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Invisible walls: Milliken v. Bradley and America's urban apartheid

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INVISIBLE WALLS:
MILLIKEN V. BRADLEY
AND AMERICA'S URBAN APARTHEID

An Abstract of a Thesis

Submitted

In Partial Fulfillment

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Sonia E. Ingles

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ABSTRACT

In 1954 the Supreme Court's *Brown v. Board of Education* ruling nullified the *Plessy v. Ferguson* (1896) doctrine of "separate but equal." At the time, a racially dysfunctional America looked to the South to observe the results of the Court's sweeping statement. Few realized that, carried to its logical conclusion, the decision would necessarily bring into question the racial practices of every part of the nation. To the dismay of Northerners, blacks began to challenge the unofficial system of segregation which existed outside of the South. The most controversial aspect of this challenge centered around school desegregation and busing. When the courts acted in support of the desegregation movement in the North, the nation's white majority deftly mustered its political clout to frustrate further civil rights progress. At the center of this backlash was the school busing case which arose out of Detroit.

The 1974 case of *Milliken v. Bradley* dealt with the desegregation of Detroit, a large urban-suburban area which was divided along racial lines--literally as well as figuratively. As with so many other Northern cities, racial separation was achieved through public and private housing discrimination, which produced one-race neighborhoods. This, together with the discriminatory actions and inactions of school officials, affected the racial composition of neighborhood schools, which then affected housing choices made by both races--producing a more and more tightly-wound spiral of apartheid. Blacks were effectively confined to the inner city, where property values were relatively low, and where the schools they supported were hard-pressed to provide the kind of education that white suburbanites were getting. This made it difficult to compete in the job market, which made escape to the suburbs a financial impossibility--not to mention the fact that blacks were likely to be kept out of white neighborhoods one way or another, whether they had the means or not.

For blacks, then, the inclusion of suburban school districts in a plan to desegregate Detroit might be a significant step toward equal distribution of community resources. For many whites, on the other hand, this scheme threatened to burst the bubble of comfortable suburban life. Nine Supreme Court justices would finally be asked to resolve the struggle between the clashing interests of America's urban-dwellers. In a five-to-four ruling which spawned three bitter dissents, the Court invalidated cross-district desegregation. The turmoil on the Court matched that in the nation as a whole: By 1974 the urban desegregation controversy had reached the boiling point among voters, and it seemed that a confrontation between Congress and the Court was imminent. The outcome of such a case depended on the resolve of Supreme Court members to protect minorities in the face of a resistant majority. In the end, the Court championed the power of the suburbs to maintain the status quo: Integration would be limited to Detroit proper, leaving the Detroit school district heavily black and the suburban districts nearly all-white. With this ruling, the Supreme Court demarcated the limits of minority rights vis-a-vis majority rights and, according to critics, created a "formula for American Apartheid."

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INTRODUCTION

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In 1954 the Supreme Court's *Brown v. Board of Education* ruling nullified the *Plessy v. Ferguson* (1896) doctrine of "separate but equal." At the time, a racially dysfunctional America looked to the South to observe the results of the Court's sweeping statement. Few realized that, carried to its logical conclusion, the decision would necessarily bring into question the racial practices of every part of the nation. As the stains of racial separation were scoured away in the South, the North and West began to look rather tarnished. To the dismay of Northerners, blacks began to challenge the unofficial system of segregation which existed outside of the South. The most controversial aspect of this challenge centered around school desegregation and busing. When the courts acted in support of the desegregation movement in the North, the nation's white majority deftly mustered its political clout to frustrate further civil rights progress. At the center of this backlash was the school busing case which arose out of Detroit.

As a subject of study, the Supreme Court case of *Milliken v. Bradley* (1974) necessarily involves two of the most troubling issues our nation faces: poverty and racism. The landmark *Brown* decision symbolized a renewed commitment to deal with these tangled problems; *Milliken*, on the other hand, represents the limitations of America's willingness to keep the promise of *Brown*. It is therefore also indicative of the limitations of our Constitution to protect minorities from that "tyranny of the majority" which so concerned the founding fathers.

The *Milliken* case dealt with the desegregation of Detroit, a large urban-suburban area which was divided along racial lines--not unlike many other Northern metropolitan areas in the 1970s. The turmoil over integrating city and suburb stemmed from the fact that

Northern and Western states, by this time, had backed themselves into a corner: Desegregation was a noble cause--as long as the distant Southern states were the primary targets. Now, the South was more integrated than the North and West, and the focus of the courts was shifting toward the newer problem of urban segregation. It looked as though the North would be forced to take inventory of its own offensive behavior.

Whereas Southern states had quite openly legislated separation of the races in schools, the origins of segregation in the North were much more elusive. In fact, the complexity of this process of racial separation cannot be overstated. In many ways it was the result of benign forces, or even the free choices of both races. And yet, given the widespread discrimination in many areas of life, it was difficult to discern where "free choice" ended and insidious oppression began. It was that area of doubt which demanded examination; the question was, would Americans see things as they really were, or would they see what they wanted to see?

The *Milliken* case will be discussed in the context of the evolution of the Supreme Court's interpretation of the Constitution. The equal protection clause of the Fourteenth Amendment lies at the heart of the desegregation question: After decades of turmoil and debate America has not determined the meaning of the commitment it made therein. The Court's reading of *Brown v. Board of Education* (1954), and the desegregation cases which followed it, also shape the debate--a debate which centers on the fundamental institution of education.

Because Americans have always viewed education as an essential tool for life and citizenship, tempers often flare when people talk about desegregation, sex education, or prayer in the schools. The younger the children, the more sensitive the public seems to be; desegregation of graduate schools, for example, did not engender nearly the same rancor as did desegregation of elementary schools. Education is one of our biggest investments--it is an investment in our children, in our communities and country, and ultimately in our way

of life. But the diversity of world views in America has been a major source of contention; indeed, the evolution of education in this nation has been driven largely by the constant struggle among various groups to inject their own philosophies into the education system.

The concept of local control sprang from this struggle over the direction of schools. Local control allows the battles over education to take place on a smaller scale, with the chances for consensus being much greater in a single community of shared interests. Officials are elected locally and remain in touch with and accountable to those they serve. Locally-controlled education systems respond more readily to the particular needs of the community. Most importantly, there is greater interest and participation on the part of parents when the quality of schools is largely the responsibility of those who send their children to them.

The concept of local control has a negative side as well. Communities are, for the most part, microcosms of the nation. They are comprised of majorities and minorities, and only rarely do the minorities have the upper hand. The majorities, unfortunately, often justify their power thusly: "We are in command because there are more of us. There are more of us because we are better. Since we are better, our way of doing things is better." A major use of local control, then, has been to create policies which siphon off "undesirables" into particular schools, thereby preserving the "right" way of doing things. Naturally, the majority clings to local control most tenaciously when its way of life is threatened.

Indeed, those who fought desegregation of the Detroit area spoke often of the importance of community control of schools. The majority-white population had constructed a way of life that rested significantly upon the segregation of whites and blacks in both neighborhoods and schools. As with so many other Northern cities, separation was achieved through public and private housing discrimination, which produced one-race neighborhoods, which in turn affected the racial composition of neighborhood schools,

which then affected housing choices made by both races--producing a more and more tightly-wound spiral of apartheid.

But the majority's way of life was about more than segregation; it was about garnering the best resources available, from property, to services, to jobs, to education. Whites could have the best jobs in the city, while building better homes, in better neighborhoods, on more valuable property in the suburbs. They benefited from city services--water, electricity, goods and services, culture and entertainment--but could avoid urban hazards by sending their children to quiet, new suburban schools generously funded from a large tax base.

Members of the majority could hardly be blamed for pursuing the "American Dream." Most were honest people who minded their own business. They labored long and hard for their education and worked diligently at their profession so that they could afford to live in the suburbs and send their children to good schools. Why should they be forced to put those children on buses only to have them hauled away to urban schools amid the dangers of the inner city? Some of these people, perhaps, had never uttered a racist comment or actively participated in discrimination of any kind. It wasn't *their* fault that schools were segregated.

Racism, then, was not as simple as it seemed. It was not a diabolical conspiracy of all white people to oppress all black people. Nor, on the other hand, could its obvious effects be ignored. Blacks were confined to the inner city, where property values were relatively low, and where the schools they supported were hard-pressed to provide the kind of education that white suburbanites were getting. This made it difficult to compete in the job market, which made escape to the suburbs a financial impossibility--not to mention the fact that they were likely to be kept out of white neighborhoods one way or another, whether they had the means or not.

For blacks, then, the inclusion of the suburbs in a plan to desegregate Detroit might be a significant step on the long road toward equal distribution of community resources. For many whites, on the other hand, this scheme threatened to burst the bubble of comfortable suburban life. The Supreme Court's decision as to whether inner-city school district boundaries could be breached in order to tap white populations would affect two very different worlds: one striving for something better, and one seeking to maintain the status quo. As usual, the outcome of such a case would depend on the resolve of Supreme Court members to protect minorities in the face of a resistant majority.

Milliken v. Bradley: The Historiography

No case can possibly be understood outside of its legal context, and in the case of *Milliken v. Bradley* building that context is a challenge. Each of the cases prior to *Milliken* has its own protracted history, adding a new twist to the winding road of desegregation. Desegregation, moreover, represents only one of many concurrent paths leading toward the ill-defined goal of "equality." Finally, the various strands of racism are so inextricable--a sign of the pervasive nature of this problem in our society--that one can hardly talk about *Milliken* without getting into complex and sensitive issues such as poverty, housing discrimination, and white flight. The controversy associated with desegregation, and in particular busing, is evident even in the writings of "objective" scholars. Most who have written on this subject come down clearly, often stridently, on one side or the other. Many, too, have been deeply involved in the litigation of desegregation cases or in policy-making and enforcement, thus the source of their bias is obvious.

The proper starting point, however, is an understanding of the evolution of the Fourteenth Amendment, which gives a sense of the obstacles which stood between blacks and the rights which were supposedly guaranteed them by the Civil War amendments. There are dozens of books and articles dealing with this subject; however, the first chapter

of Harvie Wilkinson's From Brown to Bakke[1] and the second section of Norman Amaker's article,[2] taken together, provide a sufficient explanation of the history and meaning of the Amendment. It is also useful to survey the beginning of the end of "separate but equal," ably chronicled in the first three chapters of Randall Bland's Private Pressure on Public Law.[3] Bland details the development of NAACP strategy and the preludes to *Brown*, and discusses the progress made in other civil rights arenas--voting, housing, and due process--before education took the spotlight in 1954. In that year, through *Brown*, Thurgood Marshall and his associates stepped forward to reclaim the Fourteenth Amendment on behalf of its intended beneficiaries.

The history of *Brown*'s enforcement is of crucial importance in evaluating *Milliken*. For general purposes, Harvie Wilkinson's From Brown to Bakke is probably the best account of the post-*Brown* era. Wilkinson writes from a Southern (Virginia) perspective, but takes great pains to present all sides of his multi-faceted subject.[4] Wilkinson, a one-time law clerk to Justice Lewis Powell, views the *Brown* decision as a watershed in twentieth-century American history, but is critical of the Court's enforcement of desegregation thereafter. Too often the Court went to extremes, sometimes timid and tentative, other times forceful and demanding--consistent only in its inconsistency. After five brief years of bold rulings (1968 -73), the Court's momentum was lost as it ran up against the "legitimate competing ideals" of whites; accordingly, the *Milliken* (cross-district

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[1] J. Harvie Wilkinson, From Brown to Bakke: The Supreme Court and School Integration: 1954-1978 (Oxford: Oxford University Press, 1979).

[2] Norman C. Amaker, "*Milliken v. Bradley*: The Meaning of the Constitution in School Desegregation Cases," Hastings Constitutional Law Quarterly 2 (Spring 1975).

[3] Randall W. Bland, Private Pressure on Public Law: The Legal Career of Justice Thurgood Marshall, Publication of National University Publications Series in American Studies, ed. James P. Shenton (Port Washington, N.Y.: Kennikat Press, 1973).

[4] C. Vann Woodward, review of From Brown to Bakke, by J. Harvie Wilkinson III, In The New Republic 180 (June 23, 1979): 27.

desegregation) and *Bakke* (affirmative action) decisions denoted the outer limits of white indulgence.[5]

The literature pertaining to desegregation and busing is abundant. Like Wilkinson's, many of these works chronicle, in varying detail, the progress of desegregation since *Brown.* A number of authors include chapters devoted to analysis of particular cases, with *Milliken* as a frequently chosen topic. These sources proved to be most helpful for the purposes of this study.

Wilkinson himself devotes one chapter to discussion of *Milliken.* He contends that the Court's decision to forestall multi-district desegregation was largely a result of the majority's "deep conservative distrust. . .of central planning;" it could not abide one district judge having so much power over so many people via desegregation.[6] In its haste to preclude the expansion of judicial power, the Court abandoned its own established principle of judging desegregation plans by their effectiveness,[7] and gave top priority to local control of schools.[8] Wilkinson's lucid presentation does not oversimplify; on the contrary, he delves into the complex issues of housing and class as they relate to the effectiveness of busing remedies. Wilkinson's work is by far the clearest and most thoughtful treatment of the intricacies of desegregation.

George Metcalf, himself a civil rights activist, follows the progress of desegregation in From Little Rock to Boston.[9] He focuses upon the politicization of the issue, tracing its evolution up through the Carter presidency, with special attention given to the Nixon administration. Metcalf is openly critical of the many community and national

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[5] Wilkinson, 308.
[6] Ibid., 226.
[7] Ibid., 222.
[8] Ibid., 225.
[9] George R. Metcalf, From Little Rock to Boston: The History of School Desegregation, Contributions to the Study of Education Series, No. 8 (Westport, Conn.: Greenwood Press, 1983).

leaders who opposed desegregation for the sake of politics rather than principle, President Nixon being foremost among them. It was Nixon, he charges, who manipulated the various branches of government and stirred public outrage over busing in an effort to thwart reform efforts and score political points.[10] Metcalf also points out that, amid the furor over desegregation in Detroit, the area's congressional delegation--a normally liberal group which had previously supported busing--"cut and ran," aggressively pursuing measures which would halt progress and pacify angry white constituents.[11]

Metcalf gives much consideration to *Milliken*, presenting it as a pivotal case: It was, in his estimation, the Court's "one failure to stand up."[12] The *Milliken* majority was more concerned with the Court's status among white, middle-class America than with integration, and was unwilling "to fashion new remedies to fit a new situation, a metropolitan situation."[13] Metcalf's own support of busing to overcome residential segregation is based on his belief that busing itself is not in fact the cause of white flight;[14] rather, fear and hatred keep the races apart, and this will only change if they are educated side by side.[15]

As is evident from the title, Gary Orfield's Must We Bus? deals exclusively with urban desegregation.[16] The author is a political scientist who has written extensively on this subject. Orfield's analysis parallels that of Metcalf in that he believes busing to be our best hope for realizing an integrated society. On the other hand, he is not as optimistic as Metcalf where white flight is concerned: He is in fact convinced that majority-black

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[10] James C. Duram, review of From Little Rock to Boston, by George R. Metcalf, In American Historical Review 89 (April 1984): 551.

[11] Metcalf, 163.

[12] Ibid., 268.

[13] Ibid., 192.

[14] Judy Jolley Mohraz, review of From Little Rock to Boston, by George R. Metcalf, In The Journal of American History 70 (March 1984): 926.

[15] Metcalf, ix.

[16] Gary Orfield, Must We Bus? Segregated Schools and National Policy (Washington, D.C.: The Brookings Institution, 1978).

schools will never be accepted by whites, and will instead be deserted by them.[17] Orfield takes on a despairing tone as he evaluates the prospects for city-dwellers who lack any and all access to suburban resources.

The importance that Orfield attaches to *Milliken* is evident throughout the book, but its significance is highlighted in a chapter on "Metropolitan Desegregation." For Orfield, as for Wilkinson, *Milliken* carried with it consequences of socioeconomic as well as racial segregation: The Supreme Court lacked vigor enough to challenge the economic and political power of the suburbs, with the result that blacks and poor whites have been left to carry the burden of desegregation. By ignoring the issue of residential segregation, the Court left intact the ability of the suburbs "to determine their residential character" in terms of race *and* class.[18] Had the Court's decision in *Milliken* not precluded it, Orfield would be in favor of busing across city-suburb lines in order to achieve majority-white schools. He includes suggestions for sensible, practical busing plans that would produce maximum desegregation--the only kind that really counts, in Orfield's view.

Wilkinson, Metcalf, and Orfield all take the Court to task for its failure to confront residential segregation, but none so passionately as Paul Dimond, a lawyer for black plaintiffs in the Detroit litigation as well as several other prominent desegregation cases. In his book, Beyond Busing,[19] Dimond not only provides a behind-the-scenes account of several school segregation battles, but also focuses intensely upon the nature of residential segregation, via the Chicago public housing discrimination case, *Hills v. Gautreaux* (1976).[20] Dimond contends that the copious housing discrimination evidence which was

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[17] Robert L. Crain, "School Desegregation: The First Good Policy Review," Contemporary Sociology 8 (July 1979): 557.

[18] Orfield, 32.

[19] Paul R. Dimond, Beyond Busing: Inside the Challenge to Urban Segregation (Ann Arbor: The University of Michigan Press, 1985).

[20] Drew S. Days III, "School Desegregation Law in the 1980's: Why Isn't Anybody Laughing?" The Yale Law Journal 95 (July 1986): 1741.

presented to the District Court in *Milliken*, and which formed much of the basis for that court's ruling, was subsequently ignored in both the Court of Appeals and the Supreme Court.[21]

Though Dimond's book is not a scholarly work in the traditional sense, his sources are overwhelmingly primary ones (trial records, briefs, oral arguments, opinions), and he gives life to what could otherwise be dry reading. The particulars he provides about the various proceedings--facial expression, tone of voice, and body language, as well as the ideologies and temperaments of the major personalities--give a unique dimension to this drama. His insights into the thinking and actions of the plaintiffs' lawyers, as well as the conflicted Detroit defendants, illustrate the complexity and turmoil that characterized the unfolding events. As one might guess, Dimond's perspective is not unbiased, but his account of the case is probably the most detailed to be had short of wading through the entire case record.

In Disaster by Decree, Lino Graglia presents a viewpoint entirely antithetical to that of Wilkinson, Metcalf, Orfield, and Dimond.[22] Graglia, a professor of constitutional law, is avidly opposed not only to busing but also to the integration requirement itself. His aversion to desegregation stems from his belief that existing racial segregation has little to do with the legal segregation of the past. The title of the book clearly indicates his attitude toward judicial involvement in resolving issues of race and education; indeed, Graglia finds error in the Court's desegregation decisions all the way back to *Brown*. In that landmark case, the Court's reliance on social theories encouraged controversy, while its failure to demand immediate compliance put the court system in a position of having to supervise

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[21] Dimond, 111.

[22] Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Schools (Ithaca: Cornell University Press, 1976).

implementation.[23] Subsequently, the Court proceeded to turn its own ruling inside out: Whereas in 1954 it prohibited the assignment of students to schools on a racial basis, in 1971 its endorsement of busing to integrate required precisely that. Graglia is also highly critical of court proceedings in desegregation cases, citing instances of questionable evidence and flawed reasoning at all levels.[24]

For Graglia, *Milliken* is "a fitting conclusion to the unhappy story of the Supreme Court's decisions on race and the schools since *Brown*. . . .the story of how the Constitution came to require racially balanced schools and the busing necessary to achieve such schools."[25] As far as he is concerned, a decision from the Court in favor of multi-district desegregation would have been no more appalling than the ruling they did hand down, approving integration within Detroit--an "irrational" result given the predominantly black population there.[26] Graglia obviously embraces the theory that residential segregation is a natural, benign occurrence; he does not acknowledge the existence of housing discrimination, and is apparently oblivious to the patterns and connections between various forms of discrimination. Indeed, he dismisses the findings of *de jure* (purposeful) school segregation in Detroit as "preposterous."[27] Thus, his views do not appear to be grounded in a realistic appraisal of racism in America. While providing a useful critical perspective, Graglia's work makes for laborious reading, as his arguments are difficult to follow and his style is ungainly.

Eleanor Wolf, a sociology professor, takes Graglia's critical view of *Milliken* to a deeper level in her book, Trial and Error, which deals exclusively with the Detroit

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[23] Elliott Abrams, "Desegregation and the Courts," Commentary 62 (November 1976): 85.

[24] Nathan Glazer, "In Uplifting, Get Underneath," National Review 28 (October 15, 1976): 1132.

[25] Graglia, 203, 256.

[26] Ibid., 203.

[27] Ibid., 204.

litigation. Wolf is harsh in her analysis of federal court procedures in that case, charging that the judge based his rulings upon expert testimony which was highly questionable in many regards.[28] Indeed, Wolf expresses great skepticism concerning most judges' ability to evaluate such testimony; furthermore, she questions the practicality and efficacy of the busing remedies these judges order into effect.[29]

Wolf is wholly unconvinced that school segregation is the product of anything more than residential segregation, which in turn is the result of the *natural* tendency of racial and ethnic groups to band together in communities.[30] Wolf does not, therefore, confront issues of discrimination at the individual or governmental level.[31] Her critical analysis, like Graglia's, provides a useful contrast to authors such as Metcalf and Dimond; however, her focus is almost exclusively upon lower court proceedings. Since this study will not attempt a detailed analysis of the specific evidence presented at trial, her critique is of limited use here.

Perhaps the most balanced work is the collection of essays in Limits of Justice, edited by Howard Kalodner and James Fishman.[32] This volume brings together several chapter-long case studies of desegregation litigation in large cities around the nation, written by experts with a wide range of opinions on the subject. In his introduction, Kalodner describes the many problems courts face in performing remedial tasks, including their "political isolation," their lack of expertise with regard to complex educational problems, and the shortage of time and resources necessary to oversee implementation.[33]

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[28] Ralph A. Rossum, "A Sweetheart Suit," National Review 33 (October 30, 1981): 1279.

[29] Ibid., 1280.

[30] Elizabeth L. Useem, "Desegregation in Northern Cities: Two Case Studies," Contemporary Sociology 11 (November 1982): 649.

[31] Ibid., 650.

[32] Howard I. Kalodner and James J. Fishman, eds., Limits of Justice: The Courts' Role in School Desegregation (Cambridge, Mass.: Ballinger Publishing Co., 1978).

[33] G. Alan Tarr, review of Limits of Justice, ed. by Howard I. Kalodner and James J. Fishman, In Social Science Quarterly 59 (December 1978): 594.

