special School Dist. Number 1, Minneapolis, Minn.*, 351 F. Supp. 799 (Minn. 1972).¹⁷

Finally, in addition to other remedial programs, which could, if circumstances warranted, include programs to remedy deficiencies, particularly in reading and communication skills, federal courts have expressly ordered special in-service training for teachers, see, e. g., *United States v. State of Missouri*, 523 F. 2d 885, 887 (CA8 1975); *Smith v. St. Tammany Parish School Board*, *supra*, at 110; *Moore v. Tanigpahoa Parish School Board*, *supra*, at 253, and have altered or even suspended testing programs employed by school systems undergoing desegregation. See, e. g., *Single-*

¹⁶ In denying the stay application, Mr. Justice Black was untroubled by the underlying order of the District Court:

"It would be very difficult for me to suspend the order of the District Court that, in my view, does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch." 404 U. S., at 1206.

¹⁷ We do not, of course, pass upon the correctness of the particular holdings of cases we did not review. We simply note that these holdings support the broader proposition that, when the record warrants, remedial programs may be, in the exercise of equitable discretion, appropriate remedies to treat the condition that offends the Constitution. Of course, it must be shown that the constitutional violation caused the condition for which remedial programs are mandated.

ton v. Jackson Municipal Separate School District, 419 F. 2d 1211, 1219 (CA5 1969), cert. denied, 396 U. S. 1032 (1970); *Lemon v. Bossier Parish School Board*, 444 F. 2d 1400, 1401 (CA5 1971); *Arvizu v. Waco Independent School Dist.*, 373 F. Supp. 1264 (WD Tex. 1973), rev'd in part on other issues, 495 F. 2d 499 (CA5 1974).

These cases demonstrate that the District Court in the case before us did not break new ground in approving the School Board's proposed plan. Quite the contrary, acting on abundant evidence in this record, the District Court approved a remedial plan going beyond mere pupil assignments, as expressly approved by *Swann* and *Montgomery County, supra*. In so doing, the District Court was adopting specific programs proposed by local school authorities, who must be presumed to be familiar with the problems and the needs of a system undergoing desegregation.¹⁸

We do not, of course, imply that the order here is a blueprint for other cases. That cannot be; in school desegregation cases, "[t]here is no universal answer to complex problems . . . ; there is obviously no plan that will do the job in every case." *Green, supra*, at 439. On this record, however, we are bound to conclude that the decree before us was aptly tailored to remedy the consequences of the constitutional violation. Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their isolated environment. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete,

¹⁸ This Court has from the beginning looked to the District Courts in desegregation cases, familiar as they are with the local situations coming before them, to appraise the efforts of local school authorities to carry out their constitutionally required duties. "Because of their proximity to local conditions . . . the [federal district] courts which originally heard these cases can best perform this judicial appraisal." *Brown II, supra*, at 299.

if they are to enter and be a part of that community. This is not peculiar to race; it can affect any children who, as a group, are isolated by force of law from the mainstream. Cf. *Lau v. Nichols*, 414 U. S. 563 (1974).

Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. In short, the speech habits acquired in a segregated system do not banish simply by moving the child to a desegregated school. The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task. This is what the District Judge in the case drew from the record before him as to the consequences of Detroit's *de jure* system, and we cannot conclude that the remedies decreed exceeded the scope of the violations found.

Nor do we find any other reason to believe that the broad and flexible equity powers of the court were abused in this case. The established role of local school authorities was maintained inviolate, and the remedy is indeed remedial. The order does not punish anyone, nor does it impair or jeopardize the educational system in Detroit.¹⁰ The District Court, in short, was true to the principle laid down in *Brown II*:

"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. These cases call

¹⁰ Indeed, the District Judge took great pains to devise a workable plan. For example, he sought carefully to eliminate burdensome transportation of Negro children to predominantly Negro schools and to prevent the disruption, by massive pupil reassignment, of racially mixed schools in stable neighborhoods which had successfully undergone residential and educational change.

for the exercise of these traditional attributes of equity power." 349 U. S., at 300.

III

Petitioners also contend that the District Court's order, even if otherwise proper, violates the Eleventh Amendment. In their view, the requirement that the state defendants pay one-half the additional costs attributable to the four educational components is, "in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials." Brief, at 34. Arguing from this premise, petitioners conclude that the "award" in this case is barred under this Court's holding in *Edelman v. Jordan*, 415 U. S. 651 (1974).

Edelman involved a suit for money damages against the State, as well as for prospective injunctive relief.²⁰ The suit was brought by an individual who claimed that Illinois officials had improperly withheld disability benefit payments to him and to the members of his class. Applying traditional Eleventh Amendment principles, we held that the suit was barred to the extent the suit sought "the award of an *accrued* monetary liability . . ." which represented "retroactive payments." *Id.*, at 663-664. (Emphasis supplied.) Conversely, the Court held that the suit was proper to the extent it sought "payment of state funds . . . as a necessary consequence of compliance *in the future* with a substantive federal-question determination. . . ." *Id.*, at 668. (Emphasis supplied.)