Elwood Hain, who was a co-chairman of the Metropolitan Coalition for Peaceful Integration in Detroit, contributes the chapter on *Milliken*. Hain provides a detailed factual account of the proceedings but, like Wolf, gives scant attention to the Supreme Court's handling of the case. He states only that "The Supreme Court's decision has been widely commented upon, a task that need not be repeated here."[34] Hain is less interested in taking sides on the issue than in describing how the various litigants responded to the Supreme Court's ruling in terms of cooperating to desegregate *within* the city limits. Thus he does present a side of the story--i.e., *after* the Court's decision--which otherwise tends to be neglected. Here and there, one catches glimmers of Hain's partiality, but for the most part he reserves judgment for his two-paragraph summary, where he states flatly that "only inclusion of the suburbs in a desegregation plan" can provide "truly desegregated education for the black school children of Detroit."[35]

For the Detroit case, one should also consult the scholarly journals; in this instance, law, education, and sociology periodicals seemed to be the most fruitful sources. There are numerous articles and angles to choose from, but two lengthy symposiums were particularly helpful because they presented, in convenient locations, a variety of viewpoints by noted authors and participants. Such writings are useful both as secondary and *primary* sources, since they record the reactions of the academic community at various stages after the Supreme Court's decision.

In the January, 1975 issue of the Journal of Law and Education, a symposium on the Detroit decision includes articles written by some of the major players in the Detroit case and in desegregation generally. Nathaniel Jones, for example, was one of the lead NAACP attorneys who argued *Milliken* before the Supreme Court. He describes the case as "the sad but inevitable culmination of a national anti-black strategy" practiced by the federal

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[34] Kalodner, 270.
[35] Ibid., 306.

government (the Nixon administration is strongly implicated in Jones' litany of misdeeds).[36] There is a contribution from Martin Sloane, former Civil Rights Commission housing staff director and HUD staff attorney, who did voluntary research for the NAACP and testified as an expert witness in the Detroit trial. He expresses his view that, for the foreseeable future, *Milliken* has made black plaintiffs' burden "virtually insupportable;" yet he is also hopeful that change will eventually come.[37] Derrick Bell--civil rights litigator, Deputy Director of the HEW Office for Civil Rights (during the creation of the first school desegregation guidelines, no less), the first black law professor at Harvard, and a prolific writer in the area of civil rights law--writes that the Supreme Court's decision has permitted whites to "hide in the suburbs behind an impressive array of economic, social, and legal barriers."[38] At the same time, Bell concedes that, had the Court's decision gone the other way, cross-district busing "would have made little headway against tremendous public opposition."[39]

The Wayne Law Review also features a symposium in its March, 1975 issue. Subtitled, "*Milliken v. Bradley* and the Future of Urban School Desegregation," it includes articles which focus upon implications and strategies for future desegregation efforts. Again, many of the contributors are experts who were involved in the Detroit litigation. Elwood Hain explores options for reorganizing school districts for purposes of integration, including the consolidation of districts, the creation of "umbrella" districts, and the transfer of pupils between districts.[40] He concludes that district consolidation, while initially

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[36] Nathaniel R. Jones, "An Anti-Black Strategy and the Supreme Court," Journal of Law and Education 4 (January 1975): 203.

[37] Martin E. Sloane, "*Milliken v. Bradley* in Perspective," Journal of Law and Education 4 (January, 1975): 210.

[38] Derrick A. Bell, Jr., "Running and Busing in Twentieth-Century America," Journal of Law and Education 4 (January 1975): 214.

[39] Ibid., 217.

[40] Elwood Hain, "Techniques of Governmental Reorganization to Achieve School Desegregation," Wayne Law Review 21 (March 1975): 781-82.

traumatic, provides the best hope for long-term success. Bill Grant, a journalist who closely followed the Detroit case from its beginning, provides a more backward-looking "Historical Overview" of the case. Grant writes primarily from the perspective of District Judge Stephen Roth, who presided over the trial and was deeply affected by the overwhelming evidence of racial discrimination in Detroit. Grant maintains that "the story of the evolution of the Detroit school case. . .is also the story of the evolution of the views of Judge Roth," who suffered scathing personal attacks due to his stand on desegregation.[41]

In the Wayne symposium two of the contributors debate the question of whether a different outcome could have been achieved at the Supreme Court level if the plaintiffs had developed an inter-district theory of violation in the courts below. Louis Beer (one of the lawyers for the Detroit Board) argues that in the higher courts the plaintiffs should have presented Judge Roth's "macroscopic" view of the constitutional violations, featuring the metropolitan-wide housing discrimination evidence: "If the primary cause of the unlawful segregation in the schools was the metropolitan pattern of discrimination in housing, then inherently the violation was metropolitan in nature."[42] In contrast, Douglas West (who represented one of the suburban school boards) concludes that such an approach would have produced essentially the same trial record that the plaintiffs presented anyway; neither would it have affected the ultimate outcome.[43] Had the Court been at all open to the "macroscopic" view of the Detroit violations, it had "ample opportunity" to broaden the theory of violation articulated in its earlier rulings.[44]

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[41] William R. Grant, "The Detroit School Case: An Historical Overview," Wayne Law Review 21 (March 1975): 851.

[42] Louis D. Beer, "The Nature of the Violation and the Scope of the Remedy: An Analysis of *Milliken v. Bradley* in Terms of the Evolution of the Theory of the Violation," Wayne Law Review 21 (March 1975): 913.

[43] Douglas H. West, "Another View of the *Bradley* Violation: Would a Different Evolution Have Changed the Outcome?" Wayne Law Review 21 (March 1975): 917.

[44] Ibid., 925-26.

Norman Amaker's Hastings piece (cited above) provides an excellent discussion of the constitutional implications of the Detroit ruling. He notes a fundamental difference between the majority and the dissenters as to the nature of the right of black children to equal protection of the laws. The majority's restrictive view of this right appears to Amaker to be "a refutation of the historical concerns. . .from which the [Fourteenth Amendment] flowed."[45] Under *Milliken*, "separate educational facilities, no matter how 'inherently unequal' may coexist within a state if the mode of their coexistence is a set of lines labeled a 'school system.'"[46] Insofar as the *Milliken* holding fails to require authorities to ensure equal educational *results*, it is unsatisfactory.[47]

Two anonymously authored articles from the Harvard Law Review and the Northwestern University Law Review are enlightening as well. The latter is a particularly pithy account of the historical and theoretical context of *Milliken*, with the author concluding, like Amaker, that the case turned on the fundamental "nature of the constitutional right demanding protection."[48] In the end, the majority rejected the theory that plaintiffs had a constitutional right to desegregation defined in terms of the actual racial composition of schools.[49] The Harvard piece gives an objective overview of the facts of the case and offers some theories regarding the veiled reasoning behind the decision. It is suggested, for example, that a different ruling in *Milliken* could not have been expected to follow from *Keyes* due to the massive scale of the remedy involved in Detroit; the Supreme Court must have determined that the benefits of desegregation would have been outweighed by the "social and political costs of metropolitan relief."[50]

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[45] Amaker, 356.

[46] Ibid., 365.

[47] Ibid.

[48] "*Milliken v. Bradley* in Historical Perspective: The Supreme Court Comes Full Circle," Northwestern University Law Review 69 (November-December, 1974): 817.

[49] Ibid.

[50] "Power of Federal Courts to Order Interdistrict Relief for Intradistrict Segregation," Harvard Law Review 88 (November 1974): 69.

Naturally, those who lost the *Milliken* battle were most inclined to comment upon the situation, therefore the initial reaction to the decision--such as that found in the scholarly journals--was bitter. Over time activists found reason to be hopeful that progress could be made through other avenues, and this is reflected in the more moderate analyses of Wilkinson and Hain. At the same time, authors such as Wolf and Graglia stepped forward to defend the decision as a much-needed curb on busing. A decade after *Milliken*, however, Dimond and Metcalf regretfully concluded that hindsight offered no comfortable justification for the backlash against desegregation. For them, the Court had betrayed the principles of *Brown*, and had yet to redeem itself.

II

TOWARD *MILLIKEN*

Buried Treasure:

The Fourteenth Amendment, 1868-1896

How do you deliver an entire race from slavery to citizenship when the two are separated by the angry waters of racism? During and after the Civil War American leaders sought to build a legal bridge for blacks, buttressed by the Emancipation Proclamation, the reconstruction amendments, and civil rights legislation. The Supreme Court remained properly aloof from these political processes, but was necessarily drawn into the debate when Congress's work was challenged in the South. Indeed, as blacks gained political and economic strength, Southern whites reacted with fear-driven violence and oppression. It was left to the Court to find some middle ground between the demands of the Constitution and the wrath of an indignant South, while an increasingly apathetic North shrank from the controversy.

The Thirteenth Amendment had abolished slavery but left freed blacks at the mercy of any discriminatory legislation the former slave states were inclined to enact. The Fourteenth Amendment, then, was designed to protect the rights of United States *citizens*--and the amendment specifically designated blacks as such--from infringement by the states. (Heretofore the states had not been held in check because the Fifth Amendment's due process clause applied only to the federal government.) More than this, the Fourteenth Amendment demanded that blacks be accorded rights of *state* citizenship. Norman Amaker elaborates:

> What this meant in practical terms, as it relates to the problem [of school segregation], is that state systems for educating children at public expense, to the extent that they existed or were formed, were to be made available to

> blacks not as a matter of gift but, because they were now citizens, as a matter of right.[1]

Further, the Amendment's equal protection clause mandated that, in interacting with their citizens, states must afford the same *treatment* to blacks as to whites. This, according to Amaker, implied more than "mere permission of attendance at schools;" it required "state *effort* to assure 'equal protection of the laws.'"[2]

Yet the abstract meaning of the Fourteenth Amendment is far removed from the reality of late nineteenth-century America: "By 1877, America had wearied of the Negro and his problems," and the Court--still recovering from the dishonor of *Dred Scott*--was unwilling to press the issue.[3] The Court would allow blacks some sporadic advancement over the next fifty years, but for the most part it was not a friend upon which they could rely. Instead, the Fourteenth Amendment was the curious means by which the Court became allied with the business man to promote laissez-faire capitalism. In the process, the original promises of the Fourteenth Amendment were lost--buried by the rising tide of industrialism.[4]

Harvie Wilkinson points to three "watershed" cases which essentially "nullified the Negro's Reconstruction gains."[5] The *Slaughterhouse Cases* (1873) involved a Louisiana statute which granted a monopoly on the slaughter of animals. Those who were left out of the deal argued that such a monopoly deprived them of the right to pursue their livelihood--this brought forth the question of whether the due process clause could be extended to protect this and other rights not strictly associated with national citizenship. While giving

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[1] Norman C. Amaker, "*Milliken v. Bradley*: The Meaning of the Constitution in School Desegregation Cases," Hastings Constitutional Law Quarterly 2 (Spring 1975): 354.

[2] Ibid., 355, emphasis added.

[3] J. Harvie Wilkinson, From Brown to Bakke: The Supreme Court and School Integration: 1954-1978 (Oxford: Oxford University Press, 1979), 20-21.

[4] Ibid., 21.

[5] Ibid., 13.

lip service to the grand purpose of the Civil War amendments--i.e., the protection of blacks' rights--a sharply divided Court nevertheless refused to put the entire question of civil rights into the hands of the federal government. The Court determined that only the "few and limited" rights of national citizenship were constitutionally protected; the vital privileges of *state* citizenship would not be guaranteed.[6] In effect, the Court consigned blacks "to the control of their former masters in the South."[7] Because the Court was so divided on this issue, others were encouraged to use the same argument in future cases, but not generally on behalf of civil rights. Rather, business interests took the Fourteenth Amendment as a protective cloak against governmental interference in economic matters.

A decade later, the *Civil Rights Cases* (1883) dashed hopes for civic equality for blacks. Had the Court given its blessing, the Civil Rights Act of 1875 would have assured equal access to public accommodations such as lodging, transportation, and theaters. Instead the Court determined that the Fourteenth Amendment applied to states and not private citizens; therefore discrimination by the owner of a *private* establishment--a hotel, a railroad, a theater--was not subject to review.[8] The capstone of the Court's "counter assault" on civil rights efforts was the infamous *Plessy v. Ferguson* ruling of 1896.[9] The State of Louisiana was before the Court again, this time for the enactment of a law which stipulated racially separate, though ostensibly equal, accommodations for railway passengers. The Court simply did not view this racial distinction as a violation of the rights of black individuals, and so upheld the statute.[10] According to the Court, the Fourteenth Amendment could in no way be construed as establishing total equality of the races.[11]

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[6] Ibid., 14.
[7] Ibid., 13.
[8] Ibid., 16.
[9] Ibid., 13.
[10] Ibid., 17-18.
[11] Ibid., 19.

The South was thus given a free hand in dealing with its black citizens. Not surprisingly, "the regime *Plessy* sanctioned became meticulous and complete"--so far as racial separation was concerned.[12] The "equal" side of the equation was something else altogether. Nowhere was the separation and *inequality* of the races more apparent than in schools. Blacks, being "unsuited for the kind of education the white man received," were hardly viewed as a worthy investment, and this was reflected in the discriminatory allocation of educational resources.[13] The exclusion and neglect of black students was only one facet of the systematic denigration of former slaves, but in 1954 school segregation would become the focal point of the fight to reinstate the Fourteenth Amendment as the protector of the disadvantaged.

Overthrow of Jim Crow:
The Fight to End Segregation in Education, 1934-1954

A young lawyer, Thurgood Marshall, led the early battles for school desegregation; decades later, ironically, he would sit on the very Court which would curtail integration by way of the *Milliken* ruling. In the early 1930s, Marshall was a promising law student at Howard University. At that time the black university's first African-American president, Mordecai Johnson, was attempting to cultivate an atmosphere of social consciousness on the campus, assembling a faculty of like-minded men which included law professors Charles Houston, William Hastie, and James Nabrit, Jr. These accomplished lawyers were active in the fledgling civil rights movement as lawyers for the NAACP. Charles Houston held a particularly strong belief "that Negro lawyers should be social engineers, and he attempted to make Howard the production center for the new breed of Negro

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[12] Ibid., 18.
[13] Ibid., 19-20.

lawyer."[14] In so doing, he urged upon his students the strategy of using the existing legal structure to undermine discrimination.[15]

In 1935 Charles Houston was named Special Counsel for the NAACP, and by 1936 he had surrounded himself with talented colleagues, including Marshall as Assistant Special Counsel. Under the Association's newly-launched anti-discrimination program Houston, Marshall, and William Hastie began the painstaking work of formulating a plan to dismantle the doctrine of "separate but equal."[16] Houston believed that "'the soft underbelly' of Jim Crow" would be the segregated graduate schools.[17] His hope was to make such segregation "prohibitively expensive"--that is, it would be more trouble and expense for states to maintain two separate *and equal* schools than simply to grant admission of blacks to the white universities.[18]

The first major step toward this end was taken in the 1938 case of *Missouri ex rel. Gaines v. Canada*. Lloyd Gaines was denied admission to the University of Missouri Law School despite his qualifications. Though Missouri did not have a separate black school, it claimed that by providing financial assistance to educate blacks outside the state it was satisfying the "separate but equal" requirement.[19] The Supreme Court, on the other hand, determined that the proposed financial assistance did not in fact constitute equal protection. Regardless of whether other Missouri blacks demanded such an education, Gaines must be afforded an equal opportunity for it; in the absence of equal facilities *within* the state, his admission to the existing school was required. Missouri was forced to open a separate,

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[14] Randall W. Bland, Private Pressure on Public Law: The Legal Career of Justice Thurgood Marshall, Publication of National University Publications Series in American Studies, ed. James P. Shenton (Port Washington, N.Y.: Kennikat Press, 1973), 6.

[15] Ibid.

[16] Ibid., 10-11

[17] Ibid., 10.

[18] Ibid.

[19] Ibid., 21.

comparable program for blacks, and the case prompted other litigants around the country to demand equal educational opportunities.[20]

Ten years would pass, however, before the NAACP would again make significant progress toward integration. Why the apparent hiatus from the issue of education? Randall Bland suggests that "as of 1944 the Negro leadership, including Marshall, had not adopted a positive strategy to deal with the problem, as it had with other areas of discrimination."[21] Their dilemma, it seems, was whether to continue demanding truly equal, though separate, educational opportunities for blacks, or pursue the complete overthrow of the *Plessy* doctrine which had prevailed for so long.[22] Yet in the time that it took to carefully weigh one option against the other, favorable changes took place in the nation and the world that bolstered the viability of the latter, more radical strategy.

World War II had brought home to many Americans the hypocrisy of fighting racial supremacy abroad while clinging to it at home. President Truman acted on just such a conviction when he ordered the desegregation of the armed forces in 1945.[23] The rise of McCarthyism and the ensuing infringements on civil liberties also reminded citizens of the importance of such freedoms for ***all*** Americans.[24] And in 1953, leadership of the Supreme Court passed from conservative Fred Vinson to Earl Warren, potentially tipping the balance of the Court in favor of the NAACP agenda.[25] Sensing a national climate that was ripe for change, NAACP leaders decided late in 1945 to make the leap from demanding separate equality to attacking the inherent inequality of segregation in education.[26] The NAACP

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[20] Ibid., 22.
[21] Ibid., 34.
[22] Ibid.
[23] Ibid., 38.
[24] Ibid., 39.
[25] Ibid., 37.
[26] Ibid., 38.

also decided that attempting to break down barriers at the elementary school level would be a delicate matter--the colleges and professional schools should be conquered first.[27]

A great deal of preparation in the immediate post-war years was necessary, including that of a new weapon called social science.[28] Slowly, the Association's argument against segregation took shape:

> By demonstrating to the Supreme Court of the United States that it is impossible for a state to provide equality in such intangible features as the prestige of an institution, the quality of the faculty, and the reputation of degrees for Negroes in separate schools, they hoped to prove the inconsistency of the "separate but equal" doctrine itself.[29]

The opportunity to test that argument before the Supreme Court finally came in 1948, after Ms. Ada Sipuel was denied admission to the University of Oklahoma School of Law. The State explained that an alternative school for blacks would be available in the future, and the state supreme court agreed that until such time as there was sufficient demand for a black law school, the State had no obligation to provide one.

When *Sipuel v. Oklahoma* came before the United States Supreme Court, Marshall et al argued that the State should be overruled on the basis of the *Gaines* decision--Ms. Sipuel must be admitted immediately to the only existing law program.[30] More importantly, the NAACP presented its first direct challenge to the "separate but equal" doctrine, asserting that it was "without legal foundation or social justification."[31] Though sidestepping this challenge to *Plessy*, the Supreme Court did rule that the State must provide the same education to the petitioner *at the same time* as everyone else, so that Oklahoma would either have to admit Ms. Sipuel immediately or delay admission of *all* applicants until a black program was established.[32] The University of Oklahoma regents

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[27] Ibid., 60-61; see also 69-70.
[28] Ibid., 39.
[29] Ibid., 61.
[30] Ibid.
[31] Ibid., 62.
[32] Ibid., 64.

responded by roping off an area in the State Capitol building and deeming it an equal counterpart to the original law school. Ms. Fisher (formerly Sipuel) was unsatisfied, and the issue was again taken before the Supreme Court in *Fisher v. Hurst* (1948). Here, the Court rejected the NAACP's argument that the State could not possibly provide separate equality in the intangible features of an institution. Despite losing the *legal* battle over segregation within the law school, in the end Ms. Fisher was admitted to the law school on a non-segregated basis.[33]

An important breakthrough came in 1950 with *Sweatt v. Painter*. Herman Sweatt was denied admission to the University of Texas Law School solely because of his race. Once again, there was no separate school for blacks in the state, and when the University moved to establish one, the state courts ruled against Sweatt's claim that he was denied equal protection.[34] Before the Supreme Court the NAACP reiterated the argument that, in addition to basic faculty, library, and accreditation shortcomings, the black facility could not compare to the original one in such aspects as prestige and influence.[35] This time, the Court agreed with *both* contentions.[36] Marshall and his colleagues had taken an enormous stride by extracting an admission from the Supreme Court that there was more to equality than comparable physical facilities. A companion case was decided the same day: In *McLaurin v. Oklahoma*, the admission of a black teacher to the University of Oklahoma graduate school under segregated conditions was found to be insufficient in terms of equal protection.[37] An outright repudiation of "separate but equal" was yet to come, however.[38]

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[33] Ibid., 64-65.
[34] Ibid., 65.
[35] Ibid., 66.
[36] Ibid., 67.
[37] Ibid., 68.
[38] Ibid., 67.

Shortly after the 1950 decisions, the NAACP became involved in five suits filed in federal district courts "at strategic points around the country."[39] In each case black children sought admission to white elementary or secondary schools; in each case the attorneys called for abjuration of the "separate but equal" principle on equal protection or due process grounds; and in each case their arguments were supported with copious sociological and psychological documentation.[40] Eventually four of the suits were consolidated as *Brown v. Board of Education*, while the fifth, out of Washington, D.C., went before the Court as *Bolling v. Sharpe*.[41]

Marshall put forth the same legal and sociological arguments before the Court as had been presented in the recent higher education cases.[42] Arguments from the opposition were most significant for their emphasis on the original intent of the framers of the Fourteenth Amendment; indeed, the Court called for reargument based on that issue.[43] Ultimately, the Court found the historical evidence to be inconclusive so far as original intent was concerned.[44] Instead, they focused upon the sociological evidence which the NAACP had presented time and again in the previous decade. Even if segregated schools were equal in every material regard, the Court concluded, segregation itself was an emblem of inferiority for the oppressed black race, which was thereby deprived of equal protection under the law. The unanimous 1954 ruling did not actually overturn the *Plessy* decision, but rather prohibited its application to public education. The *Bolling* case came to a similar conclusion shortly thereafter.[45]

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[39] Ibid., 70.
[40] Ibid., 70-71.
[41] Ibid., 72-73.
[42] Ibid., 74.
[43] Ibid., 74-75.
[44] Ibid., 81.
[45] Ibid., 82.

A long road had been traveled. In summary, it began with demands for equality in higher education within the confines of "separate but equal" (*Gaines*). Attempts to step beyond those limits did not meet with immediate success, but states *were* prevented from delaying fulfillment of the "separate but equal" promise (*Sipuel*). Changing times and the NAACP's use of social science eventually brought the Court to a new view of the meaning of equality, one which took into account its intangible qualities (*Sweatt*, *McLaurin*). And finally, in *Brown* the Court invalidated the application of "separate but equal" to the public education system, bringing the possibilities of integration to the controversial level of the elementary and secondary schools.

Only Just Begun:
Enforcement of Brown, 1955-1973

At last, some twenty years after the fight had begun, victory seemed to be at hand. Yet once the *Brown* ruling was achieved a myriad of unanswered questions remained: How would integration be carried out? How long could this reasonably be expected to take? Who might disobey or equivocate and how would that be handled?

The Court foresaw such problems and consequently called for the return of lawyers late in 1954 for reargument regarding implementation plans. In what has become known as *Brown II*, Marshall et al argued against the gradualist proposals of the opposition, insisting that such a strategy would only make adjustments more difficult. The Court, however, was inclined to take a more moderate stance:

> In exercising its equity powers, the Court embraced the deliberate-speed rule on the basis that it could secure the rights of the Negro litigants but, at the same time, allow the federal district courts to facilitate a reasonable, yet prompt, start toward compliance. It also presumed that the federal courts would act firmly and with good faith.[46]

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[46] Ibid., 86.

Thus the Supreme Court attempted, in *Brown II*, to give the problem of desegregation back to the states and local courts, perhaps as a peace offering. With their precious local control returned to them, the Court may have thought, Southerners would be more willing to cooperate, and might even allow themselves to be caught up in the spirit of a new era.[47]

Critics have charged that the 1955 ruling actually *invited* resistance to the original decision. All manner of evasive maneuvers were certainly employed by the Southern states to avoid integrating their schools, but whether a more exacting mandate could have prevented this evasion is obviously impossible to predict. Given the lack of support for integration in the legislative and executive branches, and the widespread and deep-rooted opposition of the South, perhaps Harvie Wilkinson reaches a more accurate conclusion when he writes that "the Court later erred tragically in implementing and monitoring that famous phrase ['all deliberate speed'], but not in formulating it."[48]

What Wilkinson and others condemn, then, is the Court's scant involvement in the enforcement of *Brown* and *Brown II* between 1955 and 1968. While it was arguably a prudent course to avoid treading on Southern toes, the Court also failed to provide crucial guidance in the execution of a broadly-phrased decree which would have far-reaching consequences and profoundly alter the Southern way of life.[49] "The Court," Wilkinson charges, "spoke mainly when it absolutely had to: at the point of crisis when obstruction was so apparent, delay so prolonged, or violation of constitutional principle so manifest that quiet was no longer feasible."[50] Thus the subtle means of segregation in the North and

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[47] Wilkinson, 65.
[48] Ibid., 77; see also 75-76.
[49] Ibid., 66.
[50] Ibid., 79.

West were ignored by the Court for nearly two decades after *Brown*, while the more overt instances of Southern discrimination took center stage.[51]

With implementation now in the hands of the lower federal courts, and the Supreme Court refusing to show the way, desegregation lurched forward in the South. As could be expected, there was little uniformity in either dispatch or vigor. Varying judicial temperaments were part of the problem. Moreover, "*Brown II* left federal district judges much too exposed."[52] So much was left to their interpretation and discretion that judges could easily incur the wrath of Southern communities by pushing too hard for integration. "Only the Supreme Court could have promoted uniformity with frequent and specific rulings, which it steadfastly declined to do," except in the most extreme circumstances.[53]

Extreme circumstances were certainly at hand when Little Rock, Arkansas attempted integration in 1957. In this instance, resistance did not begin at the grassroots level; rather, it was born of the political machinations of the state's governor, Orval Faubus. In need of an issue on which to seek a third term, he deliberately chose to capitalize upon the dramatic issue of segregation--"the great welder of white solidarity."[54]

No one had anticipated that the integration of Little Rock Central High School would be particularly eventful--desegregation had been taking place around the state at a fair pace since *Brown II*. But on the night before the fall term was to begin the governor suggested publicly that if the nine black students were brought in, disorder would be the certain outcome.[55] The next day, students were prevented from entering the high school by National Guardsmen "called out by Governor Faubus to protect life and property against

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[51] George R. Metcalf, From Little Rock to Boston: The History of School Desegregation, Contributions to the Study of Education Series, No. 8 (Westport, Conn.: Greenwood Press, 1983), 130-31.

[52] Wilkinson, 80.

[53] Ibid.

[54] Ibid., 89.

[55] Ibid.

a mob that never materialized."[56] It was only the day after this that a crowd of citizens did gather near the school, and troops turned the black students away.[57]

For three weeks the black schoolchildren were kept out of school. When the federal district judge finally interceded and troops were withdrawn, integration lasted barely half a day as tensions mounted and violence was threatened. It then took presidential intervention to ensure safe entry, and by that time opposition to integration had been so provoked that the entire school year was rife with racial turmoil.[58] In February of 1958, the despairing school board requested of the district court that the nine students be withdrawn and the desegregation plan postponed for at least two years. The judge agreed, was reversed on appeal, and the case was then taken to the Supreme Court as *Cooper v. Aaron.*[59]

Just before the start of the 1958-59 school year, members of the Court, in unison, denied the school board's requests and ordered desegregation to take place immediately.[60] Once more, there was no attempt to lay down explicit guidelines for the lower courts to work with, and after *Cooper* the Court "rehibernated," not to speak again on this issue for another five years.[61] The South continued to evade significant integration through "token compliance" tactics (most notably, the meaningless pupil placement statutes which effectively passed the burden of integration to black families), to which the Supreme Court acceded.[62]

The Court made several segregation-related rulings beginning in 1963, but the most significant again dealt with open defiance, this time in Prince Edward County, Virginia.

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[56] As quoted in Wilkinson, 90.
[57] Wilkinson, 90.
[58] Ibid.
[59] Ibid., 91.
[60] Ibid., 92.
[61] Ibid., 93-94.
[62] Ibid., 83-85.

The county had actually been involved in *Brown* as a defendant, but not until 1959 had it finally been directed to desegregate. Rather than comply with the order, it had shut down its public school system altogether. The county's white children did not go without schooling, however; on the contrary, the white community mustered considerable resources in support of the *private* schools which were opened. Even the county and state governments became involved, through public tuition grants and tax credits. Meanwhile, most black children went without formal education.[63]

Such was the state of affairs for the next four years, until in 1963 government authorities at several levels intervened to provide schooling for the black children in the area.[64] The following year, the Supreme Court finally heard *Griffin v. County School Board*, after which Prince Edward was rebuked for closing its public schools and funding its private schools out of public coffers. The county was ordered to reopen non-discriminatory public schools; its only escape from desegregation would be in maintaining two school systems, public and private.[65]

Increasingly, the Court vented its frustration with Southern obstruction by bestowing greater and greater remedial powers on district judges. The Court, through *Brown II*, had given the South its chance to change.[66] Now,

> Determination to do whatever was necessary began to take hold of the Court from deep frustration. In Prince Edward, in 1964, that meant reopening public schools. In New Kent County, in 1968, it meant promptly converting, by whatever means, to substantially integrated schools. In Charlotte-Mecklenburg, in 1971, it meant, among other things, massive compulsory transportation of schoolchildren.[67]

In addition, reinforcements were at hand in 1964, as Congress and the President threw their weight behind integration with the Civil Rights Act of 1964. The strength of the

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[63] Ibid., 98-99.
[64] Ibid.
[65] Ibid., 100.
[66] Ibid., 101.
[67] Ibid.

Department of Justice was thereby added to that of the NAACP in pursuing desegregation through litigation.[68]

Most important, the new legislation brought the Department of Health, Education, and Welfare (HEW) into play. The Court itself had been part of the problem of desegregation in that "its decrees, even in the mid-sixties, were couched in the negative."[69] Everyone knew what was impermissible, but the Court never specifically outlined what steps should be taken to avoid incurring the wrath of the judiciary.[70] Now, HEW desegregation guidelines were developed so as to provide specific standards and procedures for school integration,[71] and federal fund cutoffs threatened those who did not comply.[72]

As more and more avenues of retreat were closed to them, Southerners clung to a particular form of tokenism which seemed, for a while, as though it might satisfy the courts. "Freedom of choice" plans were adopted which allowed students and their parents to choose the school they would attend (these were essentially equivalent to the older pupil placement statutes). On the surface these plans seemed to give everyone, including the aggrieved black race, control over their education. What could not always be accounted for were the unseen forces of community pressure--from employers, from school officials, and from the average white citizen--which drained the "freedom" from "choice" for most blacks.[73] Then, too, "the South in the mid-sixties hurried to upgrade Negro schools" in hopes of encouraging black attendance at black schools.[74] Thus, the results of such plans were rarely impressive in terms of the amount of integration which actually took place.[75]

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[68] Ibid., 103.
[69] Ibid., 101.
[70] Ibid., 101-02.
[71] Ibid., 104.
[72] Ibid., 106.
[73] Ibid., 108-10.
[74] Ibid., 110.
[75] Ibid., 111.

When freedom of choice was finally challenged before the Court in 1968, it was viewed by the justices as another veiled ploy to preserve segregated schools.[76] In *Green v. County School Board of New Kent County* the Court not only declared such plans unconstitutional, it took the bold step of assigning to school officials "the *affirmative* duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[77] This time, the Court did offer specific proposals for achieving the desired goal, including pairing of schools and geographical zoning.[78] But mere plans to desegregate would no longer suffice; a school board found in violation of the Constitution was expected to "come forward with a plan that. . .promises realistically to work *now*."[79] The Court wanted visible results--statistics which showed clear progress. *Green* therefore raised the specter of desegregation-by-the-numbers; how far would this be taken?[80] What racial mix would constitute a unitary system? To what lengths would school boards have to go to reach statistical goals?[81] *Green* left these important questions unanswered.

After *Green*, however, the Supreme Court "quickly warmed to its task."[82] In 1969, the Court approved "affirmative numerical goals" to achieve faculty integration in *United States v. Montgomery County Board of Education*.[83] That same year, in *Alexander v. Holmes County Board of Education*, the Court thwarted a three-month delay in desegregating a number of Mississippi school districts.[84] When Mississippi again delayed massive student integration, the Court in *Carter v. West Feliciana Parish School Board*

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[76] Ibid., 116.

[77] *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), at 437-38, emphasis added.

[78] Wilkinson, 117.

[79] *Green v. County School Board*, at 439.

[80] Wilkinson, 116-17.

[81] Ibid., 122.

[82] Ibid., 118.

[83] Ibid.

[84] Ibid., 119.

(1970) firmly insisted on immediate compliance with *Brown*, despite the prospect of a disrupted school year. Two Court members, Burger and Stewart, could not abide this harshness and filed dissents.[85] And in the last of the Southern rural desegregation cases, *Wright v. City Council of Emporia* (1972) all four of the Nixon appointees objected when the Court refused to allow the city of Emporia to form its own school district, separate from the county school system. The county had recently come under court order to desegregate, and Emporia's withdrawal would have made desegregation more difficult. Once more, empirical racial outcomes were a central concern.[86]

Green and the cases which followed in its wake brought desegregation to the South as never before--swiftly and meaningfully. A mere three years after *Green*, HEW estimated that 44 percent of Southern black students were in majority-white schools[87]--this compared to 2.3 percent in 1964,[88] and to 28 percent in the North and West in 1971.[89] With the rural South now leading the nation in integration efforts, the Court's attention was drawn to integration problems which had been developing in urban settings.

The North and West would soon lose the comfortable immunity from Court action which they had enjoyed so far. With *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the Court began to explore issues which were not uniquely Southern. The Court was awakening to the effects of residential segregation upon urban schools, for example, and it also recognized the usefulness of the school bus as a tool for desegregation.[90] Because busing had long been used to maintain segregation, it seemed logical to some that

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[85] Ibid., 120.
[86] Ibid., 124.
[87] Ibid., 121.
[88] Ibid., 102.
[89] Ibid., 121.
[90] Ibid., 126.

it could now be employed to undo past wrongs.[91] This long-lived and essential feature of modern education was about to become the most provocative facet of desegregation yet.[92]

The *Swann* case arose when, after the *Green* ruling, a federal district judge determined that Charlotte's desegregation plan--in effect since 1965--was now an insufficient remedy.[93] Several revised proposals by the school board failed to impress the court, so an expert was consulted and his plan adopted. The new strategy would involve considerable busing of students to achieve substantial integration, and community reaction was, to say the least, unfavorable.[94] But the Supreme Court unanimously upheld the plan, and went on to present a formula with which the lower courts could evaluate future desegregation cases: If--and only if--a constitutional violation is found, a remedy which corresponds to the magnitude of the violation must be administered;[95] or, in the Court's own words, "the nature of the violation determines the scope of the remedy."[96] If concerted efforts were made by school officials to achieve and maintain a dual school system, then busing on a massive scale might well be apropos. The Court now demanded that school officials strive for "the greatest possible degree of actual desegregation"[97] in order to "eliminate from the public schools all vestiges of state-imposed segregation."[98]

But exactly how was a constitutional violation to be discerned in the first place? The Court could have made a sweeping statement on this point. Segregation was, after all, the cumulative effect of a wide range of state actions involving the distribution of political power, economic opportunity, and housing.[99] Instead, the Court determined that school

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[91] Ibid., 135.
[92] Ibid., 134.
[93] Ibid., 137.
[94] Ibid., 138.
[95] Ibid., 139.
[96] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), at 16.
[97] Ibid., at 26.
[98] Ibid., at 15.
[99] Wilkinson, 140.

desegregation "cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."[100] In desegregation cases the conduct of *school* officials was the only relevant state action to be considered by courts; in this way crucial issues such as discrimination in housing were swept aside. In addition, the Court stated that "the constitutional vice. . .was a *public* policy of segregation *at the time of Brown*;" this provided yet another loophole for most Northern school systems, few of which had ever had *official* segregatory policies.[101] Then, too, the Court restricted the use of busing remedies in *Swann*: Bus rides were not to interfere with classes or student health and safety; rigid racial quotas were deemed unnecessary; some one-race schools might be tolerated in the interest of practicality; and once desegregation was accomplished, racial ratios need not be readjusted every school year.[102]

The Court's approval of incidental one-race schools merits special attention, because an important distinction was made. The Court noted "the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city;" it acknowledged that such residential patterns have consequences for schools, and that those patterns are sometimes difficult to overcome with a reasonable amount of busing.[103] There was a difference, the Court alleged, between such *de facto* segregation and the *de jure* segregation of the South, where segregation was planned and preserved by school officials and sanctioned by law or official policy. Schools were to be held responsible only for rectifying the latter, and this had important implications for Northern school systems. In Southern schools, where courts could easily point to a protracted history of state-engendered discrimination--*de jure* segregation--school systems were taken

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[100] *Swann v. Charlotte-Mecklenburg*, at 23.
[101] Wilkinson, 145, emphasis added.
[102] Ibid., 148.
[103] *Swann v. Charlotte-Mecklenburg*, at 25.

to task; Northern schools, on the other hand, had a much better chance of deflecting blame by pointing to residential patterns beyond their control.[104]

Southern patience was tested by the differential treatment of the North and South; the Court was criticized by many a Southern congressman for creating a judicial double standard on the issue of segregation.[105] With *Keyes v. School District No. 1* (1973) came the first segregation case involving a North/Western city, and the Court's first chance to strive for equitable treatment of segregation cases.[106] Denver, Colorado had been a relatively progressive community in terms of race relations until its initially small black population grew and expanded into a previously white section of town. As the area became less and less white, moderate but ultimately inadequate steps were taken to integrate the local schools. When blacks pushed for more radical measures, which ultimately called for busing, the white community balked, racial tensions mounted, and blacks sought redress in the courts.[107]

The Supreme Court found, as had the lower courts, that Denver authorities were guilty of using numerous subtle tactics to restrict integration: strategic school construction, gerrymandered or "optional" attendance zones, and "feeder" patterns (where one-race elementary schools feed one-race junior high schools, which similarly feed the high schools).[108] Denver attempted to minimize its transgressions: Only the one neighborhood had been substantially affected, it claimed. The Court was not convinced.[109] When intentional segregation is found in a significant part of a district, nothing less than a district-wide remedy will do, because "racially inspired school board actions have an impact

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[104] Wilkinson, 194.
[105] Ibid., 193.
[106] Ibid., 195.
[107] Ibid., 196-97.
[108] Ibid., 197.
[109] Ibid., 198.

beyond the particular schools that are the subject of those actions."[110] The Court shifted the burden of proof to the school board in such cases; school officials would have to prove that segregation elsewhere in the system was not the result of intentional actions.[111] The Denver case was remanded to the district court, where a comprehensive busing plan was eventually ordered into effect.[112]

The *Keyes* case made it easier for aggrieved blacks to prod the courts to order busing, for now they were not required to prove that discrimination was present in each and every school of a district. Still, plaintiffs in Northern districts bore a heavier burden of proof than those in the South. The guilt of Southern defendants was easily proven by pointing to official segregation policies, but Northern black plaintiffs were still required to sift through mountains of school records just to prove intentional segregation in one *part* of a district.[113] The tedium and expense were "enough to discourage many potential black plaintiffs from going to court at all."[114] Go to court they did, though, and busing for purposes of integration became more and more commonplace in the North. Denver experienced a relatively untroubled transition period, but other Northern cities suffered considerable opposition and unrest over busing.[115]

For well over a decade after *Brown*, the Court had chosen to remain in the background, stepping forward only when its authority was blatantly defied. When the Court did reclaim its leadership role, its forceful decisions were not accompanied by the sort of practical guidance which could have set desegregation on a clear and even course. The Court had also held the South to a higher standard of compliance with *Brown* than the

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[110] *Keyes v. School District No. 1*, 413 U.S. 189 (1973), at 203.

[111] Gary Orfield, Must We Bus? Segregated Schools and National Policy (Washington, D.C.: The Brookings Institution, 1978), 16.

[112] Wilkinson, 198.

[113] Ibid., 198-99.

[114] Ibid., 199.

[115] Ibid., 200-202.

rest of the nation. Now it remained to be seen just how far the Court would push the issue of busing. Would it demand that the North confront its own racist traditions? Or would it capitulate to the North's squirming and fretting as desegregation was finally brought home? The case of *Milliken v. Bradley* would put the Court's fortitude to the test.

III

MILLIKEN COMES UP THROUGH THE RANKS

Zeitgeist: 1974

The year 1974 marked the anniversary of more than one civil rights achievement: *Brown* was now twenty years old, and a decade had passed since the sweeping Civil Rights Act of 1964. What had these measures actually accomplished, and what must be done in 1974 to sustain black progress? The year certainly could not be described as a stellar one for the United States as a nation. In many areas of American life, disintegration and disenchantment seemed to abound: unstable families, a stalled economy, political shame, a lost war. Where was the country headed, and how would civil rights fare under such conditions?

The social fabric of America was of a much different pattern than a mere decade before. Birth rates were generally reduced,[1] while illegitimacy was more and more commonplace;[2] marriages were down, and divorce was a growing trend.[3] Women were entering the work force[4] and had taken control of their *re*productivity as never before.[5] Populations movements had culminated in a shift from the city-country distinction to a new city-suburb distinction; the most dramatic change had taken place among blacks, who migrated in large numbers from the rural South to the urban North. Between 1950 and 1980, the thirty-three largest metropolitan areas saw their black populations increase by a total of five million people.[6] Americans were beginning to take notice of a developing

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[1] William H. Chafe, The Unfinished Journey (New York: Oxford University Press, 1991), 436.

[2] Ibid., 441.

[3] Ibid., 436.

[4] Ibid., 434-35.

[5] Ibid., 436.

[6] Tom Wicker, Tragic Failure: Racial Integration in America (New York: William Morrow and Company, Inc., 1996), 130.

"inner-city underclass," and they did not like what they saw.[7] All of these social trends had a disproportionate effect on minority families, whose stability and capacity to earn income, while improving, still lagged behind whites considerably.[8] President Nixon's "benign neglect" of these groups did not help matters.[9]

The economic picture in 1974 left much to be desired. Inflation had been a problem from the beginning of the decade and was showing no signs of abating.[10] The winter of 1973-74 had been especially difficult as Americans were hit hard by an "energy crisis."[11] Inflation and unemployment together were a rare phenomenon, but in 1974 the latter begin to rise along with the former.[12] White males were feeling the pressure in new ways: Since it was now often necessary for their wives to supplement the family income, they were competing against an influx of women into the job market. "Affirmative action" also worked against them, though such measures were a great help to black families. Despite the new opportunities for blacks and women, both groups struggled with the disparity between their own wages and those of their white male counterparts.[13] Finally, the changing job market now featured fewer blue-collar jobs, which translated into diminished security for working-class families.[14] It seemed that very few people had reason to be optimistic.

The political scene was probably the grimmest that most people could remember. After four years of "Vietnamization"--Nixon's plan to transfer military responsibility to South Vietnam[15]--the war there had ended only months ago, and the nation was still

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[7] Ibid., 176.
[8] Chafe, 441-42.
[9] J. Harvie Wilkinson, From Brown to Bakke: The Supreme Court and School Integration: 1954-1978 (Oxford: Oxford University Press, 1979), 238.
[10] Chafe, 446.
[11] Ibid., 447.
[12] Ibid., 447-48.
[13] Ibid., 437-38.
[14] Ibid., 448.
[15] Ibid., 389.

recovering from its first major military and foreign policy defeat in a long, long time.[16] Deeper disillusionment would develop from within as Americans learned that their own leader was not what he had seemed: 1974 saw, for the first time in American history, a president forced to resign in disgrace.[17]

In some ways the country had become more conservative.[18] Nixon's "silent majority"--mostly white, middle-class, middle-aged Protestants--were reacting to the liberalism of the 1960s.[19] Civil rights groups could take comfort that the Democratically-controlled Congress was pro-civil rights, but Nixon had been at best neglectful of the issue and at worst a regressive force. A case in point was his appointment of four conservative justices to the Supreme Court between 1969 and 1972.

The first change Nixon made to the Court was especially significant because he named Warren Earl Burger as chief justice of the United States, following Earl Warren's retirement in June of 1969. A Northerner, Burger had practiced law extensively before serving in the Eisenhower administration as Assistant Attorney General. He had a generally conservative record on the U.S. Court of Appeals, filing frequent dissents in response to liberal decisions made by his colleagues. But he was considered a moderate on the issue of civil rights; both integrationists and anti-integrationists were satisfied with his nomination. Burger was quickly confirmed by the Senate and took his seat in June 1969.[20]

Nixon had not had as easy a time with the next Supreme Court appointment, necessitated by Abe Fortas's resignation in the spring of 1969 amid charges of "financial

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[16] Ibid., 401.
[17] Ibid., 427.
[18] Ibid., 376-77.
[19] Ibid., 837.
[20] George R. Metcalf, From Little Rock to Boston: The History of School Desegregation, Contributions to the Study of Education Series, No. 8 (Westport, Conn.: Greenwood Press, 1983), 61.

improprieties."[21] After two controversial attempts at nominating a Southern conservative to fill the seat, Nixon had finally chosen a scholarly Northern judge from the Eighth Circuit, Harry Andrew Blackmun.[22] In keeping with his reputation as a man who "did not seem destined for controversy,"[23] Blackmun did not generate resistance in the Senate and went to work in May of 1970 after being unanimously confirmed.[24] Blackmun was a close friend of the Chief Justice, and proved to be a moderate with conservative tendencies.[25]

In the fall of 1971, the Court again required the attention of the President when Justice Black--only weeks away from death--left his position, and Justice Harlan was forced to retire due to terminal cancer.[26] Nixon's final two appointees, then, went through the confirmation process together, though not with comparable ease. After considering several candidates who provoked strong negative reactions, Nixon submitted the names of Lewis Franklin Powell, Jr. and William Hubbs Rehnquist.[27] Neither had served in any judicial capacity. Powell, a distinguished Virginia lawyer, described himself as an "independent Democrat."[28] His position on various issues was sometimes difficult to predict;[29] for example, his "conservative instincts" did not deter him from taking a stand against Southern resistance to integration.[30] Rehnquist, on the other hand, was more of a judicial activist than Powell, and held decidedly conservative views.[31] He was serving as Assistant Attorney General at the time of his nomination,[32] and had shown great loyalty to

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[21] Ibid., 170.
[22] Ibid., 170-71.
[23] Ibid., 171.
[24] Ibid., 172.
[25] Ibid., 171.
[26] Ibid., 170.
[27] Ibid., 173.
[28] As quoted in Metcalf, 174.
[29] Metcalf, 175.
[30] Ibid., 174.
[31] Ibid., 175-76.
[32] Ibid., 173.

the Nixon White House.[33] The highly respected Powell was easily confirmed, but Rehnquist, despite an attempt to "backpedal" from his anti-civil rights views, was fought by liberals in the Senate.[34] In the end, however, he took his place on the Court in January of 1972, as did Powell.[35]

The justices appointed by previous presidents were more "liberal" than those chosen by Nixon. Still, with the Nixon appointees the balance of the Court in 1974 tilted toward the conservative side. Franklin Roosevelt had placed the liberal William Orville Douglas on the Court in 1939; he could certainly be expected to support the civil rights agenda.[36] So could Eisenhower's 1956 choice, William Joseph Brennan, Jr., also a liberal constructionist.[37] But Eisenhower's 1958 appointee was less predictable: Potter Stewart had cast enough conservative votes to keep civil rights leaders guessing.[38] And Kennedy appointee Byron Raymond White, on the Court since 1962, had demonstrated a more conservative inclination than was anticipated.[39] Finally, there was Thurgood Marshall, brought to the Court in 1967 by Johnson as a staunch defender of civil rights.[40] He, of course, would be most troubled by the turn of events in *Milliken*.