The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman*. That exception, which had its genesis in *Ex parte Young*, 209 U. S. 123

²⁰ Although the complaint in *Edelman* ostensibly sought only equitable relief, the plaintiff expressly requested "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all [disability] benefits wrongfully withheld." 415 U. S., at 656.

(1908), permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. 415 U. S., at 15. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a *de jure* segregated school system. More precisely, the burden of state officials is that set forth in *Swann*—to take the necessary steps “to eliminate from the public schools all vestiges of state-imposed segregation.” 402 U. S., at 15. The educational components, which the District Court ordered into effect *prospectively*, are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit.²¹

These programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke, as could a retroactive award of money in *Edelman*.²² Rather, by the nature of the antecedent violation, which on this record caused significant deficiencies in communications skills—reading and speaking—the victims of Detroit’s *de jure* segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial

²¹ Unlike the award in *Edelman*, the injunction entered here could not instantaneously restore the victims of unlawful conduct to their rightful condition. Thus, the injunction here looks to the future, not simply to presently compensating victims for conduct and consequences completed in the past.

²² In contrast to *Edelman*, there was no money award here in favor of respondent Bradley or any members of his class. This case simply does not involve individual citizens’ conducting a raid on the state treasury for accrued monetary liability. It is wholly prospective in the same manner that the decree mandates vocational schools and assignments, for example.

fiat; they will require time, patience, and the skills of specially trained teachers. That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.²⁸

Finally, there is no merit to petitioners' claims that the relief ordered here violates the Tenth Amendment and general principles of federalism. The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. Cf. *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976). Nor are principles of federalism abrogated by the decree. The District Court has neither attempted to restructure local governmental entities, nor to mandate a particular method or structure of state or local financing. Cf. *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1 (1973). The District Court has, rather, properly enforced the guarantees of the Fourteenth Amendment consistent with our prior holdings, and in a manner that does not jeopardize the integrity of the structure or functions of state and local government.

The judgment of the Court of Appeals is therefore affirmed.

Affirmed.

²⁸ Because of our conclusion, we do not reach either of the two alternative arguments in support of the District Court's judgment, namely that the State of Michigan expressly waived its Eleventh Amendment immunity by virtue of Mich. Stat. Annot. § 15.1023 (7), and that the Fourteenth Amendment, *ex proprio vigore*, works a *pro tanto* repeal of the Eleventh Amendment. Cf. *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976). Neither question was addressed by the Court of Appeals, and we therefore do not pass on either issue.

~~Sally - renew this~~

FN 2

2. In addition to ^{these} ~~the~~ four educational components, ^{some} ~~at~~ issue before this Court, there were seven other educational directives that are not contested here. Perhaps the most expansive was the ^{District Court's order} ~~direction~~ that the City and State Boards "create [five] vocational centers" devoted to in-depth occupational preparation in the construction ^{trades,} ~~phase,~~ transportation and health services". App. 75a. ^{As} noted in the text ^{infra,} ~~above,~~ a compromise was reached as to these and the State entered into a stipulation obligating it to share the cost of ^{providing these new centers} ~~construction~~. See App. 139a-141a. ordered by the District Court included: (i) The other educational components ~~related to the~~ ^{organizing}

of "two new technical high schools in which business

education will be the central part of the curriculum"

(App. 75a); ⁽ⁱⁱ⁾ ~~prescribing the~~ ^(prescribed by the court in some detail) ~~curriculum~~ ^{a new} ~~of~~ ^{for} the vocational

education courses in the Detroit schools, including

the requirement that an additional "grade 13" be added

to afford expanded educational opportunities (App. 76a);

⁽ⁱⁱⁱ⁾ ~~the ordering of~~ ^{the} inclusion of ~~the~~ "[m]ulti-ethnic studies" ^{in the curriculum}

~~including the request~~ ^{with a} ~~of~~ ^{for} federal funds to

support "in-service training for teachers involved in such

programs" (App. 82a, 147a); ^(iv) ~~directing the Board to develop~~
~~and implement a~~ ^a "Uniform Code of Conduct," ^{which the Board was ordered to develop} pursuant to

guidelines established by the court (App. 79a, 148a);

~~requiring that the Board "develop for the court's~~

^(v) ~~approval~~ ^(with other artistic and educational institutions in the area) a specific plan for "co-curricular activities"

^{to be developed by the Board and submitted for court approval} ~~(App. 82a); and a remarkably detailed~~ ^a "community relations

program" (App. 80a, 132a). In most, if not all, instances

the court ordered that each of these programs be

"comprehensive", and that reports be made to the court.