By 1974 observers noted the significant ideological shift which was taking place on the Court. The *New York Times* reported that during the 1973-74 term the Nixon four had voted together on 103 occasions--75 percent of the time--and in all but one of these cases they had "formed the nucleus of a majority."[41] Justice Powell apparently strayed from the other three most often, while Potter Stewart and Byron White--the "swing" voters--were

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[33] Ibid., 176.
[34] Ibid., 177-78.
[35] Ibid., 178.
[36] Kermit L. Hall, ed., The Oxford Companion to The Supreme Court of the United States (New York: Oxford University Press, 1992), 234.
[37] Ibid., 87.
[38] Ibid., 837.
[39] Ibid., 927.
[40] Ibid., 527.
[41] *New York Times*, July 1, 1974, p. 10.

most likely to join the conservative bloc.[42] Meanwhile, the Court's "Democrats," including White, were voting together only 43 percent of the time; excluding White, the three solid liberals stuck together 74 percent of the time.[43]

The changes in the Court had practical consequences for desegregation, as unanimity on the issue gradually broke down.[44] In the 1970 *Carter* case Burger and Stewart had dissented; in 1972 Nixon's men went their own way in a five-to-four vote in *Wright*;[45] and a year before the *Milliken* decision, the Court split four-to-four (with Justice Powell disqualifying himself from participation) over metropolitan desegregation in Richmond, Virginia. The turmoil on the Court matched that in the nation as a whole, for by 1974 the controversy had reached the boiling point among voters. Nine Supreme Court justices would finally be asked to resolve the struggle between the clashing interests of America's urban-dwellers.

Detroit: City Divided

In 1978 Elwood Hain, a co-chairman of the Metropolitan Coalition for Peaceful Integration at the time of *Milliken*, described Detroit as "a city much maligned by public opinion, local and national. It is known as a dirty factory town, the scene of bitter strikes and race riots."[46] Detroit certainly had its share of racial problems, which erupted in deadly riots twice within a twenty-five year period. In 1943, thirty-four people were killed when racial tensions exploded into "open warfare between the Detroit Negroes and the

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[42] Ibid.
[43] Ibid.
[44] See generally *New York Times*, July 28, 1974, Section IV, p. 3.
[45] See Part II of this paper for details of these two cases.
[46] Howard I. Kalodner and James J. Fishman, eds., Limits of Justice: The Courts' Role in School Desegregation (Cambridge, Mass.: Ballinger Publishing Co., 1978), 223.

Detroit Police Department."[47] In July of 1967 the violence was even worse: Forty-three people perished and the city sustained fifty million dollars in property damage.[48]

The strains of industrialization--rapid expansion, demographic instability, urban hazards--were an underlying factor: Thanks to the automotive industry the city had undergone enormous growth since the turn of the century. By 1960 its burgeoning suburbs surpassed the city itself in population, and the metropolitan area stretched out over Wayne, Oakland, and Macomb counties. When World War I placed greater demands on heavy industry, Southern blacks migrated northward to fill jobs. Still, the small black community had grown to only four percent of the population by 1920.[49] By 1950, however, blacks accounted for 16 percent of the city population, and by 1970 the figure was 44 percent.[50] This dramatic change reflected not only the substantial post-World War II in-migration of blacks, but also the simultaneous out-migration of whites; in fact, whites left the city at a significantly faster rate than blacks moved in. Since migration for both races was greatest among families with young children, changes in the racial composition of Detroit's student population were even more striking.[51]

Over decades, the black population was "channeled" into "an expanding core area" of the city, with white neighborhoods receding to the outermost parts of town.[52] In 1970, "indexes of dissimilarity" showed residential segregation to be quite extensive in Detroit proper, and even more so in the suburbs: 97,000 blacks comprised only four percent of the suburban population, and they remained strictly segregated from white populations.[53] The residential segregation of the metropolitan area was reflected in its schools--again, even

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[47] As quoted in Metcalf, 157.
[48] Ibid.
[49] Kalodner, 224.
[50] Reynolds Farley, "Population Trends and School Segregation in the Detroit Metropolitan Area," Wayne Law Review 21 (March 1975): 870.
[51] Kalodner, 225.
[52] Ibid.
[53] Ibid.

more so in the suburbs than in Detroit. In 1970, the Detroit School District (the boundaries of which are coterminous with the city limits) was 63.6 percent black, with most of its students attending racially identifiable schools.[54] Suburban schools, meanwhile, generally served student bodies which were 98 percent or more white.[55]

The Detroit School Board did not pursue a uniform policy of segregation: It was sometimes guilty of active segregation, sometimes of segregation by default, and sometimes it was quite progressive in its policies--depending upon the inclination of its members and school administrators. In several instances the board took strong measures against personnel found guilty of discrimination. It also took aggressive steps to screen textbooks for "human-relations sensitivity."[56] Between 1957 and 1966 study commissions were established, the recommendations of which eventually led to nondiscriminatory placement of teachers.[57] When a liberal board majority took office in 1965, they replaced the school superintendent with pro-integrationist Norman Drachler.[58] Affirmative steps were then taken to integrate faculties, recruit black teachers, and promote black administrators.[59] In addition, pupil assignments, open enrollment guidelines, and busing policies were revised to promote student integration.[60]

Unfortunately, "these policies of the board were not always implemented as written."[61] Elwood Hain explains that "most of the citizenry, including school officials, . . .operated on the assumption that the racial separation of pupils was a fortuitous result of residential segregation."[62] People did not easily recognize the discriminatory effects of

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[54] Ibid., 226.
[55] Brief for Respondents, *Milliken v. Bradley*, 418 U.S. 717 (1974), at 4.
[56] Kalodner, 227.
[57] Ibid., 228.
[58] Ibid., 229-30.
[59] Ibid., 229.
[60] Ibid., 228.
[61] Ibid., 228-29.
[62] Ibid., 227.

their actions and inactions, and therefore saw no reason to change their behavior. Perhaps it was the checkered history of the school district's efforts which frustrated blacks the most. In any event, by 1968 blacks had grown impatient and sought to transform, by one means or another, a school system which was now majority-black.[63]

Choosing Up Sides

After the 1967 race riots in Detroit, a number of local civil rights activists--black and white--abandoned the goal of integration and began demanding black control of Detroit's segregated black schools.[64] In 1969, the Michigan legislature responded by passing Act 244, which decentralized the Detroit system so as to assure greater local control. Blacks would have greater influence over their neighborhood schools, and for the most part whites would only exercise power over the predominantly white schools.[65] The legislature favored this course of action over a proposal by Detroit's school board president to decentralize the entire metropolitan area and integrate Detroit with its suburbs. In fact, the new legislation pointedly reaffirmed the city limits as the boundary for the Detroit district.[66]

Thus the heavily black Detroit school system was left to itself. Toward the end of the 1969-70 school year, as the Detroit Board of Education moved to implement decentralization, they also drafted a small-scale integration plan as a first step toward "maximizing the limited potential for desegregation within the city."[67] The plan involved changing attendance zones for some 12 of the city's 21 high schools, with a relatively small number of students actually affected (less than three percent of Detroit's total student

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[63] Ibid., 229-230.

[64] Paul R. Dimond, Beyond Busing: Inside the Challenge to Urban Segregation (Ann Arbor: The University of Michigan Press, 1985), 26.

[65] Kalodner, 231.

[66] Dimond, 27.

[67] Ibid.

population).[68] The plan also proposed, "for the first time in the history of the system," the assignment of white students to black schools.[69] The new arrangement was to take effect in the fall semester of 1970.[70]

Prior to the board's next regular meeting, one of the board members who opposed the plan provided his copy to the press. He then led a rally of angry whites on the day of the board meeting.[71] Still, the plan was approved by the board and became known as the April 7, 1970 Plan.[72] White citizens groups demanded intervention from the state legislature and moved to recall those board members who voted for the plan.[73] Within two days the Michigan House, responding "with unusual dispatch," mandated that students be assigned to the neighborhood schools closest to them.[74] The Senate, for its part, voted to repeal the entire decentralization program. In order to avoid jeopardizing both decentralization and integration, black and white liberal legislators sought a compromise.[75] Two months later, on July 9, 1970, the legislature passed Public Act 48, which fully neutralized the desegregation effort: The legislation reorganized the Detroit School District, establishing racially distinct sub-districts; specifically nullified the April 7, 1970 Plan; and imposed segregatory "free choice" and "neighborhood" student assignment programs.[76]

Both the local branch of the NAACP and Detroit's progressive school superintendent were affronted by the turn of events, and sought help from Nathaniel Jones, general counsel for the NAACP's national organization. Superintendent Norman Drachler

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[68] Kalodner, 234, n. 46.
[69] Dimond, 27.
[70] Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Schools (Ithaca: Cornell University Press, 1976), 205.
[71] Kalodner, 233.
[72] Ibid., 234.
[73] Dimond, 27.
[74] Brief for Respondents, at 12.
[75] Kalodner, 234.
[76] Brief for Respondents, at 12.

sent school board attorney George Bushnell to meet with NAACP officials in secret.[77] The school administration wished to challenge Act 48 so as to push forward with the original integration plan, but the NAACP leaned toward bringing suit against the school board as well in order "to insure actual desegregation."[78] Initially the board and the NAACP cooperated in preparations to file suit against the State: District staff provided information to Association lawyers and identified students and their parents as potential plaintiffs.[79] But in the mean time the recall process continued, despite the neutralization of the April 7 Plan by Act 48. On August 4, in a special election sharply divided along racial lines, anti-busing citizens pulled off "the first successful recall campaign in the 128-year history of the school district."[80] Since the board no longer had a majority in favor of integration, the NAACP decided to list it as a defendant.[81] Upon learning of this, school board attorney Bushnell resigned his position on the Board of Directors of the Detroit NAACP.[82] Bushnell, himself an activist, had apparently become so involved in the board's progressive efforts that he was "emotionally involved in any judgment passed on it."[83]

On August 18 the local branch of the NAACP, along with a number of students and parents, and on behalf of all students and their parents in the Detroit School District,[84] filed a motion for a preliminary injunction to prevent enforcement of Act 48 so that integration could take place as planned.[85] In addition to challenging the constitutionality of the statute, plaintiffs also claimed that the Detroit Public School System was racially segregated, in

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[77] Dimond, 28-29.
[78] Ibid., 29.
[79] Kalodner, 237-38.
[80] Ibid., 235.
[81] Dimond, 29.
[82] Ibid., 30.
[83] Kalodner, 236.
[84] *Milliken v. Bradley*, 418 U.S. 717 (1974), at 722.
[85] Brief for Respondents, at 13-14.

both the student body and faculty,[86] due to official policies, actions, and inactions of the state's governor, attorney general, board of education, and superintendent, as well as Detroit's board of education and former superintendent.[87] The complaint filed by plaintiffs asked for immediate implementation of the April 7 Plan and for the eventual elimination of racially identifiable schools, but made no mention of relief beyond district boundaries. "Given the extreme difficulty of the case under existing law," states Paul Dimond, "there was little inclination among the NAACP legal staff to include a plea for city-suburban integration at the outset."[88] At this point in time, the Supreme Court had not yet made its *Swann* ruling applying the principles of *Green* to urban school systems.[89]

The attorneys for plaintiffs went immediately to the District Court to request prompt implementation of the April 7 Plan pending a hearing. They found themselves before Judge Stephen Roth, a Hungarian immigrant who had worked his way through law school and the Michigan political scene to serve as state attorney general and then state trial judge. Appointed to the federal bench by President Kennedy, he had a reputation as "a hard-working but conservative jurist who demonstrated little sympathy for minority grievances."[90] Roth turned the attorneys away without the requested injunction and scheduled a preliminary hearing for August 27.[91] Because the plaintiffs did not present substantial evidence of a dual school system at that hearing, an openly hostile Judge Roth again refused, on September 3, to grant an injunction. After dismissing the governor and attorney general as defendants, he scheduled a trial on the merits of the case for November

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[86] Brief for Petitioners, *Milliken v. Bradley*, 418 U.S. 717 (1974), at 7.
[87] Brief for Respondents, at 11.
[88] Dimond, 31.
[89] Ibid., 28-29.
[90] Ibid., 31.
[91] Ibid., 32.

12.[92] That same day (September 3), a group of white Detroit homeowners were granted intervention as defendants.[93]

The plaintiffs, meanwhile, decided to appeal the District Court's decisions. On September 8, 1970, school began in Detroit, with no remedy in place for its black schoolchildren.[94] That day the Court of Appeals held an emergency hearing, expedited the appeal process, and subsequently heard arguments on October 2.[95] On October 13 a three-judge panel again denied injunctive relief, but did rule that the State, via the legislature, had unconstitutionally interfered with a legitimate desegregation plan.[96] The governor and attorney general were reinstated as defendants,[97] and the matter was remanded to the District Court for an expedited trial on the merits of the case.[98]

In a November 4 hearing back in District Court, the plaintiffs sought execution of the April 7 Plan beginning the second semester of the academic year. Judge Roth postponed the upcoming trial and on November 6 ordered the Detroit Board to submit a high school plan along the lines of the April 7 Plan.[99] However, a board-sponsored public hearing to consider various plans was interrupted by white protesters who continued to oppose the assignment of white children to black schools.[100] Behind closed doors, the school board drafted two alternative plans for integration--"The Campbell Plan" and "The MacDonald Plan"--and presented those to the court for review.[101] On December 3 the

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[92] Ibid., 32-33.
[93] Brief for Petitioners, at 11.
[94] Dimond, 33.
[95] Ibid., 33-34.
[96] Ibid., 34.
[97] Brief for Respondents, at 15.
[98] *Milliken v. Bradley*, at 723.
[99] Dimond, 34.
[100] Ibid., 35.
[101] Brief for Petitioners, at 11-12.

MacDonald "Magnet" Plan (a more extensive plan where academic excellence would attract students to schools) was approved by the District Court.[102]

The plaintiffs were dissatisfied, however, because several similar programs had already failed to achieve integration in the past.[103] There were also more delays: The "Magnet" Plan would not be implemented until the fall of 1971, and the trial was postponed indefinitely.[104] The plaintiffs appealed once again. Though the Court of Appeals refused to consider the matter of the "Magnet" Plan, it did remand the case to the District Court for *immediate* trial concerning the charges of *de jure* segregation which had been leveled by the plaintiffs.[105]

The District Court Trial

Suing the fifth largest school district in the nation required "unprecedented effort" on the part of the NAACP.[106] In the process of preparing their case, plaintiffs' lawyers found Detroit to be "a community long divided along racial lines."[107] Paul Dimond reveals that their strategy was to present evidence of widespread housing discrimination coupled with purposeful segregatory actions by school officials:

> If we could show that the housing segregation resulted from racial discrimination and was part of a community custom of racial caste, then we might be able to move any judge to see that school authorities should not get off scot-free by arguing that they only incorporated residential segregation through an allegedly neutral system of neighborhood pupil assignments. It would not take much proof of school board manipulation designed to take advantage of, or to exacerbate, such housing segregation to show that school authorities were willing partners--not neutral observers--in the process of segregation.[108]

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[102] Graglia, 207.
[103] Dimond, 35-36.
[104] Ibid., 36.
[105] *Milliken v. Bradley*, at 724.
[106] Kalodner, 244.
[107] Dimond, 38.
[108] Ibid., 39.

Despite evidence that segregation was not limited to Detroit, the NAACP legal team lacked the resources to tackle metropolitan integration. Dimond explains that, at the time, a case developing in Richmond, Virginia showed greater promise for successfully breaching district lines and, "if successful, might eventually provide the legal building block necessary to raise the issue at a subsequent stage in the Detroit case."[109]

The trial began on April 6 and went through July 22 of 1971. With boldly colored maps and overlays the plaintiffs demonstrated the extensive residential segregation of Detroit and the manner in which school boundaries "neatly coincided" with uniracial neighborhoods over time.[110] Numerous Michigan Supreme Court cases were introduced showing that restrictive covenants were enforced throughout the Detroit area until the *Shelley v. Kramer* (1948) case precluded state complicity.[111] Witness after witness testified to the development and perpetuation of black "containment" through various mechanisms, including

> rock-throwing mob action; realtor and neighborhood association "point systems," "codes of ethics," and discriminatory marketing of homes and apartments to exclude "undesirables," particularly blacks; FHA promotion of racial restrictions and whites-only housing; racially dual public housing with black projects in designated black tracts and white projects in neighborhoods reserved for whites.[112]

Experts also explained that higher incomes rarely propelled blacks over the color line, nor did segregation of other ethnic groups compare to that of blacks.[113] The most moving testimony came from a seasoned black realtor who described his harrowing experience with the entrenched system of housing discrimination.[114]

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[109] Ibid., 40.
[110] Ibid., 41.
[111] Ibid., 42-43.
[112] Ibid., 43-44.
[113] Ibid., 46-47.
[114] Ibid., 50-54.

By the time plaintiffs wrapped up the housing discrimination portion of their case, several extraordinary developments had transformed the atmosphere of the trial. First, the possibility of metropolitan relief arose when, during the cross-examination of a witness, Alex Ritchie (attorney for the white anti-busing group) suggested that desegregation in Detroit would be "an exercise in futility."[115] Judge Roth initially shied away from the subject of area-wide desegregation.[116] Over time, however, Judge Roth appeared to be deeply affected by the evidence he confronted, particularly the testimony of the black realtor. That testimony also rattled Alex Ritchie, who experienced such a dramatic "conversion" that he announced that he would push for cross-district relief of segregation.[117] Finally, on April 20, in the midst of the plaintiffs' case, the favorable *Swann* decision came down, bringing hope to the plaintiffs that their case would be viewed with more sympathy by the courts.[118]

The plaintiffs concluded with evidence and witnesses attesting to actions and inactions by the Detroit Board and the State which incorporated housing patterns to produce one-race schools.[119] Plaintiffs contended that, in spite of recent efforts by a liberal board, past segregation had not been remedied; generally speaking, the board had continued to capitulate to community pressure for segregation.[120] The plaintiffs still proceeded with great caution where metropolitan relief was concerned, for fear that haste would jeopardize success in the higher courts.[121]

When the plaintiffs rested their case, the State defendants (including the state's governor, attorney general, board of education, and superintendent) announced that they

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[115] Ibid., 48.
[116] Ibid., 49-50.
[117] Ibid., 54.
[118] Ibid., 56.
[119] Ibid., 59-63.
[120] Kalodner, 246.
[121] Dimond, 63-64.

did not intend to present a defense, and asked to be dismissed. Apparently offended at the State's default, Judge Roth refused to dismiss them from the case; still, the State did not participate in the remainder of the trial. On June 25, by way of messenger, Roth warned the State defendants that they should be prepared for the possibility of a metropolitan-wide remedy, as he was now skeptical that Detroit could desegregate on its own.[122]

George Bushnell--a man torn between his own liberal beliefs and his duty to defend the Detroit Board[123]--attempted to spotlight the board's recent progressive policies, particularly in the area of faculty integration.[124] But he also added to the case *against* the State by providing evidence that the State had discriminated against the Detroit School District through various funding policies.[125] Moreover, the defendant board's own education expert testified in favor of area-wide integration.[126]

On July 16, Alex Ritchie (counsel for the white Detroit homeowners group) moved to join as defendants all other school districts in the tri-county area; Ritchie also submitted his own findings as to the lily-white complexion of the suburbs. The anxious plaintiffs' attorneys backed away from this, arguing to delay consideration of the motion until desegregation plans had been evaluated.[127] Roth agreed, and took Ritchie's request under advisement.[128] The trial ended on July 22.