The details of ~~this extensive educational oversight~~ ^{the foregoing} are

set forth in the opinions and decrees of August 11, 1975,

November 4 and 20, 1975, and May 11, 1976. ~~See Appendix~~

~~filed in this Court.~~ One may doubt whether

there is any precedent for a federal court exercising such extensive control over ^{the} purely educational responsibilities of a school board.

↑
Cite cases
in F. Supp.
check about

check
led are

and implement a "Uniform Code of Conduct," pursuant to

guidelines established by the court (App. 79a, 148a);

~~requiring~~ requiring that the Board "develop for the court's

(v) *with other artistic and educational institutions in the area*

approval a specific plan for co-curricular activities

(App. 82a) and a remarkably detailed "community relations

program" (App. 80a, 132a). In most, if not all, instances

the court ordered that each of these programs be

"comprehensive" and that reports be made to the court.

The details of ~~this extensive educational oversight~~ *The foregoing* are

set forth in the opinions and decrees of August 11, 1975,

November 4 and 20, 1975, and May 11, 1976. ~~See Appendix~~

~~filed in this Court.~~ *One may doubt whether*

there is any precedent for a federal court exercising such extensive control over the purely educational responsibilities of a school board.

↑
Cite cases
in F. Supp.
& check
quater about
the S/Bd.
Ask C.F.'s clerk
if opinions
were reported
& if they were
changed.

to be developed
by the Board
and submitted
for court
approval

prescribed in
remarkable
detail by
the court.

lfp/ss 6/15/77

Note

4. ~~2~~. The Court's opinion ~~further~~ states, for example, that the District Court "expressly found that the two components of testing and counseling, as then administered in Detroit's schools, were infected with the discriminatory bias of a segregated school system." Ante, at 7.

4. (copy from p 8 of text)

3/ It merits emphasizing that the School Board invited this assumption of power. Indeed, the District Court had complimented the Board on its willingness to "implement any desegregation order the Court may issue". App. 49a. But at one point there were serious second thoughts.

consequences of ^{the having agreed} agreeing to such extensive

~~federal court oversight.~~ In its brief in the

Court of Appeals, the Board expressed grave concern

as to what the District Court's assumption of the

Board's powers could do to the school system

financially:

"[O]n May 11, 1976, . . . ↔
the District Court ordered equalization of
all school facilities and buildings preparatory
to the 1976-77 school term; continuance of the
comprehensive construction and renovation
program; the institution of a reading and
communication skills program together with the
necessary in-service training therefor; the
institution of the testing program with the
accompanying in-service training; institution
of the counseling and career guidance program
with the accompanying in-service training; the
application of a formula for equal sharing of
excess cost of implementing the educational
components by the Detroit Board and the State
Defendants; institution of the vocational
education program; institution of a compre-
hensive program for bi-lingual/multi-ethnic
studies; and institution of the in-service
training program for implementation of the
Uniform Code of Conduct.

[;]

"Even without actual dollar figures, the
financial impact of these orders could easily
destroy the educational program of the Detroit
School system. The financing of these compo-
nents by the Detroit school system would only
mean a concomitant elimination of existing
programs.

"It is virtually impossible for the Detroit
Board of Education to re-order its priorities
when it is already operating on a woefully
inadequate budget that cannot provide a minimal
quality educational program. Any attempt to
redistribute available resources will cause
further deterioration in on-going educational
programs and will merely result in robbing Peter
to pay Paul." App. 189a (emphasis added) ○

*Implementation of the
educational components
summarized in N. 2, supra*

lfp/ss 6/17/77

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 17 1977

Recirculated: _____

File

2 PROOFS

*First draft
circulated*

No. 76-447 MILLIKEN v. BRADLEY

MR. JUSTICE POWELL, concurring in the judgment.

The Court's opinion addresses this case as if it were conventional desegregation litigation. The wide-ranging opinion reiterates the familiar general principles drawn from the line of precedents commencing with Brown v. Board of Education, 347 U.S. 483 (1954), and including today's decision in Dayton Board of Education v. Brinkman, post, at _____. One has to read the opinion closely to understand that the case, as it finally reaches us, is wholly different from any prior case. I write to emphasize its uniqueness, and the consequent limited precedential effect of much of the Court's opinion.

Normally, the plaintiffs in this type of litigation are students, parents and supporting organizations who desire to desegregate a school system alleged to be the product, in whole or in part, of de jure segregative action by the public school authorities. The principal defendant is usually the local board of education or school board. Occasionally, the state board

of education and public officials are joined as defendants. This protracted litigation commenced in 1970 in this conventional mold. In the intervening years, however, the posture of the litigation has changed so drastically as to leave it largely a friendly suit between the plaintiffs (respondents Bradley, et al.) and the original principal defendant, the Detroit School Board. These parties, antagonistic for years, have now joined forces apparently for the purpose of extracting funds from the state treasury. As between the original principal parties - the plaintiffs and the Detroit School Board - no case or controversy remains on the issues now before us. The Board enthusiastically supports the entire desegregation decree even though the decree intrudes deeply on the Board's own decisionmaking powers. Indeed, the present School Board proposed most of the educational components included in the District Court's decree. The plaintiffs originally favored a desegregation plan that would have required more extensive transportation of pupils, and they did not initially propose or endorse the educational components. In this Court, however, the plaintiffs also support the decree of the District Court¹ as affirmed by the Court of Appeals.

Thus the only complaining party is the State of Michigan (acting through state officials), and its basic

complaint concerns money, not desegregation. It has been ordered to pay about \$5,800,000 to the Detroit School Board. This is one-half the estimated "excess cost" of four of the ¹⁴~~eleven~~ educational components included in the desegregation decree: remedial reading, in-service training of teachers, testing, and counseling.² The State, understandably anxious to preserve the state budget from federal court control or interference, now contests the decree on two grounds.

First, it is argued that the order to pay state funds violates the Eleventh Amendment and principles of federalism. Ordinarily a federal court's order that a state pay unappropriated funds to a locality would raise the gravest constitutional issues. See generally San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40-42 (1973); National League of Cities v. Usery, 426 U.S. 833 (1976). But here, in a finding no longer subject to review, the State has been adjudged a participant in the constitutional violations, and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate.

The State's second argument is one that normally would be advanced vigorously by the school board. Relying on the established principle that the scope of the remedy in a desegregation case is determined and limited by the

extent of the identified constitutional violations, Dayton Board of Education, supra, at ____; Hills v. Gautreaux, 425 U.S. 284, 293-294 (1976); Milliken v. Bradley, 418 U.S. 717, 744 (1974); Austin Independent School Dist. v. United States, 97 S. Ct. 517 (1976) (Powell, J., concurring), the State argues that the District Court erred in ordering the system-wide expansion of the four educational components mentioned above. It contends that there has been no finding of a constitutional violation with respect to the past operation of any of these programs, and it insists that without more specifically focused findings of this sort, the decree exceeded the court's powers.

This argument is by no means a frivolous one. But the context in which it is presented is so unusual that it would be appropriate to dismiss the writ as improvidently granted. The argument is advanced by the State and not by the party primarily concerned. The educational programs at issue are standard and widely approved in public education. The State Board normally would be enthusiastic over enhancement of these programs so long as the local school board could fund them without requiring financial aid from the State. It is equally evident that the State probably would resist a federal court order requiring it to pay unappropriated state funds to the local school board regardless of whether violations by the local board justified the remedy. The State's

interest in protecting its own budget - limited by legislative appropriations - is a genuine one. But it is not an interest that is related, except fortuitously, to a claim that the desegregation remedy may have exceeded the extent of the violations.

The State's reliance on the remedy issue contains a further weakness, emphasizing the unusual character of this case. There is no indication that the State objected - certainly, it does not object here - to the inclusion in the District Court's decree of the seven other educational components. See n. 2, supra. Indeed, the State expressly agreed to one of the most expensive components, the establishment of vocational education centers, in a stipulation obligating it to share the cost of construction equally with the Detroit Board. See App. 139a-141a. Furthermore, the District Court's decree largely embodies the original recommendation of the Detroit Board. Since local school boards "have the primary responsibility for elucidating, assessing, and solving [the] problems" generated by "[f]ull implementation of . . . constitutional principles" in the local setting, Brown v. Board of Education, 349 U.S. 294, 299 (1955), the State's limited challenge here is particularly lacking in force.

Moreover, the District Court was faced with a school district in exceptional disarray. It found the

structure of the Detroit school system "chaotic and incapable of effective administration." App. 124a. The "general superintendent has little direct authority."

Ibid. Each of the eight regional boards may be preoccupied with "distribut[ing] local board patronage." App. 125a. The "local boards have diverted resources that would otherwise have been available for educational purposes to build new offices and other facilities to house this administrative overload." Ibid. The District Court continued:

"In addition to the administrative chaos, we know of no other school system that is so enmeshed in politics. . . . Rather than devoting themselves to the educational system and the desegregative process, board members are busily engaged in politics not only to assure their own re-election but also to defeat others with whom they disagree." App. 125a-126a (footnote omitted).

Referring again to the "political paralysis" and "inefficient bureaucracy" of the system, the court also noted - discouragingly - that the election then approaching "may well [result in] a board of education consisting of members possessing no experience in education." App. 126a. In this quite remarkable situation, it is perhaps not surprising that the District Court virtually assumed the role of school superintendent and school board.³

Given the foregoing unique circumstances, it seems to me that the proper disposition of this case is to

dismiss the writ of certiorari as improvidently granted. But being unable to persuade my Brothers to this prudential view, I join in the judgment as a result less likely to prolong the disruption of education in Detroit than a reversal or remand. The District Court did, after all, make findings relating the educational remedies directly to specific constitutional violations. In my view, it is at least arguable that the findings in this respect were too generalized to meet the standards prescribed by this Court. See Dayton Board of Education, supra. But the majority views the record as justifying a finding that "the need for the educational components flowed directly from the constitutional violations by both state and local officials." Ante, at 14.⁴ On that view of the record, our settled doctrine requiring that the remedy be carefully tailored to fit identified constitutional violations is not disturbed by today's result. I therefore concur in the judgment.