On September 27, the court announced that it had found both government and private institutions to be involved--actively or passively or both--in the creation and maintenance of residential segregation in the Detroit area; this, combined with significant discriminatory conduct on the part of state and local school officials, had resulted in a

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[122] Ibid., 66.
[123] Ibid., 54.
[124] Ibid., 65.
[125] Ibid., 67.
[126] Ibid., 68.
[127] Ibid., 66-67.
[128] Brief for Petitioners, at 13.

thoroughly segregated school system.[129] Specifically, the court determined that attendance zones had been drawn from north to south, rather than east to west, in order to minimize racial mixing.[130] Attendance lines were gerrymandered or optional attendance zones established strategically so as to frustrate integration.[131] The optional zones occurred in neighborhoods in the midst of racial transition, for example, or between schools of opposite racial character, giving white students the "out" they so often sought.[132]

School construction decisions, too, almost always resulted in schools being built in one-race neighborhoods so as to achieve one-race schools. The district's busing program had been used to the same effect: Buses carrying black students bypassed white schools with plenty of space in favor of predominantly black schools. White students, on the other hand, were rarely bused to black schools. And while many white suburban districts had enjoyed full state funding for school transportation, inner-city schools were not provided for during the same time frame. In addition to the Act 48 and state funding issues, all of the actions, or inactions, of Detroit school officials were deemed to be extensions of *state* action.[133] The complicity of the State in segregating Detroit brought the full weight of the Constitution to bear upon the State defendants, and might indeed justify a court order demanding that the State now use its power to desegregate across district lines.[134]

Due to relatively sparse media coverage of the trial, Judge Roth's ruling was a shock to the Detroit community. At an October 4 conference the courtroom was filled to overflowing with interested parties and members of the media.[135] The Detroit Board was ordered to submit a plan to desegregate within the city limits, while the remaining State

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[129] Brief for Respondents, at 18.
[130] *Milliken v. Bradley*, at 725.
[131] Brief for Respondents, at 16.
[132] *Milliken v. Bradley*, at 725.
[133] Ibid., at 725-27.
[134] Ibid., at 771-72.
[135] Dimond, 74.

defendants were asked to plan desegregation for the entire metropolitan area.[136] Roth again shelved the matter of joining suburban districts until a more appropriate time. When that meeting ended, organized opposition began: rallies, petitions, bumper stickers, scathing editorials. Most significant was the sudden conversion of many politicians to the anti-busing ranks. Michigan's Republican senator, Robert Griffin, went so far as to introduce a constitutional amendment banning forced busing.[137]

While the ordered desegregation plans were under construction, various other developments took place: After the segregation ruling was issued, a local newspaper revealed that school board representatives, including the board attorney, had approached the NAACP before the case started. Tensions mounted between George Bushnell and the new, conservative board.[138] When in November the board decided to appoint co-counsel--an apparent "vote of no confidence in Bushnell"--the long-time board attorney resigned.[139] Also, in January of 1972, Richmond was ordered to desegregate with two adjacent county school systems, and plaintiffs monitored the case expectantly as it made its way to the Fourth Circuit. Meanwhile, an attempt by the *Milliken* defendants to appeal Roth's segregation ruling and planning orders was unsuccessful: On February 23, 1972, the Sixth Circuit deemed them unappealable.[140]

All of the requested desegregation plans had been submitted by the first week of February, 1972.[141] The plaintiffs, unsatisfied with the two Detroit-only plans submitted by the school board, drew up their own proposal for desegregation of the district.[142] They also submitted a multi-district plan, as did Alex Ritchie and the Detroit Board.[143] As multi-

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[136] Brief for Petitioners, at 14.
[137] Dimond, 75-76.
[138] Kalodner, 252.
[139] Ibid., 253.
[140] Dimond, 77.
[141] Brief for Petitioners, at 14.
[142] Dimond, 76.
[143] Ibid., 77.

district relief became a real possibility, many suburban school districts were increasingly anxious to be party to the proceedings.[144] Some districts could not afford to do so; some, on the other hand, abstained precisely because they could later claim that they were not properly represented in the proceedings.[145] In the end forty-three districts sought intervention.[146] On March 14, 1972, hearings began for the Detroit-only plans, and the next day the court granted the motions for intervention. As new defendants, the suburban school districts would only be allowed to participate in the proceedings with regard to remedy, and only as advisors to the court. They would have one week to submit legal arguments on the matter of multi-district relief.[147]

On March 24, two days after briefs were submitted, the court made its ruling with regard to the propriety of a multi-district plan: It rejected the intervening districts' argument that such a plan would not be justifiable unless all districts were shown to have acted in violation of the Constitution; nor did it accept the State's claim of blamelessness.[148] Meanwhile, hearings for the Detroit-only plans had taken place (which the suburban intervenors failed to attend).[149] The two "free transfer" plans submitted by Detroit school officials had little potential for success; they were nothing more than variations on the MacDonald "Magnet" Plan which was put into effect in the fall of 1971, and which had actually worsened the segregation problem.[150] The Detroit School Board urged that, due to the probable exodus of whites, real integration would call for a plan reaching beyond district boundaries.[151]

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[144] Kalodner, 256.
[145] Ibid., 257, n.167.
[146] Ibid., 256.
[147] Brief for Petitioners, at 14-15.
[148] *Milliken v. Bradley*, at 732.
[149] Brief for Respondents, at 28.
[150] Dimond, 76.
[151] Ibid., 78.

Lawyers for the plaintiffs, on the other hand, argued for immediate Detroit-only desegregation: "City-only relief, although inadequate, was far better than leaving the existing school segregation in place for years while waiting for metropolitan relief."[152] On March 28, the court determined that the most promising of the three intra-city plans--a pupil reassignment plan submitted by plaintiffs--was still unsatisfactory because it would likely produce a "white flight" reaction by creating a greater number of predominantly black schools. The sanctity of school district lines, the court contended, did not outweigh constitutional rights: It would be necessary to seek a solution outside the city limits.[153]

The next couple of weeks were spent in hearings to evaluate metropolitan-wide plans. The suburban districts refused to offer suggestions for achieving successful area-wide integration; rather, their attorney simply argued that because violations had been found only in Detroit proper, any remedy must be contained within the city limits.[154] The State defendants, for their part, had failed to submit a practical plan for metropolitan desegregation. Rather, the six "plans" which were presented amounted to piecemeal discussions of alternative concepts, methods, and administrative structures. Thereafter, the State continued to resist assisting the court in its remedial efforts. Because there was no substantial desegregation plan to work with, these initial hearings were largely spent haggling over the new desegregation area and outlining procedures for *future* planning.[155]

In mid-June of 1972 the court issued a ruling which "adopted the plaintiffs' proposed perimeter, the most conservative proposal that would effectively eliminate racially identifiable schools."[156] Fifty-three of the original 85 outlying districts were to be included in plans for integration, producing a desegregation area with a student population that was

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[152] Ibid.
[153] *Milliken v. Bradley*, at 732-33.
[154] Kalodner, 259-60.
[155] Brief for Respondents, at 28-29.
[156] Kalodner, 261.

25 percent black.[157] A panel was appointed and directed to design a plan that would result in maximum integration by pairing portions of the city with districts in the suburbs. The goal would be schools, grades, and classrooms which reflected the racial composition of the entire student population.[158] Although there had not been findings of discrimination with regard to faculty placement, the court also ordered that each school's faculty be at least ten percent black.[159] Finally, Roth required that the State begin making practical arrangements for short- and long-term desegregation.[160]

During the remedy hearings "the politics of desegregation had reached a boil."[161] On March 14, anti-busing presidential candidate George Wallace won a "smashing victory" in the Florida Democratic primary--a race in which the busing issue was key.[162] The political implications of Wallace's triumph were not lost upon President Nixon; in a televised speech just two days later, Nixon expressly equated busing with racial balance and called for a congressional moratorium to restrain the courts.[163] That June, Congress passed the Broomfield Amendment to thwart implementation of federal busing orders until all litigation was complete.[164] Some members of the Detroit community also continued to react belligerently, but others--including religious, civic, and labor groups in the city *and* suburbs--moved to embrace Roth's efforts by forming the biracial Metropolitan Coalition for Peaceful Integration.[165]

On July 11, 1972, Judge Roth acted on the recommendations of the appointed panel: The State defendants were ordered to shoulder the cost of acquiring nearly 300

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[157] Ibid.
[158] *Milliken v. Bradley*, at 733-34.
[159] Graglia, 222.
[160] Kalodner, 260.
[161] Ibid., 262.
[162] Metcalf, 142.
[163] Ibid., 143.
[164] Kalodner, 263-64.
[165] Dimond, 86.

school buses with which to carry out an interim metropolitan-wide transportation program for the 1972-73 school year.[166] When the defendants indicated that the necessary funds would not be released, the District Court responded by joining the State Treasurer as a defendant to the proceedings.[167] With the State defendants continuing to dig in their heels, it looked as though another school year would be lost to litigation.

The Sixth Circuit Court of Appeals

The defendants made a predictable appeal to the Sixth Circuit. Pending appeal, the order requiring purchase of buses was stayed, as were all further proceedings save for planning by the panel.[168] The plaintiffs would have to face another conservative court: In a 1969 case, *Deal v. Cincinnati Board of Education*, the Sixth Circuit had determined that neighborhood schools provided free choice because parents could choose schools through their choice of residence; at the same time, proof of housing discrimination had been deemed irrelevant and was disallowed.[169] In plotting their strategy, therefore, the plaintiffs decided to downplay their housing discrimination evidence in order to "avoid a direct confrontation with *Deal*."[170]

The State, for its part, attempted to refute Roth's findings of state complicity. The new attorney for the Detroit School Board, George Roumell, did not strive to challenge the segregation findings but instead argued that the suburban districts were as culpable as the Detroit district. Paul Dimond comments that "[Roumell's] strategy was clear: if you must affirm the constitutional violation, then give us a metropolitan remedy."[171] Finally, the

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[166] *Milliken v. Bradley*, at 734.
[167] Brief for Respondents, at 32.
[168] Brief for Petitioners, at 17.
[169] Dimond, 26.
[170] Ibid., 87.
[171] Ibid., 88.

suburban defendants complained that they had not been "given their day in court," and again argued that the scope of the remedy must be limited by the actual findings.[172]

While Detroit awaited yet another court decision, President Nixon was reelected on November 4, 1972. That same day, Judge Stephen Roth suffered a major heart attack.[173] In December, while he was still recuperating, the three-judge panel of the Sixth Circuit unanimously affirmed Roth's segregation findings as well as his judgment that inter-district relief was required. Some of Roth's minor rulings, including his determination of the desegregation area, were vacated in the interest of allowing the state legislature to correct the situation voluntarily. The court also directed Roth to accord a full hearing to all affected suburbs.[174]

The decision was heartening for the plaintiffs, but they also watched with trepidation as Richmond's multi-district desegregation order went before the Supreme Court. In that case, metropolitan relief had been rejected by the Fourth Circuit on the grounds that local school districts were autonomous and the Tenth Amendment prevented federal courts from restructuring a state's school system. Meanwhile, on January 16, 1973, the Sixth Circuit agreed to an *en banc* (full court) review of the panel's decision in the Detroit case.[175] While awaiting that verdict, plaintiffs were disappointed to learn that the Supreme Court had split four to four over the Richmond case (Justice Powell had excluded himself from participation). A tie vote meant that the Fourth Circuit's ruling would stand, and that neither an opinion nor the justices' votes would be made public. The plaintiffs speculated that "one of the five remaining members of the Warren court, probably

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[172] Ibid.
[173] Ibid., 89.
[174] Ibid., 90.
[175] Ibid., 90-91.

Justice Stewart or Justice White, had joined the Nixon appointees in rejecting cross-district relief."[176]

Despite this ominous development, on June 12, 1973, the *en banc* Court of Appeals affirmed, by a six to three vote, the District Court's finding of constitutional violations on the part of both the Detroit Board of Education and the State. It agreed that those violations were a direct cause of segregation both in Detroit and between Detroit and the suburbs, and that other metropolitan districts could and should be involved in order to rectify the situation effectively.[177] On procedural grounds the court vacated the planning and desegregation area ruling, declining to comment on the substance of those arrangements. The court-appointed panel would still be allowed to continue its planning activities, but all affected districts would have to be made party to the case on remand.[178] Lastly, the court vacated the order regarding the purchase or lease of buses, leaving open the option of reissuing the order at a later date.[179] Significantly, the court declined to consider any proof of housing discrimination, and expressly refused to base any part of its decision upon that evidence.[180]

In accordance with the court's instructions, the plaintiffs on August 6 moved for joinder of all tri-county school districts not already involved in the suit; this was so ordered by the District Court one month later. On September 4, 1973, plaintiffs also amended their original complaint "to conform to evidence."[181] The complaint now alleged segregation both within Detroit and between Detroit and its suburbs, and sought nothing less than inter-district relief.[182]

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[176] Ibid., 92.
[177] *Milliken v. Bradley*, at 734-35.
[178] Brief for Respondents, at 35.
[179] *Milliken v. Bradley*, at 736.
[180] Dimond, 93.
[181] Brief for Petitioners, at 18.
[182] Ibid., at 18.

IV

TO THE HIGHEST COURT

Raising the Stakes

As the various parties to the Detroit case were assessing the Court of Appeals decision, the Supreme Court issued its *Keyes* ruling, which focused on the *intent* of school authorities in making student assignments. Because the *Milliken* plaintiffs had shown segregatory intent on the part of defendants, they felt that Roth's segregation ruling would not be in jeopardy; they could concentrate their efforts on defending inter-district relief. The Detroit Board came to a similar conclusion, and so did not pursue Supreme Court review of the rulings against it.[1]

But the *Keyes* decision had another, less welcome, implication: Justice Powell, who had declined to hear the Richmond case, filed a partial dissent in the Denver decision. He qualified his support of the *Keyes* majority by stating that he did not believe in massive busing for purposes of integration. Because the Richmond case had crucial implications for the Detroit case, Powell and "swing" voters Stewart and White had been the focus of much speculation. Unfortunately for the plaintiffs, it was now "widely expected" that Powell would not be receptive to Roth's order calling for widespread busing in the Detroit metropolitan area.[2] The plaintiffs would have to pull off a Roth-like conversion of Powell or convince one other "swing" justice--they knew not which--that multi-district relief was necessary and proper.

On September 6, 1973, a petition for *certiorari* was filed in the Supreme Court by the State defendants, by Allen Park Public Schools, et al., and by the Grosse Pointe Public

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[1] Paul R. Dimond, Beyond Busing: Inside the Challenge to Urban Segregation (Ann Arbor: The University of Michigan Press, 1985), 99.

[2] *New York Times*, June 27, 1974, p. 39.

School System.[3] The petitioners sought review of the decisions of the Court of Appeals regarding the State's constitutional violations, desegregation outside of Detroit proper, and the timely joining of the affected suburban school districts.[4] The State defendants' petition pressured the Court for a "definitive" ruling on the proper use of metropolitan remedies.[5] They insisted that, should Roth's order be upheld, the Court would be obligated to explain to Michigan students and their parents "why the result in this cause must be different than the result in [Richmond]."[6] And they reminded the Court that "this hotly disputed issue influences local, state and national elections and, as this Court is aware, has spawned serious attempts to amend the Constitution."[7] The Detroit School Board joined the original plaintiffs in opposing the petitions on the ground that the proceedings below must be allowed to play out before a conclusive ruling could be made.[8]

On November 19, the justices voted on the petitions: Justices Brennan, Douglas, and Marshall, not surprisingly, voted to deny *certiorari* in each case. Justices Blackmun, Powell, Rehnquist, Stewart, and Chief Justice Burger voted to grant *certiorari* for each. Most interesting was Justice White's vote to grant, as he would later vote to uphold the lower court rulings. Given his reputation as a "swing" voter, perhaps this was not unexpected; he would have wanted a full hearing before making a commitment to either side. *Certiorari* having been favored six to three, the three cases were then consolidated as *Milliken v. Bradley*, and time was allotted for oral argument--one and one-half hours, total.

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[3] William O. Douglas, Docket Entry Nos. 73-434, 435, and 436, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1663.

[4] Brief for Respondents, *Milliken v. Bradley*, 418 U.S. 717 (1974), at 36-37.

[5] State Defendants' Petition for Writ of *Certiorari*, *Milliken v. Bradley*, 418 U.S. 717 (1974), at 49.

[6] Ibid., at 50-51.

[7] Ibid., at 52.

[8] Howard I. Kalodner and James J. Fishman, eds., Limits of Justice: The Courts' Role in School Desegregation (Cambridge, Mass.: Ballinger Publishing Co., 1978), 269.

The briefs and accompanying records which were submitted in due course were detailed and extensive, with appendices that took up several lengthy volumes.[9] Indeed, there would later be some dispute over who would bear the cost of printing such materials, which ran up a bill of nearly $90,000.[10] Thurgood Marshall complained that with such an extensive record to review, he felt hard-pressed to complete his dissent in a timely manner.[11]

The Petitioners' Brief: Desegregation Has Run Amok

The brief submitted by petitioners posed three basic questions to the Court for review: Did defendants Milliken, et al., commit acts having a racially segregatory effect either within the Detroit School District or between Detroit and surrounding districts? Could the majority-black Detroit School District achieve a constitutional, unitary system under a Detroit-only desegregation plan? And finally, absent allegations, evidence, or findings that any district boundaries in the tri-county area were established or maintained with purposeful segregatory effect, or that acts of *de jure* segregation were committed in any district other than Detroit, was a multi-district remedy constitutional?[12]

Having outlined the questions for consideration, the brief was thereafter directed toward several obvious objectives: minimization of the *effects* of the violations committed *by the State*; minimization of the remedial requirements of the Constitution; emphasis of the inconvenience and difficulty of a multi-district remedy; and emphasis of the possibility of error in the lower courts. The first two objectives were most crucial: State involvement in

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[9] Oral Arguments, *Milliken v. Bradley*, 418 U.S. 717 (1974), at 1202-03.

[10] Memo to William O. Douglas dated September 25, 1974, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1632, at 2.

[11] Thurgood Marshall, Memorandum to the Conference dated June 13, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

[12] Brief for Petitioners, *Milliken v. Bradley*, 418 U.S. 717 (1974), at 4-5.

area-wide segregation would have to be downplayed since it could easily serve as a foundation for area-wide desegregation. At the same time, the petitioners wanted to highlight the fact that no other districts were found in violation, while urging that under such circumstances the Constitution could not be read as requiring an inter-district remedy. Every argument in the brief was geared toward avoiding the ultimate defeat: multi-district desegregation.

The petitioners, as defendants below, had been charged with a number of misdeeds which would have to be refuted. With regard to specific acts of segregation *in* Detroit, the State officials insisted that it was in fact the local school boards which directly handled issues such as school construction, attendance zoning, pupil assignment, and transportation.[13] On these matters, then, the State defendants pleaded ignorance of or powerlessness over the actions of the local board. Nor, they contended, could the vicarious liability theory of *Keyes* be applied here. In that case the Supreme Court held that a finding of *de jure* segregation in one part of a school district could be used to infer a school board's intentions with regard to the entire school system. In the present case, however, the intentions of the local school board could not automatically be equated with those of the State.[14]

Further, although the defendant Governor Milliken had in fact signed into law Act 48 (which specifically targeted Detroit's desegregation effort), no executive officer had ever been held liable for signing legislation later deemed unconstitutional. Indeed, Act 48 had been invalidated by the Court of Appeals in short order, so that it had the limited effect of delaying one small-scale, intra-district desegregation plan for all of one semester. After October 13, 1970, failure to implement the April 7, 1970 Plan rested squarely with the

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[13] Ibid., at 19.
[14] Ibid., at 43-44.

Detroit Board and the District Court. In the view of petitioners, Act 48 did not constitute grounds even for intra-district relief, much less multi-district relief.[15]

The more far-reaching allegations against the State were the most troubling, thus the assertions involving state actions with *inter-district* effects received special attention. The petitioners' brief frequently emphasized that no trial evidence had shown indiscretions to have occurred in any district other than Detroit. Moreover, there had never been accusations or offers of proof that any state agency had undertaken to manipulate district boundaries or influence demographic patterns in order to shape school attendance. Indeed, the petitioners claimed, despite many allegations, no solid connection had ever been established between actions of the State and racial disparity between Detroit and its suburbs.

The first such charge was that during the 1950s black students had been bused from the Carver School District across district lines to a black Detroit high school, rather than to a closer, white suburban high school. "The reason that the [students] were [bused] past Mumford to Northern was that 'Mumford was [much] more crowded,'" the petitioners maintained.[16] The brief did not state whether Mumford was so overcrowded as to be unable to handle the students at all; it only argued that the white school was *more* crowded than the black one. Furthermore, petitioners claimed that neither the State Board of Education nor even Detroit's own superintendent, initially, had knowledge of the situation. In addition, any segregatory effect was "negated" by the subsequent annexation of Carver by the predominantly *white* Oak Park School District in 1960.[17]

As to any financial disparities between Detroit and suburban districts (due to limitations on bonding and state aid), the brief swept this aside as a non-issue in light of the

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[15] Ibid., at 40-41.
[16] Ibid., at 25.
[17] Ibid., at 19.

recent *Rodriguez* ruling.[18] (The year before, in *San Antonio Independent School District v. Rodriguez*, the Court had determined that states were not constitutionally compelled to equalize funding among school districts.)[19] The petitioners further indicated that no evidence of discriminatory allocation between black and white schools *within* the city could be found.[20] Moreover, the specific lack of transportation funds for Detroit arose not from race-based discrimination, but from legislation which allocated funds based on an urban-rural residency distinction.[21] At any rate, petitioners argued, how could lack of transportation funds have had an additional segregatory impact since Detroit was allegedly using its transportation system to segregate in the first place?[22] Finally, neither lower court had found that the transportation funds issue had a segregatory effect between city and suburb.[23]

The final allegation was that construction of schools *throughout* the metropolitan area was calculated to produce one-race schools. Site selection and attendance zoning, the petitioners explained, were solely in the hands of the local boards. The State's only involvement came after actual site selection was final, when the State Superintendent approved building plans only with regard to fire, health, and safety criteria.[24] Again, no proof had been taken as to school construction in the suburbs, but even so there could be nothing unconstitutional in the building of much-needed schools to serve either the expanding inner-city populations or the suburban neighborhoods. The growth of the inner-

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[18] Ibid., at 30.

[19] J. Harvie Wilkinson, From Brown to Bakke: The Supreme Court and School Integration: 1954-1978 (Oxford: Oxford University Press, 1979), 221.

[20] Brief for Petitioners, at 27.

[21] Ibid., at 30-32.

[22] Ibid., at 32.

[23] Ibid., at 33.