1. ✓ Until the case reached this Court the plaintiffs apparently did not view the educational components as necessary or even important elements of a desegregation plan. These components were not included in plans submitted by the plaintiffs, and in briefs filed below there were indications that the plaintiffs viewed some - if not all - of these components as being "wholly unrelated to desegregation of students and faculty in schools." See plaintiff's brief in the Court of Appeals, at 5, n. 6.

6 2. ✓ In addition to these four components, there were some seven other educational directives that are not contested here. Perhaps the most expansive was the District Court's order that the City and State Boards create five vocational centers "devoted to in-depth occupational preparation in the construction trades, transportation and health services." App. 75a. As noted in the text infra, a compromise was reached as to these centers and the State entered into a stipulation obligating it to share the cost of providing them. See App. 139a-142a. The other educational components ordered by the District Court included: (i) "two new technical high schools in which business education will be the central part of the curriculum" (App. 75a); (ii) a new curriculum prescribed by the court in some detail for the vocational education courses in the Detroit schools,

including the requirement that an additional "grade 13" be added to afford expanded educational opportunities (App. 76a); (iii) the inclusion of "multi-ethnic studies" in the curriculum, with a request for federal funds to support "in-service training for teachers involved in such programs" (App. 82a, 147a); (iv) a "Uniform Code of Conduct," which the Board was ordered to develop pursuant to guidelines established by the court (App. 79a, 148a); (v) a specific plan for "co-curricular activities" with other artistic and educational institutions in the area, to be developed by the Board and submitted for court approval (App. 82a); and (vi) a "community relations program" prescribed in remarkable detail by the court. (App. 80a, 132a).

In most, if not all, instances the court ordered that each of these programs be "comprehensive," and that reports be made to the court. The details of the foregoing are set forth in the opinions and decrees of August 1, 1975, November 4 and 20, 1975, and May 11, 1976. One may doubt whether there is any precedent for a federal court exercising such extensive control over the purely educational responsibilities of a school board.

3. It merits emphasizing that the School Board invited this assumption of power. Indeed, the District Court had complimented the Board on its willingness to "implement any desegregation order the Court may issue".

App. 49a. But at one point there were serious second thoughts. In its brief in the Court of Appeals, the Board expressed grave concern as to what the District Court's assumption of the Board's powers could do to the school system financially:

"[O]n May 11, 1976 . . . the District Court ordered equalization of all school facilities and buildings preparatory to the 1976-77 school term; continuance of the comprehensive construction and renovation program; [and implementation of the educational components summarized in n. 2, supra]. . . .

"Even without actual dollar figures, the financial impact of these orders could easily destroy the educational program of the Detroit School system. The financing of these components by the Detroit school system would only mean a concomittant elimination of existing programs.

It is virtually impossible for the Detroit Board of Education to re-order its priorities when it is already operating on a woefully inadequate budget that cannot provide a minimal quality educational program. Any attempt to redistribute available resources will cause further deterioration in on-going educational programs and will merely result in robbing Peter to pay Paul." App. 189a (emphasis added).

To say the least, the financial impact of the court's decree was profoundly disturbing. But apparently the financially pressed Board was willing to surrender a substantial portion of its decisionmaking authority in return for the prospect of enhanced state funding. For by the time it made this statement to the Court of Appeals, the Board knew that the District Court had exercised its

power to do what the state legislature had chosen not to do: appropriate funds from the state treasury for these particular programs of the Detroit schools.

4. The Court's opinion states, for example, that the District Court "expressly found that the two components of testing and counseling, as then administered in Detroit's schools, were infected with the discriminatory bias of a segregated school system." Ante, at 7.

lfp/ss 6/17/77

*Changes to be
made - p 7*

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 17 1977

Recirculated: _____

No. 76-447 MILLIKEN v. BRADLEY

MR. JUSTICE POWELL, concurring in the judgment.

The Court's opinion addresses this case as if it were conventional desegregation litigation. The wide-ranging opinion reiterates the familiar general principles drawn from the line of precedents commencing with Brown v. Board of Education, 347 U.S. 483 (1954), and including today's decision in Dayton Board of Education v. Brinkman, post, at _____. One has to read the opinion closely to understand that the case, as it finally reaches us, is wholly different from any prior case. I write to emphasize its uniqueness, and the consequent limited precedential effect of much of the Court's opinion.

Normally, the plaintiffs in this type of litigation are students, parents and supporting organizations who desire to desegregate a school system alleged to be the product, in whole or in part, of de jure segregative action by the public school authorities. The principal defendant is usually the local board of education or school board. Occasionally, the state board

of education and public officials are joined as defendants. This protracted litigation commenced in 1970 in this conventional mold. In the intervening years, however, the posture of the litigation has changed so drastically as to leave it largely a friendly suit between the plaintiffs (respondents Bradley, et al.) and the original principal defendant, the Detroit School Board. These parties, antagonistic for years, have now joined forces apparently for the purpose of extracting funds from the state treasury. As between the original principal parties - the plaintiffs and the Detroit School Board - no case or controversy remains on the issues now before us. The Board enthusiastically supports the entire desegregation decree even though the decree intrudes deeply on the Board's own decisionmaking powers. Indeed, the present School Board proposed most of the educational components included in the District Court's decree. The plaintiffs originally favored a desegregation plan that would have required more extensive transportation of pupils, and they did not initially propose or endorse the educational components. In this Court, however, the plaintiffs also support the decree of the District Court¹ as affirmed by the Court of Appeals.

Thus the only complaining party is the State of Michigan (acting through state officials), and its basic

complaint concerns money, not desegregation. It has been ordered to pay about \$5,800,000 to the Detroit School Board. This is one-half the estimated "excess cost" of four of the eleven educational components included in the desegregation decree: remedial reading, in-service training of teachers, testing, and counseling.² The State, understandably anxious to preserve the state budget from federal court control or interference, now contests the decree on two grounds.

First, it is argued that the order to pay state funds violates the Eleventh Amendment and principles of federalism. Ordinarily a federal court's order that a state pay unappropriated funds to a locality would raise the gravest constitutional issues. See generally San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40-42 (1973); National League of Cities v. Usery, 426 U.S. 833 (1976). But here, in a finding no longer subject to review, the State has been adjudged a participant in the constitutional violations, and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate.

The State's second argument is one that normally would be advanced vigorously by the school board. Relying on the established principle that the scope of the remedy in a desegregation case is determined and limited by the

extent of the identified constitutional violations, Dayton Board of Education, supra, at ____; Hills v. Gautreaux, 425 U.S. 284, 293-294 (1976); Milliken v. Bradley, 418 U.S. 717, 744 (1974); Austin Independent School Dist. v. United States, 97 S. Ct. 517 (1976) (Powell, J., concurring), the State argues that the District Court erred in ordering the system-wide expansion of the four educational components mentioned above. It contends that there has been no finding of a constitutional violation with respect to the past operation of any of these programs, and it insists that without more specifically focused findings of this sort, the decree exceeded the court's powers.

This argument is by no means a frivolous one. But the context in which it is presented is so unusual that it would be appropriate to dismiss the writ as improvidently granted. The argument is advanced by the State and not by the party primarily concerned. The educational programs at issue are standard and widely approved in public education. The State Board normally would be enthusiastic over enhancement of these programs so long as the local school board could fund them without requiring financial aid from the State. It is equally evident that the State probably would resist a federal court order requiring it to pay unappropriated state funds to the local school board regardless of whether violations by the local board justified the remedy. The State's

interest in protecting its own budget - limited by legislative appropriations - is a genuine one. But it is not an interest that is related, except fortuitously, to a claim that the desegregation remedy may have exceeded the extent of the violations.

The State's reliance on the remedy issue contains a further weakness, emphasizing the unusual character of this case. There is no indication that the State objected - certainly, it does not object here - to the inclusion in the District Court's decree of the seven other educational components. See n. 2, supra. Indeed, the State expressly agreed to one of the most expensive components, the establishment of vocational education centers, in a stipulation obligating it to share the cost of construction equally with the Detroit Board. See App. 139a-141a. Furthermore, the District Court's decree largely embodies the original recommendation of the Detroit Board. Since local school boards "have the primary responsibility for elucidating, assessing, and solving [the] problems" generated by "[f]ull implementation of . . . constitutional principles" in the local setting, Brown v. Board of Education, 349 U.S. 294, 299 (1955), the State's limited challenge here is particularly lacking in force.

Moreover, the District Court was faced with a school district in exceptional disarray. It found the

structure of the Detroit school system "chaotic and incapable of effective administration." App. 124a. The "general superintendent has little direct authority."

Ibid. Each of the eight regional boards may be preoccupied with "distribut[ing] local board patronage." App. 125a. The "local boards have diverted resources that would otherwise have been available for educational purposes to build new offices and other facilities to house this administrative overload." Ibid. The District Court continued:

"In addition to the administrative chaos, we know of no other school system that is so enmeshed in politics. . . . Rather than devoting themselves to the educational system and the desegregative process, board members are busily engaged in politics not only to assure their own re-election but also to defeat others with whom they disagree." App. 125a-126a (footnote omitted).