[24] Ibid., at 34.

city black population and the tendency of suburbia to remain white were factors well beyond the State's control.[25]

The petitioners expressed confidence that the State was not to blame for segregation either in Detroit or beyond the city's borders. Moreover, even if Detroit officials had fostered segregation (and petitioners did not concede that they did),[26] the Constitution and case precedent placed only limited demands on school officials in terms of remedy:

> The holdings in *Swann*. . .are clear. A school district operating as a dual school system must dismantle its *de jure* segregated system so that it operates a unitary system wherein no pupil of a racial minority shall be excluded from any school, directly or indirectly, on account of race or color. There is no constitutional right to a particular degree of racial balance or mixing within such school district. The Constitution does not require that every school must always reflect the racial composition of the school district. Nor does it mandate that federal judges make annual adjustments in the racial compositions of schools because of demographic changes.[27]

Thus, school boards were under no obligation to undo residential segregation through racially balanced schools.[28] All that *was* required was the establishment of a unitary school system--one in which no child could be excluded from attending any school on the basis of race. This, petitioners claimed, a Detroit-only plan could deliver.[29] The fact that a unitary system in Detroit would inevitably be majority-black was of no moment: There were plenty of precedents for majority-black unitary systems, such as in *Wright v. City Council of Emporia* (1972), *United States v. Scotland Neck City Board of Education* (1972), *Raney v. Board of Education of Gould School District* (1968), and *Bradley v. School Board of City of Richmond* (1973).[30]

Not only was a multi-district remedy uncalled for, the petitioners alleged, it was impractical to the point that it could not be justified under the equity principle. Aside from

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[25] Ibid., at 37-38.
[26] Ibid., at 47.
[27] Ibid., at 56.
[28] Ibid., at 58.
[29] Ibid., at 62-63.
[30] Ibid., at 58-61.

the unreasonable cost (350 buses at $10,000 each would mean an initial outlay of three-and-a-half million dollars, with an estimated yearly operating cost of seventeen million),[31] the necessary restructuring would impose undue administrative hardship and disruption upon the districts involved.[32] Just as the petitioners had pointed to the independence of the local school districts in order to deny State responsibility for segregation, here as well they emphasized "the integrity of local political subdivisions" and the importance of local control.[33] Parents would almost certainly be reluctant to approve the necessary tax increases since the money would only be used to send their children to distant schools, making interest and participation in school events more difficult.[34]

Should any of these arguments fail to persuade the Court, perhaps evidence of a flawed judicial process might form a basis for reversal. First, the reasoning of the courts below was attacked, particularly that underlying rejection of the Detroit-only plans. The petitioners reiterated the argument that a majority-black school system was not unconstitutional *per se*; in fact, it was rather racist of the courts to imply that a majority-black school system was unacceptable, as though a school system was somehow inadequate unless there was a substantial number of whites.[35] The courts' projection of a massive "white flight" reaction, moreover, was based on pure conjecture.[36] Secondly, the petitioners reiterated that the decision to turn to multi-district relief was made without having taken proof of any violations by the districts it proposed to involve, thus denying those districts their due process rights.[37] Finally, all of these drastic actions were taken, it was alleged, because the court had improperly deemed itself a social reformer, with

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[31] Ibid., at 85-86.
[32] Ibid., at 79.
[33] Ibid., at 82.
[34] Ibid., at 87.
[35] Ibid., at 60.
[36] Ibid., at 52.
[37] Ibid., at 67; also at 88.

universal racial balance as its goal.[38] The only reason that Detroit was not presently operating under the original April 7 Plan was because the lower courts had refused to order its implementation.[39]

The "racial balance" theme reverberated throughout the brief and oral argument. The petitioners were playing upon the reservations of the Court, as expressed in *Swann*, that desegregation could be taken too far, that it was not a cure-all for racial separation, that there were limits to what the Court could hope to accomplish in the face of widespread opposition. In the climate of near-hysteria over busing, this well-chosen strategy would present a difficult challenge for the respondents.

The Respondents' Brief: Let Justice Be Served

For the respondents, review of this case by the Supreme Court could be reduced to one major question: Would states now be allowed to use school district lines to undermine desegregation, thereby avoiding their Fourteenth Amendment obligation to provide equal education to schoolchildren?[40] The brief submitted by the original plaintiffs would have to defend, step by step, the conclusions reached and the actions taken by the lower courts. Sufficient record evidence and valid reasoning would have to be evident at each stage of the prior proceedings. It would be most critical for the respondents to defend the decision to pursue multi-district relief. The question as to whether district lines could be breached for the sole purpose of providing effective relief for *Detroit* "need not necessarily be reached," the respondents insisted; they believed there was a case against the State involving *metropolitan-wide* segregation, calling for *metropolitan-wide* relief.[41]

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[38] Ibid., at 71, and throughout the brief.
[39] Ibid., at 40-41.
[40] Brief for Respondents, at 1-2.
[41] Ibid., at 40-43.

Their argument began with a litany of acts of *de jure* segregation on the part of both local and state school officials geared toward "confin[ing] Negro children to a core of black schools separated. . .from outer-area schools."[42] Ample evidence had shown, they asserted, that Detroit officials had used not just one or two, but a number and range of common mechanisms to create and maintain segregated schools: selective school construction to achieve one-race schools, usually signaled by initial faculty assignments which reflected the anticipated racial composition of the student body;[43] gerrymandered attendance zones, especially along north-south lines so as to take full advantage of residential patterns;[44] strategically located optional attendance zones and dual overlapping zones, "to serve as emergency exits for white stragglers;"[45] and segregatory busing programs, feeder patterns, and grade structures, as well as in-school segregation.[46]

Actions and inactions on the part of the State had contributed to segregation as well, albeit in subtle, complex fashion. State officials, by their ignorance of events in the subordinate districts, had condoned the Carver-Detroit inter-district busing situation (in which black students were bused past not one, but several, closer white high schools) for over a decade. And after Carver was split and magnanimously annexed by Ferndale and Oak Park, segregation of students continued at the elementary level. Indeed, only a year earlier the Court of Appeals had upheld the HEW's withholding of funds after a finding of state-imposed segregation in the Ferndale district.[47]

Furthermore, with city and suburbia becoming more racially distinct, the implementation of transportation funding regulations based on an urban-rural classification could no longer be viewed with the same nonchalance. Indeed, claimed the respondents,

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[42] Ibid., at 44.
[43] Ibid.
[44] Ibid., at 45.
[45] Ibid., at 47.
[46] Ibid., at 45.
[47] Ibid., at 19-20, n. 14.

these policies had the effect of discriminating against the predominantly black Detroit system in a significant and sophisticated way: The dearth in funds contributed to the aforementioned construction of walk-in schools in segregated city neighborhoods, while new, appealing schools went up in suburbia, where transportation *was* available, and to which only whites had the means and the freedom to migrate, thanks in large part to pervasive housing discrimination.[48]

Most recently, the State had attempted to interfere with Detroit's desegregation plan and impose segregatory pupil assignment, through Act 48. This, the respondents urged, had two profound implications. First, it discredited the State's claim of impotence with regard to the workings of the individual districts. Second, it exposed the State's true colors, so to speak, with regard to the segregation practiced under its supervision. As long as the local districts carried out the bulk of segregatory policy, the State could stand aloof and claim no responsibility. But when in April of 1970 a district "strayed" by attempting even limited desegregation, the State acted swiftly and effectively to restore the status quo. "It is in this context," stated the respondents, "that the other state-level contributions to racial dualism in Detroit area schools. . .must be judged."[49]

Evidence of the increasingly segregatory effect of these actions and inactions could be found in school attendance figures:

> In 1960-61, of 251 Detroit regular (K-12) public schools, 171 had student enrollments 90% or more one race (71 black, 100 white); 61% of the system's 126,278 black students were assigned to the virtually all-black schools. In 1970-71 (the school year in progress when the trial on the merits began), of 282 Detroit regular public schools, 202 had student enrollments 90% or more one race (69 white, 133 black); 74.9% of the 177,079 black students were assigned to the virtually all-black schools.[50]

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[48] Ibid., at 51.
[49] Ibid., at 52-53, including n. 45.
[50] Ibid., at 16, n. 9.

Working "in lockstep" with widespread public and private housing discrimination, state and local officials had effectively confined the city's black student population to a growing core of black schools separated from a receding ring of virtually all-white schools surrounding it. This ring of white schools extended past the borders of the Detroit district, so that the outlying suburbs had pupil populations that were 98% or more white.[51]

Based on the established and pervasive nature of segregation in Detroit, then, the lower courts had properly determined that substantial desegregation efforts were called for. However, careful review of several Detroit-only plans (submitted by *both* sides) led them to the conclusion that the most that could be accomplished was a majority-black school system. Given the longstanding atmosphere of segregation in Detroit, the likely result would be an acceleration of the exodus of whites and the complete separation of the races along the Detroit district line.[52] The respondents emphasized that, contrary to what the petitioners had implied, neither they nor the courts below had ever subscribed to the idea that majority-black schools were inferior or unacceptable per se; *state-enforced segregation* of black and white children, they argued, was the condition for which they sought relief.[53]

The courts reasoned that a metropolitan solution might be the only means to effective desegregation. In exploring this possibility, the courts properly consulted Michigan law and practice in order to determine the relationship of the State to its school districts. They discovered that, according to law and precedent, school districts were in fact subordinate to the State, which had the power to withhold funds.[54] The State had routinely exercised its "plenary powers" to directly control school districts, as through Act 48 in 1970.[55] Moreover, there was an established history of crossing and altering district

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[51] Ibid., at 4.
[52] Ibid., at 5.
[53] Ibid., at 10-11, n. 6.
[54] Ibid., at 6.
[55] Ibid., at 12; also at 6.

boundaries for a number of purposes, including segregation, as with the Carver district.[56] Indeed, the administration of such changes had been provided for by state law.[57] The respondents noted the refusal of petitioners to participate in this inquiry into the "local practicalities" pertinent to consideration and eventual implementation of an inter-district remedy.[58]

As further evidence of judicial caution, the respondents could also point to the courts' consideration of the relationship of Detroit to its satellite communities. They found that Detroit and its suburbs were very much bound together by social, economic, political, and practical interests. These ties ran across racial lines except, significantly, in the areas of housing and schools.[59] Thus, an inter-district remedy to an area-wide problem would be in keeping with the community of interest which had evolved between Detroit and its neighbors. Additionally, the court could minimize disruption of both school and community structures by deferring planning and implementation to the State and the affected parties.[60]

All of the courts' considerations, then, supported their ultimate conclusion: Since states were ultimately responsible for providing a constitutionally sound educational system; since, also, Michigan's educational system was a *state* system wherein school districts were clearly subordinate units; since Detroit represented a significant portion of that system and had been found to have committed acts of segregation; and since, further, the State had been actively involved, as much as was necessary, in establishing and maintaining segregation in Detroit and between Detroit and the suburbs, it was logical that the State had both the obligation and the power to remedy segregation in and around Detroit

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[56] Ibid., at 19-20, n. 14; also at 6.
[57] Ibid., at 6.
[58] Ibid., at 56; also at 57-58.
[59] Ibid., at 7.
[60] Ibid., at 9; also at 33-35 including n. 31; also at 58, 62, 69, and 71.

through a metropolitan-wide desegregation effort. Whether or not the outlying districts had been active participants in segregation, circumstances in Detroit had certainly affected them "in an opposite and equal way;"[61] that is, the confinement of the black population in Detroit had preserved the suburbs as a haven for retreating whites.[62]

Indeed, the respondents insisted, the inclusion of surrounding districts in a final remedy, regardless of their complicity, was no more unreasonable than the involvement of certain electoral districts in the reapportionment of other over- and under-represented districts. In addition, *Brown II* had clearly approved the redrawing of school districts as part of the remedial process, and *Emporia* had as clearly enjoined the use of school districts to impede desegregation.[63] Ultimately, the right of children to attend desegregated schools could not be limited by the organizational framework of a state's education system.[64]

It was certainly necessary, at some point, to answer the petitioners' complaints regarding due process. The respondents' brief explained that those who were accused of wrongdoing and who, more importantly, had the power to provide relief--namely, the Detroit and State defendants--*were* before the court.[65] Not at any time had the original plaintiffs leveled charges of any kind against the outlying districts.[66] In addition, once the District Court had decided that a metropolitan remedy was justifiable, to the greatest extent possible it left planning and implementation to the parties involved. For example, the court-appointed panel which was to develop the remedy represented both sides of the dispute, and outlying districts were also joined in the proceedings so as to offer their recommendations.[67] Furthermore, any restructuring of school districts would be left to the

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[61] Ibid., at 60.
[62] Ibid., at 47.
[63] Ibid., at 59.
[64] Ibid., at 58.
[65] Ibid., at 70.
[66] Ibid., at 62-63, n. 51.
[67] Ibid., at 35.

legislature, as would interim desegregation strategies, pending a finalized plan.[68] In any case, these matters were still "poised below" for further action, where all parties involved would be heard, and difficulties could be addressed before any plan was actually implemented.[69]

The plaintiffs' position, as argued before the Supreme Court, was precarious in a sense. Paul Dimond admits that the "black containment" argument had not been consistently articulated in the courts below:

> In the trial court, we originally avoided the cross-district aspects of the case and then watched in awe as Judge Roth tried to articulate the reality of containment within the expanding color line that he had come to recognize. In the Sixth Circuit, we were so concerned about prevailing on the legal standard and proof of intentional segregation in the North that we failed to focus on this understanding of the violation and downplayed some of its important supports, particularly the proof of areawide community discrimination and housing segregation.[70]

Indeed, the petitioners did not attempt to challenge the containment theory, but instead argued that plaintiffs had failed thus far to make a clear case for metropolitan-wide "containment" of blacks. The respondents could only hope that the Court would not be so easily distracted from the deeper issues at hand.

The Oral Arguments

Oral argument took place on Wednesday, February 27, 1974, in a Court crowded with reporters and spectators. There was not a vacant seat to be found; even the wives of the justices took keen interest in the proceedings and filled the private seats reserved for them. Anti-busing congressmen--who had been quite busy collaborating with Nixon to undercut the tide of desegregation--were on hand to demonstrate presidential and

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[68] Ibid., at 9; also at 33-35 including n. 31; also at 58, 62, 69, and 71.
[69] Ibid., at 39.
[70] Dimond, 102.

congressional support for the defendants.[71] In the opinion of Paul Dimond, "No Court could be blind to this political backlash to what had become the Roth Case."[72] Judge Roth's law clerk also attended; Roth himself was recovering from surgery after a second heart attack in 1973.[73]

Speaking before the Court on behalf of the petitioners were Frank J. Kelley, Attorney General of Michigan, and William M. Saxton, attorney for Allen Park Schools, et al. Attorneys J. Harold Flannery and Nathaniel R. Jones argued for the respondents. Two days before, the attorney for the Detroit School Board was denied leave to speak.[74] Elwood Hain explains that

> although they were allied at this point of the case, the Detroit board and the NAACP were still adversaries. For this and possibly other reasons, the NAACP, which controlled the allocation of time for respondents' oral argument, refused to allot time for the attorney for the Detroit School Board to make an oral argument.[75]

Solicitor General Robert H. Bork was also present, the Court having recently granted him fifteen minutes to speak on behalf of the United States as *amicus curiae*.[76]

Despite the intense public interest and the protracted, complex, and controversial nature of the case, the oral arguments were undramatic in the sense that very little in the way of new information or novel theories was presented by either side. Perhaps the most captivating speaker would have been Solicitor General Bork, who "cut an odd figure in his formal tails, flaming red hair and beard, and booming voice."[77] Beginning with Justice Powell, various members of the Court asked for details or clarification with regard to the

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[71] Ibid., 103-04.
[72] Ibid., 104.
[73] Ibid.
[74] William O. Douglas, Docket Entry No. 73-434, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1663.
[75] Kalodner, 270, n. 252.
[76] Douglas, Docket Entry No. 73-434.
[77] Dimond, 105.

workings of school finance in Michigan.[78] There were some factual disputes over this matter, with Saxton (for the petitioners) devoting a third of his rebuttal to getting in the final word.[79] For the most part, however, the attorneys attempted to emphasize the most important points of their briefs, so as to make clear the issues at stake.

The Court, at this stage, was obviously concerned with potential applications of multi-district remedies. Justice Blackmun, for example, posed the hypothetical situation of a segregated city whose borders or suburbs crossed over into another state, as would be the case with Kansas City or the District of Columbia. Flannery (for the respondents) expressed the view that there would certainly be problems of jurisdiction, since states are autonomous in a way that school districts are not; nevertheless if two states cooperated to segregate schoolchildren, the rights of those children would have to be protected, with the federal courts as the proper forum.[80] Later, Justice White asked Jones (also for the respondents) about the possible necessity of taxing the suburban districts in order to defray the extra costs of desegregating Detroit. Jones replied that, as citizens of the State of Michigan, which had allowed discrimination in a significant part of its school system, those in the outlying school districts could reasonably be expected to bear some tax burden in order to rectify past injustice.[81]

Perhaps the most interesting contribution to the argument was made by the Solicitor General on behalf of the federal government. Bork communicated the administration's dismay at the prospect of a remedy which was, in the first place, disproportionate to the violation, and in the second place, a harbinger of governmental disruption at the local level.[82] He reiterated the charge that the lower courts had abandoned the proper goal of a

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[78] *Washington Post*, February 28, 1974, p. B4. See also Oral Arguments, at 1206 and 1232-34.

[79] Oral Arguments, at 1236-37.

[80] Ibid., at 1228-29.

[81] Ibid., at 1234-35.

[82] Ibid., at 1214.

unitary school system in their pursuit of racial balance. An inter-district remedy could only be had, he maintained, with a proper finding, on remand, of inter-district segregative effect.[83]

The Solicitor General's comments prompted a significant discussion of just what would qualify as an inter-district violation. Bork began with a definition of an inter-district violation as "a violation that results in altering the racial composition of two districts, so that blacks tend to be confined to one and whites confined to another."[84] With prompting from the Court, he was able to refine that definition to the following effect: A multi-district violation would be one which alters the racial composition *between* two or more districts as a result of either action by the State or actions by two or more districts acting cooperatively, using such tactics as the shifting of boundaries or cross-district busing to accomplish segregation *between* districts. It would not do, apparently, to show only that two districts had violated the Constitution; *inter-district effects* resulting from official conduct would have to be proven.[85]

Later, Flannery referred to a portion of the government's brief where there was discussion of inter-district violations. The government itself, he claimed, had recognized the possibility that even actions by only one district could have multi-district ramifications if the racial composition of schools in other districts were significantly altered. This was obviously the case with Detroit and the surrounding suburbs.[86] Whether this concept of multi-district violation would ultimately be accepted by a majority of the Court remained to be seen.

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[83] Ibid., at 1215.
[84] Ibid., at 1216.
[85] Ibid., at 1216-17.
[86] Ibid., at 1220.

V

THE DECISION

Opinions in the Making

On March 1, 1974, two days after oral argument, the Court was in conference.[1] It was a Friday, and the matter of *Milliken v. Bradley* was up for discussion. Justice Douglas, in his conference notes, recorded the views enunciated by each Court member during this private meeting. Because most Americans see only the finished, composite result of the Court's deliberations and opinion-writing, these conference notes, though cryptic, are a rare source of insight into the evolution of the Court's position.

According to Douglas, the Chief Justice opened the discussion by commenting that "each [school] district is a separate entity," and that "outlying districts keep a unitary system."[2] Already his position was clear: Local control would concern him, as would the imposition of a remedy on presumably innocent districts. From Burger's perspective, multi-district relief could only be justified on a "'racial balance' theory"--a signal that the petitioners' arguments on that point were rather effective.[3] Douglas summed up Burger's views with the statement that "D Ct [District Court] went way beyond what he [Burger] could do & Ct of A [Court of Appeals] erred in affirming--reverses."[4] Douglas's final entry regarding Burger's monologue reads, "it's like Richmond," indicating that the Chief Justice saw nothing in the Detroit case which would persuade him to vote differently than he had in 1973.[5]

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[1] William O. Douglas, Conference Notes dated March 1, 1974, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1656, at 1.

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Ibid.

Douglas spoke after the Chief Justice. He intended to vote to affirm the Sixth Circuit Court. He declared that there were "no due process questions" in this case; the State's "several districts. . .are homogeneous" and the "D Ct [District Court] can deal with them as a unit."[6] His words were an apt summary of the views he would express in his opinion. For Douglas, district lines were simply arbitrary and could in no way serve as a justification for limiting desegregation efforts. Brennan spoke next, adding his vote to affirm. He drew attention to the fact that matters were still unresolved below: "Suburban districts still have hearings to decide their fates," he reminded the brethren.[7] He had voted to reverse in the Richmond case, and obviously had no intention of changing course.[8]

Justice Stewart's comments were apparently quite brief--Douglas recorded only that Stewart "agrees with SG [Solicitor General] & vacates & remands."[9] But this position is noteworthy in light of Stewart's final vote to reverse and his support of the Chief Justice's majority opinion, which invalidated cross-district desegregation. Stewart was clearly the most ambivalent member of the Court in this case: He could not bring himself to support the majority unequivocally, and, according to one commentator, his concurring opinion served only to "muddle" the message of the Court.[10]

Justice White agreed with the decisions of the lower courts; he "[had] not changed his mind since Richmond."[11] This comment sheds light upon the tie vote in the 1973 Richmond case--the case in which no opinion was issued and the votes of the justices remained undisclosed. Here we learn that White voted with the liberal block in that case, therefore it had to have been Stewart who "swung" to the conservative side. White

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[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Ibid., at 2.
[10] Gary Orfield, Must We Bus? Segregated Schools and National Policy (Washington, D.C.: The Brookings Institution, 1978), 34.
[11] Douglas, Conference Notes, at 2.

maintained that in the *Milliken* case the State was indeed "guilty of *de jure* segregation."[12] However, he also commented that "perhaps D Ct [District Court] has bad overtones" and that he was "not for overall 'racial balance.'"[13] It seems that the petitioners' emphasis of this issue may have bothered him as well, though not enough to keep him from mounting a vigorous defense of the District Court's actions in his dissent.

Judging from Douglas's notes, Thurgood Marshall had astonishingly little to say. He clearly voiced his support for the courts below, but Douglas recorded only one elaborative statement: "There are white schools in Detroit 1/2 mile from black schools in Deerfield."[14] Marshall was probably referring to the fact that a metropolitan plan would in fact be more convenient and effective than an intra-city plan, because the latter would likely require that students be bused all the way from one side of town to the other, meaning longer bus rides and greater expense. This was the first and only time during the conference--again, judging strictly from Douglas's scribblings--that anyone compared Detroit-only and metropolitan plans in a concrete, practical way.

Justice Blackmun was next. He reiterated that there was "some question that [this] is not a final order."[15] In his view "the case [was] weaker than Richmond where only 3 counties [were] involved & each was pro-segregationist."[16] He was "inclined to go along with SG [Solicitor General]"--that is, he would be willing to remand the case--but in the end he sided with the Chief Justice to reverse.[17] Lewis Powell then spoke at some length concerning the reach of a metropolitan remedy:

> This is open-ended jurisdiction with as many as 84 districts--no remedy has been as far reaching as this one--it's a monstrosity on its face--the plan

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[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.

> would in operation be chaotic--it would destroy local government & power to issue bonds & raise revenue.[18]

These concerns would be echoed in the Chief Justice's opinion for the majority. Douglas concluded: "Lewis essentially in SG's corner;" thus Powell, too, would probably have been willing to remand.[19] Finally, Justice Rehnquist threw his support--apparently without comment--behind "CJ [Chief Justice] PS [Potter Stewart] & LP [Lewis Powell]."[20]

The final vote, as recorded on Justice Douglas's tally sheet, found five in favor of reversal (Burger, Stewart, Blackmun, Powell, and Rehnquist) and four in favor of affirming (Douglas, Brennan, White, and Marshall).[21] One might venture to question why the case was not simply remanded for further findings if Stewart, Blackmun, and Powell would have supported this. Neither Douglas's nor Marshall's papers offer any clues, but given the intense political debate over busing, the finality of the 1974 decision may have been the result of a Dred Scott-like desire among certain Court members to bring about a quick and definitive resolution to a painfully protracted issue.

It remained for the majority to justify its position and for the dissenters to decry it. If Marshall had little to say in conference, he was nevertheless willing to put his thoughts on paper. On the Monday following the conference, he sent a type-written note to Douglas (who would have been the senior dissenting Justice) volunteering for the dissent in *Milliken* and another case. A copy of that letter went to Justice Brennan as well.[22] But Marshall's opinion, as well as those of his colleagues, would be a long time in coming; the day after oral arguments the *New York Times* predicted that there would not be a decision

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[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] William O. Douglas, Docket Entry No. 73-434, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1663.

[22] Thurgood Marshall, Memo to William O. Douglas dated March 4, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

until just before the summer recess at the end of June.[23] Despite any desire to have the case over and done with, the Court members undoubtedly weighed their words carefully. Almost twelve weeks would pass before Justice Douglas would make corrections on the original hand-written draft of his opinion.[24] A week later, on May 31, the Chief Justice finally circulated a rough draft of the majority opinion.[25] Douglas's first, second, and third drafts were completed during the first few days of June, with only minor changes to each.[26]

By June 11 the Chief Justice's second draft was ready to view. Some significant alterations had been made: Whereas the first draft made no mention of the issue of local control of schools, the Chief Justice now added almost two paragraphs and a lengthy footnote on the subject.[27] In addition, Burger further developed his definition of inter-district violations and appropriate corresponding remedies. Burger had first required "a constitutional violation by all of the districts affected by the remedy;"[28] but according to his second draft multi-district relief could be predicated upon "racially discriminatory acts of the State, or local school districts, or of a single local district" which "have been a direct

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[23] *New York Times*, February 28, 1974, p. 44.

[24] William O. Douglas, Unnumbered Draft of Opinion in *Milliken v. Bradley* dated May 24, 1974, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1656.

[25] Warren Burger, Unnumbered Draft of Opinion in *Milliken v. Bradley* dated May 31, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

[26] William O. Douglas, First Draft of Opinion in *Milliken v. Bradley*, undated, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1656. William O. Douglas, Second Draft of Opinion in *Milliken v. Bradley* dated June 5, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131. William O. Douglas, Third Draft of Opinion in *Milliken v. Bradley*, undated, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1656.

[27] Warren Burger, Second Draft of Opinion in *Milliken v. Bradley* dated June 11, 1974, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1655, at 20-22.

[28] Burger, Unnumbered Draft of Opinion in *Milliken v. Bradley* dated May 31, 1974, at 24.

and substantial cause of inter-district school segregation."[29] Lastly, Burger elaborated upon the violations of the State of Michigan, most notably on the issue of the State's responsibility for Detroit's behavior.[30]

Douglas may have been responding to this last change when he sent out a "Memorandum to the Conference" on June 13. It consisted of the most recent addendum to his dissent, in which he insisted that it was not good enough for the majority to acknowledge State responsibility merely for the sake of argument and then let the State off the hook. Douglas reiterated his belief that the distinction between *de jure* and *de facto* segregation was a false one: The State, via its districts, should not be allowed to build upon residential segregation without facing the consequences.[31] Douglas also added a brief response to the "racial balance" charge appearing in the majority opinion.[32] Douglas's full-length fourth draft, with these and a few other minor changes, was circulated the next day.[33]

Marshall also distributed a memo on June 13. This document gives one a sense of the time frame involved in the opinion-writing process, especially as the date for adjournment approached. Indeed, the purpose of Marshall's memo was to inform his colleagues that he would be unable to finish his dissent before the end of the 1973 term:

> The issues in these cases are as complex as they are momentous, ultimately requiring for their resolution, as the Court's opinion recognizes, extensive review of a lengthy record which was somewhat haphazardly put together. The great difficulties of these cases, both factually and doctrinally, are evidenced by the amount of time required for the initial draft of the Court's

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[29] Burger, Second Draft of Opinion in *Milliken v. Bradley* dated June 11, 1974, at 26.

[30] Ibid., at 27-28.

[31] William O. Douglas, Memorandum to the Conference dated June 13, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131, at 1.

[32] Ibid., at 2.

[33] William O. Douglas, Fourth Draft of Opinion in *Milliken v. Bradley* dated June 14, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

> opinion, which was circulated in typewritten form on May 31, three full months after the Conference voted on these cases on March 1. They are also evidenced by the substantial changes, both as to the legal standard which should govern the use of an inter-district remedy and with respect to the extent to which the present record satisfies this standard, which have been introduced into the second draft of the opinion which was circulated on June 11, less than two weeks before the cases are scheduled to be handed down. . . .And it still appears possible that further substantive changes may be made before the majority agrees upon an opinion for the Court.[34]

This tells us that the Court originally planned to hand down the decision sometime during the week of June 24, or possibly late the week before. Marshall went on to outline the issues he intended to address in his opinion, including the autonomy of Michigan's school districts, past manipulation or crossing of district lines, disparities in state aid, and housing patterns, to name but a few.[35]

Marshall ended the three-page memorandum with the following pointed remarks:

> As the Court's opinion recognizes, the District Court's primary findings in the case were made at a time when the focus of the case was solely the city of Detroit. Rather than vacate and remand for additional hearings on inter-district segregation, with the participation of all interested parties, the Court has evaluated the record on its own. This, in turn, requires on my part an in-depth examination of the present record.[36]

He therefore requested that the decision be delayed until the following term.[37] Certainly Marshall was not the only one behind schedule; Justice White had yet to circulate his first draft, and Douglas and Burger were still making changes in late July. But the Court was apparently unwilling to put off the decision for as long as Marshall would have liked. The Court members continued to work apace after the term officially ended, and a special session would be called in order to hand down the decision.

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[34] Thurgood Marshall, Memorandum to the Conference dated June 13, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131, at 1.

[35] Ibid., at 1-2.

[36] Ibid., at 2.

[37] Ibid., at 3.

On June 21, a Friday, Burger's third draft was distributed. The last two-thirds of Part II of the opinion (the heart of the majority's argument), though containing basically the same points, had undergone major reconstruction resulting in a more logical flow of ideas. To the issue of local control the Chief Justice added a long list of potential problems associated with district consolidation which might diminish community influence upon schools, and he expressed concern that there would be a corresponding expansion of judicial power over education.[38] A significant deletion had been made in this section as well: Burger had originally included a lengthy quote from the *Swann* case pertaining to the interplay between segregated schools, segregative school construction, and residential patterns.[39] The passage was such an excellent summary of the argument put forth by the respondents (indeed, Marshall would use most of that same quote in his opinion)[40] that it is no wonder Burger omitted it. Finally, Burger cut Part IV of the opinion by two-thirds. Whereas the Chief Justice had initially included an analysis of due process issues which would have favored the petitioners, the entire matter was now deemed immaterial given the Court's verdict on cross-district desegregation.[41]

The overall effect of Burger's revisions must have pleased the majority, because on the following Monday Powell, Rehnquist, and Stewart sent brief memos to the Chief Justice indicating that they were prepared to join in the opinion.[42] Justice Blackmun joined

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[38] Warren Burger, Third Draft of Opinion in *Milliken v. Bradley* dated June 21, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131, at 22-24.

[39] Burger, Second Draft of Opinion in *Milliken v. Bradley* dated June 11, 1974, at 24-25.

[40] *Milliken v. Bradley*, 418 U.S. 717 (1974), at 805-06.

[41] Burger, Second Draft of Opinion in *Milliken v. Bradley* dated June 11, 1974, at 31-33.

[42] Lewis F. Powell, Memo to Warren Burger dated June 24, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131. William H. Rehnquist, Memo to Warren Burger dated June 24, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131. Potter Stewart, Memo to Warren Burger dated June 24, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

the following day, on June 25.[43] Powell's memo alluded to some "word changes" he planned to suggest at a later date, and he also proposed that Burger cite *Spencer v. Kugler* "at an appropriate place" in the opinion.[44] In *Spencer*--a 1972 case out of New Jersey--the Court had affirmed a lower court ruling that school officials were under no constitutional obligation to compensate for residential segregation through racially balanced schools.[45]

On June 26, the last day of the 1973-74 term, the *New York Times* described a Court packed with "a throng of lawyers and newsmen" who were expecting a decision in the case.[46] They were disappointed, of course. Though Court officials apparently declined to project when the announcement would come, the *Times* speculated that the decision might be rendered on July 8, the scheduled date for the Watergate arguments; or perhaps it would be handed down along with the Watergate ruling, which was expected a short time after argument. Then, too, the case might be postponed until the next term, and the Court might ask for reargument. The anxiety over the Detroit case--"probably the single most important controversy of the term" --was apparent, and would become more so as the summer wore on.[47]

Two weeks later, on July 8, the Court heard oral arguments on the matter of the Nixon tapes.[48] Justice White finally circulated his first draft as well.[49] Douglas was quick to join White's opinion the very next day.[50] On Wednesday, July 10, Douglas distributed

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[43] Harry A. Blackmun, Memo to Warren Burger dated June 25, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

[44] Powell, Memo to Warren Burger dated June 24, 1974.

[45] Brief for Petitioners, *Milliken v. Bradley*, 418 U.S. 717 (1974), at 20.

[46] *New York Times*, June 27, 1974, p. 39.

[47] Ibid.

[48] Paul R. Dimond, Beyond Busing: Inside the Challenge to Urban Segregation (Ann Arbor: The University of Michigan Press, 1985), 109.

[49] Byron R. White, First Draft of Opinion in *Milliken v. Bradley* dated July 8, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

[50] William O. Douglas, Memo to Byron R. White dated July 9, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

copies of his fifth draft, which featured lengthy footnotes addressing demographic changes among black populations, the quality of black schools, financial disparities among school districts, and the problems of inner cities.[51] On Friday of that same week, Marshall's first draft was presented[52] and was joined by Douglas before the day was over.[53] On Monday, July 15, a flurry of memos went back and forth between the dissenting justices as Brennan and White joined Marshall, and Marshall and Brennan joined White.[54]

The same day (July 15) a second draft of Stewart's concurring opinion came out. Neither Marshall nor Douglas had copies of Stewart's *first* draft among their papers, but judging from the opening statement of the opinion,[55] one can deduce that his first draft was written in response to White, and that the second draft probably added the long footnote responding to Marshall's opinion. Specifically, Stewart challenged Marshall's claim that state-sanctioned segregation in Detroit also contributed to inter-district segregation.[56]

Among Douglas's papers is a memo circulated by Justice Stewart on July 16, drawing the Court's attention to the death of Judge Stephen Roth the previous Thursday,

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[51] William O. Douglas, Fifth Draft of Opinion in *Milliken v. Bradley* dated July 10, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131, at 3-4.

[52] Thurgood Marshall, First Draft of Opinion in *Milliken v. Bradley* dated July 12, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

[53] William O. Douglas, Memo to Thurgood Marshall dated July 12, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

[54] William J. Brennan, Memo to Thurgood Marshall dated July 15, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131. Byron R. White, Memo to Thurgood Marshall dated July 15, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131. Thurgood Marshall, Memo to Byron R. White dated July 15, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131. William J. Brennan, Memo to Byron R. White dated July 15, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

[55] "In joining the opinion of the Court, I think it appropriate, in view of some of the extravagant language of the dissenting opinions, to state briefly my understanding of what it is that the Court decides today" (*Milliken v. Bradley*, at 753).

[56] Potter Stewart, First Draft of Opinion in *Milliken v. Bradley* dated July 15, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131, at 4-5, n. 2.

July 11; attached is a copy of an undated *Detroit Free Press* article reporting the death. The Judge had suffered a third and fatal heart attack only two weeks before the long-awaited decision came down; thus he never learned the fate of the case in which he had become so deeply involved both professionally and personally.[57] Roth had become the target of unmitigated public wrath, but upon his death even the most severe of his critics, the *Detroit News*, "had the grace to credit Roth with 'authoring one of the most discussed questions of law in modern judicial history.'"[58]

On Thursday, July 18, Marshall answered Stewart's criticism by way of a footnote in his second draft which blasted the majority for requiring plaintiffs to show State responsibility for the fact of a predominantly black school district.[59] The next day, the Chief Justice distributed a memo indicating further changes he planned to make to the majority opinion. The most significant was his direct response to the White and Marshall dissents at the end of Part II. The added text clearly evinced the constrictive outlook of the majority: They were simply unwilling to deal with desegregation outside of the familiar context of a single, independent school district.[60]

In his fourth draft the Chief Justice also took Powell's advice and included a reference to the *Spencer* case.[61] The complete draft was circulated on July 22. In a memo with the same date, signed "AA" (presumably by a law clerk), Douglas was advised of

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[57] Potter Stewart, Memorandum to the Conference dated July 16, 1974, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1656.

[58] George R. Metcalf, From Little Rock to Boston: The History of School Desegregation, Contributions to the Study of Education Series, No. 8 (Westport, Conn.: Greenwood Press, 1983), 188.

[59] Thurgood Marshall, Second Draft of Opinion in *Milliken v. Bradley* dated July 18, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131, at 19-20, n. 19.

[60] See generally, Warren Burger, Memorandum to the Conference dated July 19, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

[61] Warren Burger, Fourth Draft of Opinion in *Milliken v. Bradley* dated July 22, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131, at 21.

Burger's alterations. The author of this memo was satisfied that Douglas's opinion already answered Burger's challenges. He or she was more concerned with Justice Stewart's "emphasis on equities" and attached a suggested response which would downplay the importance of equitable factors, especially as compared to the constitutional rights of black children.[62]

Justice White passed around a virtually unchanged second draft on July 23 along with a memorandum/addendum. It expressed his skepticism of the majority's concern for restoring lost opportunity to the victims of discrimination, recently expressed in their fourth draft.[63] Douglas, meanwhile, had his sixth draft ready the same day; he simply included his clerk's proposed modifications regarding equitable considerations.[64] Only minor changes were made in the opinions after July 23.

With the Detroit and Watergate decisions both pending, it was with great anticipation and uncertainty that the *New York Times* announced on July 24 that the Court had given "special advance notice" that it would convene that day.[65] Reporters expected that the Court would make an important ruling, but could only guess whether one or both of the cases would be resolved.[66] Later that day, Nixon was handed a sound defeat, and when the Court announced that its last session would be held Thursday, July 25, there was little doubt that Detroit's moment of truth was at hand.[67] The next day, desegregation met the same fate as the President, with a five-to-four ruling against multi-district relief.

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[62] Memo to William O. Douglas dated July 22, 1974, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1656.

[63] See generally, Byron R. White, Memorandum to the Conference dated July 23 1974, Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Box No. 1656.

[64] William O. Douglas, Sixth Draft of Opinion in *Milliken v. Bradley* dated July 23, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

[65] *New York Times*, July 24, 1974, p. 30.

[66] Ibid.

[67] *Washington Post*, July 25, 1974, p. A3.

Among Justice Marshall's papers is a copy of an abridged version of his opinion, dated July 25, 1974, with the words "Read in Court by Justice Marshall" typed in the upper right corner of the front page.[68] This speech, composed of the most compelling arguments in his dissent, must surely have brought an uneasy quiet to the packed courtroom.

The fact that no fewer than five opinions were filed in this case was an indication of the contentious nature of the busing issue. The controversy was not limited to legal and academic circles; it was very much on the minds of Americans everywhere. Inter-district busing cases were pending in several large cities around the country--Hartford, Indianapolis, Louisville, Atlanta, Wilmington, Grand Rapids, Cincinnati, Cleveland, Dayton, and others--thus the Court's ruling would affect millions of students and their families.[69] Indeed, the case came as close to rivaling the much-anticipated Watergate ruling as anything could have.

The Majority's Verdict

Justice Stewart, in his relatively brief concurring opinion, summarized the *Milliken* case as follows:

> In the present posture of the case,. . .the Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction.[70]

It is true that the Court did not dispute previous findings of constitutional violation in the Detroit school system.[71] The obvious question to be resolved was whether the effects of those violations justified multi-district relief. But as Norman Amaker points out, and as the

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[68] Thurgood Marshall, Abridged Opinion in *Milliken v. Bradley* dated July 23, 1974, Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress, Box No. 131.

[69] *Washington Post*, July 30, 1974, p. A19.

[70] *Milliken v. Bradley*, at 753.

[71] Ibid., at 738, n. 18.

Chief Justice himself states, the essential nature of the constitutional right involved here was very much at issue.[72]

After laying out the facts of the case in the first section of his opinion, the Chief Justice turned to a theoretical foundation for the majority's position. With the *Brown*, *Brown II*, and *Swann* rulings as essential premises, Burger echoed the refrain of the petitioners' brief: The District Court had "abruptly"[73] changed the course of the proceedings by rejecting Detroit-only relief on the sole ground that "total desegregation of Detroit would not produce the *racial balance* which they perceived as desirable."[74] *Swann* had made it clear, Burger insisted, that "any particular degree of racial balance or mixing" was an improper judicial pursuit.[75]

If the District Court's quest for racial balance was its first mistake, then its second transgression, according to Burger, was its mischaracterization of district boundaries as "arbitrary lines on a map 'drawn for political convenience.'"[76] The Chief Justice extolled the virtues of the long-valued tradition of local control which, in the majority's estimation, would be pillaged by an integration plan such as the lower courts proposed.[77] Nor were the Court members convinced that Michigan's educational system could be described as a *state* system; on the contrary, the innumerable functions which were carried on *independently* by the various districts would be disrupted and distorted as considerable restructuring took place.[78]

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[72] Norman C. Amaker, "*Milliken v. Bradley*: The Meaning of the Constitution in School Desegregation Cases, Hastings Constitutional Law Quarterly 2 (Spring 1975): 363.

[73] *Milliken v. Bradley*, at 738.

[74] Ibid., at 740, emphasis added.

[75] Ibid., at 740-41.

[76] Ibid., at 741.

[77] Ibid., at 741-43.

[78] Ibid., at 742-43, especially n. 20.

Indeed, Burger listed a whole series of obstacles which would arise, from transportation logistics to the finance and operation of this new educational conglomerate.[79] Apparently, the majority's confidence in the District Court to resolve these difficulties was no greater than it's confidence in the court's motives:

> It may be suggested that all of these vital operational problems are yet to be resolved by the District Court, and that this is the purpose of the Court of Appeals' proposed remand. But it is obvious from the scope of the inter-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a *de facto* "legislative authority" to resolve these complex questions, and then the "school superintendent" for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.[80]

Justice Stewart, too, expressed the view that issues of local control and administrative hardship were overriding concerns. He believed that, given the limited nature and extent of the present findings, a multi-district remedy was plainly inequitable.[81]

In this particular case, clearly, the predicate for taking such "drastic" remedial action had not been established to the satisfaction of the Chief Justice and his like-minded colleagues.[82] What, then, *would* have persuaded the majority to endorse an order for multi-district relief? Both Burger and Stewart attempted to address the applicability of inter-district remedies. Burger, for his part, provided the following criteria for a finding of inter-district violation:

> It must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation.[83]

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[79] Ibid., at 743.
[80] Ibid., at 743-44.
[81] Ibid., at 755.
[82] Ibid., at 747.
[83] Ibid., at 744-45.

Justice Stewart, in his concurring opinion, enumerated the various mechanisms by which such inter-district segregation might be accomplished, including the gerrymandering of district lines, the "transfer of school units between districts," or the intentional use of housing or zoning laws in a discriminatory manner.[84]

In the view of the majority, the use of even one of these tactics had not been evidenced in the present case.[85] And while the majority acknowledged improper conduct at the local level,[86] and even the involvement of the State in the maintenance of Detroit's segregated system of education, they discerned nothing in the way of *multi-district* segregatory *effect* resulting from either Detroit's actions or the disputed actions of the State.[87] Where the majority "part[ed] company"[88] with the dissenters, then, was in their reading of the constitutional right in question:

> The view of the dissenters, that the existence of a dual system in *Detroit* can be made the basis for a decree requiring cross-district transportation of pupils. . . .can be supported only by drastic expansion of *the constitutional right itself*, an expansion without any support in either constitutional principle or precedent.[89]

For five years, the Court had established relatively aggressive remedial precedents; in 1974, however, the complexion of the Court allowed no more expansive an interpretation of the rights of minorities than had already been accorded. A Detroit-only plan, in their view, would guarantee everything the respondents had a right to: a unitary system of education--in the narrowest sense--within Detroit.[90] Strict construction was the order of the day.

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[84] Ibid., at 755.
[85] Ibid.
[86] See especially ibid., at 738, n. 18.
[87] Ibid., at 745-46.
[88] Ibid., at 746.
[89] Ibid., at 747, emphasis added.
[90] Ibid., at 746-47.

Burger thus established a theoretical framework which focused upon the *inter-district segregative effect* of the actions of a state or district. He then devoted the third portion of the opinion to an analysis of the actions of the *State* in precisely those terms--discussion of the possible inter-district effects of *Detroit's* segregatory practices was conspicuously absent. In his dissent, Justice Marshall would level harsh criticism at the majority for their failure to acknowledge the "rippling effects" of systematic segregation inside the city limits.[91]

The Chief Justice first characterized the District Court's findings with regard to the State as "incidental" and "isolated;" ultimately, he contended, only one allegation could potentially qualify as an inter-district violation.[92] Burger then declared the Court's acceptance, for the sake of argument, of the respondents' theory that the State was "derivatively responsible" for the actions of its local school boards.[93] He did not probe the issue of whether the actions of the Detroit Board, *for which the State was admittedly responsible*, had cross-district segregatory effects upon the suburban districts. Rather, Burger simply reiterated that there had been no showing that the State itself had taken any action with substantial inter-district ramifications.[94]

Burger was willing to concede possible inter-district effect only with regard to the Carver-Detroit issue. While there was no evidence that the Carver students were forced to attend a black Detroit high school due to the refusal of white school districts to accept them, the majority did admit that such an arrangement, "whether with or without the State's consent, may have had a segregatory effect on the school populations of the two districts involved."[95] Nevertheless, Burger continued, an "isolated" incident such as this could in

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[91] Ibid., at 806.
[92] Ibid., at 748.
[93] Ibid.
[94] Ibid.
[95] Ibid., at 750.

no way be used as the foundation for a far-reaching remedy such as that considered by the lower courts.[96]

In one very brief paragraph, the Chief Justice also dispensed with the State's enactment of Act 48, which nullified the April 7 desegregation plan: "That plan. . .affected only 12 of 21 Detroit high schools and had no causal connection with the distribution of pupils by race between Detroit and the other school districts within the tri-county area."[97] In short order, then, Burger moved on to the problem of school construction, which allegedly had area-wide consequences. Because the trial below had not included evidence with regard to construction in any district other than Detroit, inter-district effects were not apparent. Finally, as to disparities in state aid, Chief Justice Burger maintained that no satisfactory connection had been made by the lower courts between lack of funds and the racial composition of any district.[98]

All that remained to be said was that, given the Court's conclusions regarding the propriety of multi-district relief, the due process claims of the petitioners were a moot point. The courts below never had reason to question the actions of the suburban school districts in the first place; their inquiry should have been confined to the original complaint, that is, constitutional violations within Detroit. The Chief Justice's concluding statements indicated only that the suburban districts had done nothing to abet segregation in Detroit; the possibility of a reverse effect was not mentioned.[99] The decision of the Court of Appeals was vacated and the case remanded "for further proceedings consistent with this opinion leading to prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970."[100]

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[96] Ibid.
[97] Ibid.
[98] Ibid., at 751.
[99] Ibid., at 752.
[100] Ibid., at 753.