Referring again to the "political paralysis" and "inefficient bureaucracy" of the system, the court also noted - discouragingly - that the election then approaching "may well [result in] a board of education consisting of members possessing no experience in education." App. 126a. In this quite remarkable situation, it is perhaps not surprising that the District Court virtually assumed the role of school superintendent and school board.

Given the foregoing unique circumstances, it seems to me that the proper disposition of this case is to

as the Court ~~to~~ has ~~chosen~~ chosen to
~~to write extensively~~ decide the
case here,

7.

dismiss the writ of certiorari as improvidently granted.

But ~~being unable to persuade my Brothers to this~~
~~prudential view~~, I join in the judgment as a result less
likely to prolong the disruption of education in Detroit
than a reversal or remand. ~~The District Court did, after~~

~~all, make findings relating the educational remedies~~
~~directly to specific constitutional violations~~. In my

view, it is at least arguable that the findings in this
respect were too generalized to meet the standards

prescribed by this Court. See Dayton Board of Education,

supra. But the majority views the record as justifying ~~the~~

the conclusion

~~finding~~ that "the need for the educational components

flowed directly from the constitutional violations by both

state and local officials." Ante, at 14. On that

view of the record, our settled doctrine requiring that

the remedy be carefully tailored to fit identified

constitutional violations is ~~not~~ ^{reaffirmed} disturbed by today's

result. I therefore concur in the judgment.

Despite wide ranging dicta, the only
issue decided ~~was~~ ^{is} that the
Detroit ~~Court~~ Court's findings
as to ~~a~~ specific constitutional
violations justified the four
remedial educational remedies
~~was~~ included in the desegregation
decree.

1. Until the case reached this Court the plaintiffs apparently did not view the educational components as necessary or even important elements of a desegregation plan. These components were not included in plans submitted by the plaintiffs, and in briefs filed below there were indications that the plaintiffs viewed some - if not all - of these components as being "wholly unrelated to desegregation of students and faculty in schools." See plaintiff's brief in the Court of Appeals, at 5, n. 6.

2. In addition to these four components, there were some seven other educational directives that are not contested here. Perhaps the most expansive was the District Court's order that the City and State Boards create five vocational centers "devoted to in-depth occupational preparation in the construction trades, transportation and health services." App. 75a. As noted in the text infra, a compromise was reached as to these centers and the State entered into a stipulation obligating it to share the cost of providing them. See App. 139a-142a. The other educational components ordered by the District Court included: (i) "two new technical high schools in which business education will be the central part of the curriculum" (App. 75a); (ii) a new curriculum prescribed by the court in some detail for the vocational education courses in the Detroit schools,

including the requirement that an additional "grade 13" be added to afford expanded educational opportunities (App. 76a); (iii) the inclusion of "multi-ethnic studies" in the curriculum, with a request for federal funds to support "in-service training for teachers involved in such programs" (App. 82a, 147a); (iv) a "Uniform Code of Conduct," which the Board was ordered to develop pursuant to guidelines established by the court (App. 79a, 148a); (v) a specific plan for "co-curricular activities" with other artistic and educational institutions in the area, to be developed by the Board and submitted for court approval (App. 82a); and (vi) a "community relations program" prescribed in remarkable detail by the court. (App. 80a, 132a).

In most, if not all, instances the court ordered that each of these programs be "comprehensive," and that reports be made to the court. The details of the foregoing are set forth in the opinions and decrees of August 1, 1975, November 4 and 20, 1975, and May 11, 1976. One may doubt whether there is any precedent for a federal court exercising such extensive control over the purely educational responsibilities of a school board.

3. It merits emphasizing that the School Board invited this assumption of power. Indeed, the District Court had complimented the Board on its willingness to "implement any desegregation order the Court may issue".

App. 49a. But at one point there were serious second thoughts. In its brief in the Court of Appeals, the Board expressed grave concern as to what the District Court's assumption of the Board's powers could do to the school system financially:

"[O]n May 11, 1976 . . . the District Court ordered equalization of all school facilities and buildings preparatory to the 1976-77 school term; continuance of the comprehensive construction and renovation program; [and implementation of the educational components summarized in n. 2, supra]. . . .

"Even without actual dollar figures, the financial impact of these orders could easily destroy the educational program of the Detroit School system. The financing of these components by the Detroit school system would only mean a concomittant elimination of existing programs.

"It is virtually impossible for the Detroit Board of Education to re-order its priorities when it is already operating on a woefully inadequate budget that cannot provide a minimal quality educational program. Any attempt to redistribute available resources will cause further deterioration in on-going educational programs and will merely result in robbing Peter to pay Paul." App. 189a (emphasis added).

To say the least, the financial impact of the court's decree was profoundly disturbing. But apparently the financially pressed Board was willing to surrender a substantial portion of its decisionmaking authority in return for the prospect of enhanced state funding. For by the time it made this statement to the Court of Appeals, the Board knew that the District Court had exercised its

power to do what the state legislature had chosen not to do: appropriate funds from the state treasury for these particular programs of the Detroit schools.

4. The Court's opinion states, for example, that the District Court "expressly found that the two components of testing and counseling, as then administered in Detroit's schools, were infected with the discriminatory bias of a segregated school system." Ante, at 7.

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

CHAMBERS OF
THE CHIEF JUSTICE

6/21/77

Lewis
Enclosed two
pages of Milliken.

I think you may
not have focused
on F.N. 17 but in
any event I add
some of your thought
on p. 19.
Will this do it?
WSB

file

tunities resulting from past or present racial and ethnic isolation. . . ." *Id.*, at 448.¹⁶

See also *George v. O'Kelly*, 448 F. 2d 145, 150 (CA5 1971). And, as school desegregation litigation emerged in other regions of the country, federal courts have likewise looked in part to remedial programs, when the record supported an order to that effect. See, e. g., *Morgan v. Kerrigan*, 401 F. Supp. 216, 235 (Mass. 1975), aff'd, 530 F. 2d 401 (CA1 1976), cert. denied, — U. S. — (1976); *Hart v. Community School Board of Brooklyn*, 383 F. Supp. 699, 757 (EDNY 1974), aff'd, 512 F. 2d 37 (CA2 1975); cf. *Booker v. Special School Dist. Number 1, Minneapolis, Minn.*, 351 F. Supp. 799 (Minn. 1972).¹⁷

Finally, in addition to other remedial programs, which could, if circumstances warranted, include programs to remedy deficiencies, particularly in reading and communication skills, federal courts have expressly ordered special in-service training for teachers, see, e. g., *United States v. State of Missouri*, 523 F. 2d 885, 887 (CA8 1975); *Smith v. St. Tammany Parish School Board*, *supra*, at 110; *Moore v. Tanigpahoa Parish School Board*, *supra*, at 253, and have altered or even suspended testing programs employed by school systems undergoing desegregation. See, e. g., *Single-*

¹⁶ In denying the stay application, Mr. Justice Black was untroubled by the underlying order of the District Court:

"It would be very difficult for me to suspend the order of the District Court that, in my view, does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch." 404 U. S., at 1206.

¹⁷ We do not, of course, pass upon the correctness of the particular holdings of cases we did not review. We simply note that these holdings support the broader proposition that, when the record warrants, remedial programs may be in the exercise of equitable discretion, appropriate remedies to treat the condition that offends the Constitution. Of course, it must be shown that the constitutional violation caused the condition for which remedial programs are mandated.

always

ton v. Jackson Municipal Separate School District, 419 F. 2d 1211, 1219 (CA5 1969), cert. denied, 396 U. S. 1032 (1970); *Lemon v. Bossier Parish School Board*, 444 F. 2d 1400, 1401 (CA5 1971); *Arvizu v. Waco Independent School Dist.*, 373 F. Supp. 1264 (WD Tex. 1973), rev'd in part on other issues, 495 F. 2d 499 (CA5 1974).

~~We note that, although the cases cited above were not reviewed by this Court, they demonstrate that the District Court in the case now before us did not break new ground in approving the School Board's proposed plan. Quite the contrary, acting on abundant evidence in this record, the District Court approved a remedial plan going beyond mere pupil assignments, as expressly approved by *Swann* and *Montgomery County*, *supra*. In so doing, the District Court was adopting specific programs proposed by local school authorities, who must be presumed to be familiar with the problems and the needs of a system undergoing desegregation.~~¹⁸

We do not, of course, imply that the order here is a blueprint for other cases. That cannot be; in school desegregation cases, "[t]here is no universal answer to complex problems . . . ; there is obviously no plan that will do the job in every case." *Green, supra*, at 439. On this record, however, we are bound to conclude that the decree before us was aptly tailored to remedy the consequences of the constitutional violation. Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete,

¹⁸ This Court has from the beginning looked to the District Courts in desegregation cases, familiar as they are with the local situations coming before them, to appraise the efforts of local school authorities to carry out their constitutionally required duties. "Because of their proximity to local conditions . . . the [federal district] courts which originally heard these cases can best perform this judicial appraisal." *Brown II, supra*, at 299.

cases is not
to be taken
as necessarily
approving
the holdings
not reviewed
by this Court.
However

findings ^{& conclusions} relating to educ. components

35a - 37a

[49a - 51a]

55a

59a - 60a

61a (last ¶) - 62a

64a (1st full ¶)

* 72a - 74a

* 78a - 79a

* 81a - 82a

86a (in-service training has high priority)

May 11, 76 ^{memo} p. 118a, n. 5 - responds to state objections -
educ components "repair the effects
of past segregation"

* 127a - 131a

May 11, 76
order

* 146a - 147a

→ This orders state to split excess cost of
these 4 educ components

State violation ~~only~~ summarized pp. 11a,
116a

Summary of record evidence supporting
DC's findings: Detroit Bd's brief
at 14-27