The Dissenters' Rebuke

Justice Stewart's concurring opinion had ended with the assurance that *Brown* was alive and well; the Court was "in no way turning its back on the proscription of state-imposed segregation" articulated in that landmark case.[101] To Thurgood Marshall, for whom this must have been a very personal defeat, these words were small comfort. He had helped precipitate the recent tide of civil rights achievement, but all too soon that tide was turning, just when truly significant integration might have been possible. His dissent in *Milliken* was, to say the least, one of the most vigorous of his career.

The two other members of the solid liberal bloc, Brennan and Douglas, joined Marshall in that stinging dissent, with Douglas authoring his own brief protest as well. Observers had labeled both White and Stewart as "swing" voters, but in this case White's spirited dissent did not equivocate.[102] He also had joined Marshall's dissent, and in turn Marshall, Douglas, and Brennan joined his. In the discussion that follows, Marshall's opinion will be the central focus, along with the most crucial elements of the others'. Throughout his commentary, Marshall blasted the majority for failing to ground their arguments in a realistic assessment of the nature of racism and segregation.

Marshall's opening statements underscored the futility of taking the unconstitutional Detroit situation, applying a remedy which would essentially do nothing to change it, and then deeming it constitutional.[103] The Fourteenth Amendment duties of the state, as compelled by precedent, would not be achieved without cross-district relief, and in this instance, neither legal nor practical considerations could justify denying black schoolchildren their constitutional rights. Indeed, those rights should have been the

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[101] Ibid., at 757.
[102] *New York Times*, July 1, 1974, p. 10.
[103] *Milliken v. Bradley*, at 782.

unqualified top priority, for they carried with them a special significance in light of the country's racist past.[104]

Marshall's lengthy opinion was thereafter divided into three sections, the first of which defended procedure in the lower courts. Having found purposeful segregation in Detroit, and having correctly determined that the State of Michigan bore responsibility for local conduct, the District Court had given due consideration to Detroit-only arrangements.[105] Based on the realities of a predominantly black student population and the phenomenon of white flight, the court recognized the ineffectiveness of creating a system which would be perceptibly black and likely to trigger an adverse white reaction.[106] The majority, however, had misrepresented the District Court's purpose entirely:

> The essential foundation of interdistrict relief in this case was not to correct conditions within outlying districts which themselves engaged in purposeful segregation. Instead, interdistrict relief was seen as a necessary part of any meaningful effort by the State of Michigan to remedy the state-caused segregation within the city of Detroit.[107]

Moreover, Burger's professed concern with the involvement of innocent bystanders was wholly inconsistent with his own statement that where one district's actions affected another, inter-district relief would be called for, in which case an unoffending district would in fact be required to participate in the remedial process.[108]

The majority, Marshall challenged, had utterly failed to refute the District Court's finding that Detroit-only relief would not accomplish meaningful integration.[109] Moreover, the District Court's timely consideration of inter-district relief was wrongfully characterized by the majority as an "abrupt"[110] and "improper" shifting of focus from desegregation in

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[104] Ibid., at 782-83.
[105] Ibid., at 786-87.
[106] Ibid., at 787.
[107] Ibid., at 789.
[108] Ibid., at 789, n. 2.
[109] Ibid., at 784.
[110] Ibid., at 738.

Detroit to racial balance throughout the metropolitan area.[111] "The issue," urged Justice Douglas, "is not whether there should be racial balance but whether the State's use of various devices that end up with black schools and white schools brought the Equal Protection Clause into effect."[112] In Marshall's estimation, the message of *Keyes* was that a finding of such intentional segregation "justifies 'all-out desegregation.'"[113]

Marshall ended his defense of the District Court with sharp criticism of the Chief Justice's disparaging tone in the majority opinion:

> With all due respect, the Court, in my view, does a great disservice to the District Judge who labored long and hard with this complex litigation by accusing him of changing horses in midstream and shifting the focus of this case from the pursuit of a remedy for the condition of segregation within the Detroit school district to some unprincipled attempt to impose his own philosophy of racial balance on the entire Detroit metropolitan area. . . . Unlike the Court, I perceive my task to be to review the District Court's order for what it is, rather than to criticize it for what it manifestly is not.[114]

In Marshall's view, the majority's accusations not only maligned the integrity of the District Court, but also obscured the issue of state-sanctioned segregation in Detroit. Once the majority was convinced of some plot to achieve racial balance, the possibility that multi-district relief might be a genuine exigency was eclipsed.[115]

Marshall's second segment was devoted to analysis of the District Court's conclusions themselves. Specifically, Marshall focused on the court's assignment of ultimate responsibility to the State, and its judgment that a multi-district remedy was necessary for effective desegregation.[116] The former conclusion had rested on three relevant considerations, Marshall argued: The State's own contributions to segregation; the

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[111] Ibid., at 755.
[112] Ibid., at 761-62.
[113] Ibid., at 786.
[114] Ibid., at 789-90.
[115] Ibid., at 789.
[116] Ibid., at 790.

status of the Detroit Board of Education as an agency of the State; and the organization of Michigan's schools as a *state* system, both in law and in practice.[117]

Enumerating the school construction, transportation funding, Carver-Detroit busing, and Act 48 issues one after the other, Marshall fully approved the lower courts' conclusion that the State was an active accomplice in segregating Detroit's students.[118] But even without such evidence, the district's status as a state agency was firmly established in law and precedent; both Marshall and White cited several sources in support of this, including the recent *Keyes* decision.[119] It was in *Keyes*, claimed Marshall, that intentional segregation carried out by government agencies was placed at the same level with segregation mandated by state statute.[120]

Marshall gave particular emphasis to Michigan's *state* education system and its power over the districts within that framework, again citing a number of state cases as precedent.[121] In fact, he suggested, the majority's concern with local control was quite inappropriate given the reality of State authority over education in Michigan: In addition to its potent "power over the purse," the State also controlled, influenced, or approved teacher certification and tenure standards, curriculum, school terms, bus routes, textbooks, discipline procedures, and removal of school board members.[122]

Most significantly, the State could (and did) consolidate and merge districts, as well as transfer property between them, all *without the consent* of either the districts or their citizens. Marshall demonstrated that, in truth, the State and its districts were increasingly accustomed to administering consolidations: "Whereas the state had 7,362 local districts in 1912, the number had been reduced to 1,438 in 1964 and to 738 in 1968. By June 1972,

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[117] Ibid., at 786.
[118] Ibid., at 790-92.
[119] Ibid., at 793; also at 770.
[120] Ibid., at 793.
[121] Ibid., at 794-95; also at 797.
[122] Ibid., at 795-96.

only 608 school districts remained."[123] Given all of the above facts, the suggestion that the State could be absolved of responsibility for segregated conditions, or that it was powerless to intercede, was simply unsupportable. Detroit, a substantial portion of Michigan's *state system* of education, had been found guilty of segregation, and the State had both the obligation and the power to integrate.[124]

Marshall next turned to the District Court's determination that a cross-district remedy would be required to achieve substantial integration. The directives in *Green*, *Wright*, and *Swann* would have been most compelling for the District Court in this situation: Future racial distinctions, as well as past vestiges of them, would have to be eliminated through a remedy which promised to work realistically and immediately.[125] Justice White emphasized that maximum desegregation and the elimination of one-race schools were crucial, for that was the only way to eradicate the stigma associated with segregation--this had been the reasoning in *Swann*.[126]

But White also indicated that there were practical limits to remedial efforts. In a large geographical area such as the Detroit district, where there were a large proportion of blacks and clear residential segregation, the elimination of one-race schools would be a challenge.[127] In light of the guidelines set forth in case precedent, the Detroit-only plans would need to be evaluated in terms of their chances for success given the nature of segregation in Detroit.[128]

Thus, according to Marshall, factors such as pervasive residential segregation, the predominantly black student population, and the likelihood of white flight were appropriate considerations. The existence of residential segregation would have to be taken into

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[123] Ibid., at 796.
[124] Ibid., at 797-98.
[125] Ibid., at 798.
[126] Ibid., at 779-80.
[127] Ibid., at 764.
[128] Ibid., at 799.

account when evaluating the practicability of any remedy: For example, if most blacks were on one side of town and most whites on the other, it might be quite inconvenient or even impossible to effectuate the massive transportation necessary to desegregate.[129] The fact of a high black-to-white ratio was also relevant for purposes of determining whether racially identifiable schools--the vestiges of state-imposed segregation--could effectively be eliminated.[130] Finally, the white flight element, which had been substantiated by expert testimony and was considered by the Court in *Wright*, would have to be reckoned with in light of the first two factors.[131]

The District Court's evaluation of circumstances in Detroit led to the inevitable conclusion that a Detroit-only plan might provide a future free of racial distinctions, but could not possibly eliminate the vestiges of *past* discrimination.[132] Marshall elaborated:

> The continued racial identifiability of the Detroit schools under a Detroit-only remedy is not simply a reflection of their high percentage of Negro students. What is or is not a racially identifiable vestige of *de jure* segregation must necessarily depend on several factors. . . .Foremost among these should be the relationship between the schools in question and the neighboring community.[133]

Since the metropolitan area was plainly a community of interest, connected and integrated in a variety of ways, a Detroit-only plan would not conceal the fact that, compared to most other facets of metropolitan life, the *schools* in the city and the suburbs were racially identifiable.[134] Justice White added that, in addition to resulting in an all-black school system, any intra-city plan would actually be more costly and more complex than the inter-district plan which was proposed.[135]

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[129] Ibid., at 799, n. 19.
[130] Ibid., at 802-03.
[131] Ibid., at 801-02.
[132] Ibid., at 798-99.
[133] Ibid., at 803-04.
[134] Ibid., at 804.
[135] Ibid., at 767.

It was Marshall's view that the State had also been responsible for *residential* segregation, if for no other reason than that the segregation of its schools had influenced housing choices made by both blacks and whites--an effect which did not necessarily stop at the Detroit city limits.[136] But he insisted that whether or not the government was in any way responsible for the state of affairs in Detroit in terms of residential segregation or the concentration of blacks, it was nevertheless responsible for implementing an *effective* plan that would take these factors into account.[137] Thus, the shortcoming of a Detroit-only plan was not racial imbalance *per se*; rather, it was the fact that it essentially changed nothing, and instead promised a worse scenario than was already the case.[138]

In past cases the Court had never specifically mentioned the possibility of multi-district remedies; and yet, urged Justice White, in both *Brown II* and *Swann* the gerrymandering of district lines--even "drastic" restructuring--had been mentioned as a permissible tactic.[139] In this case, declared White,

> there is no acceptable reason for permitting the party responsible for the constitutional violation to contain the remedial powers of the federal court within administrative boundaries over which the transgressor itself has plenary power.[140]

Quoting from *Swann*, White reminded his colleagues that when a right is established and a violation of that right demonstrated, a district court has broad equitable powers at its dispense, "for breadth and flexibility are inherent in equitable remedies."[141]

Furthermore, both White and Marshall urged that

> the permissible revision of school districts contemplated in *Brown II* rested on the State's responsibility for desegregating its unlawfully segregated schools, not on any segregative effect which the condition of segregation in

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[136] Ibid., 805-06.
[137] Ibid., at 799, n. 19.
[138] Ibid., at 803.
[139] Ibid., at 772-73; also at 775.
[140] Ibid., at 772.
[141] Ibid.

> one school district might have had on the schools of a neighboring district.[142]

Indeed, both justices compared the inclusion of the outlying districts in a desegregation plan to the common practice of including multiple voting districts in reapportionment: "No finding of fault on the part of each electoral district and no finding of a discriminatory effect on each district is a prerequisite to its involvement in the constitutionally required remedy."[143] The State, Marshall commented, had the same obligation to its children as to its voters; it should not be allowed to avoid its constitutional duties through the drawing, redrawing, *or* maintenance of school district lines.[144] Justice White observed that in *Wright* and *Scotland Neck* the Court had not allowed the creation of new districts precisely because they would have hindered desegregation.[145] Nor, he added, should the State's delegation of its authority to the school districts be an acceptable excuse for allowing segregation to take place.[146]

The State itself, asserted Marshall, was responsible for the fact that effective desegregation could no longer be had from within Detroit. School segregation had not only sent a message to blacks concerning their supposed inferiority; it had sent a message to whites, too. The State had fostered an environment in which the races were not accustomed to living and learning together--hence, the white flight reaction. Now, through the *Milliken* ruling, a Detroit-only plan would allow the State's unconstitutional goal to be realized as blacks were confined to the city, whites fled to the suburbs, and the separation of the races was assured.[147]

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[142] Ibid., at 773; see also 799, n. 19.
[143] Ibid., at 807; see also 777.
[144] Ibid., at 808.
[145] Ibid., at 776.
[146] Ibid., at 763.
[147] Ibid., at 806.

Justice Douglas took the scenario a step further: A solidly black Detroit, he suggested, had even more profound implications when one took the poverty factor into account. Since blacks were likely to be poorer, and since *Rodriguez* had sanctioned financial disparities between school districts, the Detroit schools would not only be separate, but almost certainly inferior as well. The Court, he announced, was "in a dramatic retreat from the 7-to-1 decision in 1896," for even *Plessy* had purported to guarantee equality for the separated races.[148] The combined effect of *Milliken* and *Rodriguez* was separation *and* inequality.

The Court, according to White, had not disputed the finding of segregation in Detroit, nor the necessity of a remedy;[149] neither had it rebutted the finding that a Detroit-only plan would be less effective and less efficient than a multi-district plan.[150] Yet the Court had severely limited remedial possibilities through a harshly narrow reading of the *Swann* proviso wherein "the nature of the violation determines the scope of the remedy." In the hands of the majority, Marshall charged, that principle had produced twisted results: Desegregation would apparently be disabled under the unrealistic and erroneous theory that the effects of segregation automatically stopped at arbitrary boundaries--there and no farther could a remedy go.[151] On the contrary, Marshall instructed, the scope of a remedy was *properly* determined by its actual effectiveness in "curing" the original violation:

> No more is necessary, but we can tolerate no less. To read this principle as barring a district court from imposing the only effective remedy for past segregation and remitting the court to a patently ineffective alternative is, in my view, to turn a simple commonsense rule into a cruel and meaningless paradox.[152]

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[148] Ibid., at 759-61.
[149] Ibid., at 762.
[150] Ibid., at 767.
[151] Ibid., at 806.
[152] Ibid., at 807.

The third and final section of Marshall's opinion addressed issues of equity; that is, the practicability of implementing area-wide relief, which was of great concern to the majority. Marshall, of course, viewed the majority's catalog of potential logistical problems as a "flimsy" excuse for denying inter-district relief.[153] Justice White further remarked that it was inconceivable that intentional segregation should go unremedied simply because it would make things difficult for the State.[154] The Court's focus on inconvenience to the State, he claimed, was not in keeping with "the usual criteria governing school desegregation cases,"[155] such as the distance, time, and hazards involved with busing plans.[156]

Nevertheless, the dissenting justices felt compelled to address some of the problems anticipated by the Court. The consolidation of districts, for example, had been depicted as an administrative nightmare. Marshall countered that the State not only had the power to do so, but plenty of practice as well, as indicated by the growing trend of school district mergers. If consolidation was that distasteful, he offered, Michigan had a long-established practice of contractual agreements between districts to facilitate nonresident education.[157] Additionally, Douglas observed that metropolitan solutions for problems were "commonplace;" the State would not have hesitated to resolve a water or sewage problem in such a manner.[158]

As to the expediency of busing students, Marshall noted that the practice had been approved in *Swann*, and all indications were that the District Court intended to follow the guidelines established in that case.[159] The rough draft of the metropolitan plan compared

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[153] Ibid., at 809.
[154] Ibid., at 763.
[155] Ibid.
[156] Ibid., at 777.
[157] Ibid., at 811-12.
[158] Ibid., at 758.
[159] Ibid., at 812.

well with busing programs already in place throughout the tri-county area in terms of the number of students bused and time and distance traveled.[160] Moreover, the cross-district plan would not require the purchase of as many buses as would an intra-city plan, and with the pairing of segments of Detroit with contiguous suburban districts, busing programs would likely be less complex.[161]

Therefore, a multi-district plan was not only possible, it was preferable. According to the majority's reasoning, in contrast,

> the District Court will be forced to impose an intracity desegregation plan more expensive to the district, more burdensome for many of Detroit's Negro students, and surely more conducive to white flight than a metropolitan plan would be--all of this merely to avoid what the Detroit School Board, the District Court, and the *en banc* Court of Appeals considered to be the very manageable and quite surmountable difficulties that would be involved in extending the desegregation remedy to the suburban school districts.[162]

To Justice White, then, it was highly unlikely that administrative strain could outweigh the benefits of a plan which was more efficient and more effective than a plan confined to Detroit.

White also acknowledged the problem of local control, particularly the very crucial issue of parental participation and interest in schools. Yet it was unclear to him why such participation could not continue through a restructuring of local authority which would parallel restructured attendance areas. Nor was it apparent that such adjustments would be any more traumatic in a multi-district situation than in an intra-district scenario.[163]

Finally, Marshall dealt with the problem of District Court supervision of the remedial process. In his mind there was no reason to think that the District Court would have to get heavily involved in implementing relief. To date it had properly required the

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[160] Ibid., at 812-13.
[161] Ibid., at 813-14.
[162] Ibid., at 781.
[163] Ibid., at 778-79.

parties involved to do as much of the planning as possible, except where the State defendants had failed to carry their burden in designing a remedy. Even then the court had made use of a panel representing both sides to carry out further planning duties. Moreover, it was left to the State to make its own interim arrangements pending a finalized plan.[164] On the whole, then, the District Court had successfully limited itself to an "approval" role. The Court of Appeals, for its part, had assured suburban participation in the process by ordering the joinder of affected districts.[165] Justice Douglas stated in his opinion that "the task of equity is to provide a unitary system for the affected area *where, as here, the State washes its hands of its own creations.*"[166] In Douglas's estimation, the courts below had demonstrated their commitment to that task by acting responsibly and with proper restraint.[167]

Justice White, for his part, scoffed at the majority's suggestion that district judges were somehow unqualified to deal with such administrative problems as might be confronted in the present case:

> It is precisely this sort of task which the district courts have been properly exercising to vindicate the constitutional rights of Negro students since *Brown I* and which the Court has never suggested they lack the capacity to perform.[168]

On the contrary, White found great irony in the fact that the least local court in the land was professing to know better about the feasibility of inter-district relief than the local courts which were "on the scene and familiar with local conditions."[169] Indeed, the unique situation in Detroit and the novel problems it presented were the best reasons for allowing the District Court that flexibility referred to in *Brown II*.[170]

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[164] Ibid., at 809-10.
[165] Ibid., at 810.
[166] Ibid., at 762, emphasis added.
[167] Ibid., at 757.
[168] Ibid., at 778.
[169] Ibid., at 768; see also 769.
[170] Ibid., at 772.

Marshall urged that the courts below should be allowed to follow through with final planning. The majority's basis for deeming the plan unworkable, absent a complete picture of what would actually be required, was shaky at best.[171] Justice White added the compelling argument that

> whatever difficulties there might be, they are surmountable; for the Court itself concedes that had there been sufficient evidence of an inter-district violation, the District Court could have fashioned a single remedy for the districts implicated rather than a different remedy for each district in which the violation had occurred or had an impact.[172]

Ultimately, contended Marshall, there was going to be some disruption, regardless of which desegregation plan was finally adopted--why not strive for results that would truly be worth the effort?[173]

Justice Marshall's concluding statements were an open indictment of the Court's abandonment of African-Americans:

> Just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law.[174]

On the Court of 1974, Marshall's perspective with regard to such matters was truly unique. His words carried with them the weight of decades of very personal experience with racism and resistance to integration. This time his point of view did not prevail, but his forceful protest could hardly be ignored.

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[171] Ibid., at 810.
[172] Ibid., at 669-70.
[173] Ibid., at 814.
[174] Ibid.

Public Reaction

On July 25, 1974, Verda Bradley had taken her television to work in anticipation of some news about the case which borrowed her son's name. When she heard the outcome, "My mouth just fell open in a state of shock for a few minutes."[175] The decision was equally "stunning" to Alex Ritchie (attorney for the white Detroiters): "I'm sad and disappointed. I really thought Judge Roth made a sound statement of law. I believed in it."[176] When a local reporter spoke to Judge Roth's widow, Evelyn, "she responded with the same iron resolve that had come to grip Judge Roth in the face of personal vilification and public outcry":

> I can't know for sure what Stephen would have thought, but I know how I feel. I'm proud and I'm sad. My heart is heavy but I'm very proud of my husband's dedication to the law and the courage he displayed in defending the Constitution. Someone must now step forward and continue my husband's efforts. How sad it is that our troubled times demand such sacrifices.[177]

For others, the decision came as no surprise. William Raspberry of the *Washington Post* commented that "it has been clear for some time now that busing for purposes of racial integration was in its terminal stages; the only question was whether the courts or the Congress would administer the *coup de grace*."[178] Nor was the outcome bemoaned by all blacks. Harvard law professor Derrick Bell charged that "the insistence on integrating every public school that is black perpetuates the racially demeaning and unproven assumption that blacks must have a majority white presence in order to either teach or learn effectively." And Detroit Mayor Coleman Young, a black separatist leader, declared,

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[175] As quoted in Metcalf, 192.
[176] As quoted in Dimond, 118.
[177] As quoted in Dimond, 118.
[178] William Raspberry, "Busing and the Court: 'A Giant Step Backward'?" *Washington Post*, July 29, 1974, p. A27.

> I shed no big tears for cross-district busing. . . .I don't think there's any magic in putting little white kids alongside little black kids on a school bench if the little white kids and little black kids over here have half a dollar for their education and the little black kids and little white kids over there are getting a dollar.[179]

Most suburbanites, meanwhile, "revelled" in their renewed security.[180] They could "relax" now that their children were "safe."[181] One suburban mother explained, "You've got your good colored and your bad, just like white. . . .I've lived with the good ones, and I've lived with the bad. Colored as such doesn't bother me. But you put me in with the bad ones, and I'm going to run."[182] The *Milliken* case might have forced these privileged Americans to confront the consequences of abandoning the disadvantaged. Instead,

> *Milliken v. Bradley* was an act of absolution. Segregated Detroit schools were not the suburbs' creation and thus not their burden. . . .The impetus for progress in Civil Rights in the 1960s had been white America's recognition of its part in creating the black's degraded state. *Milliken* foretold a time of greater innocence, of freer conscience; there were limits, it said, to assigning guilt and shame.[183]

Thus many were deaf to the *Washington Post*'s call for a renewed commitment from communities and individuals to pursue equal opportunity.[184] One commentator flatly rejected the idea that such commitment was possible:

> During the busing controversy politicians kept saying the issue was not busing but quality of education. Will the leaders. . .who jumped on the antibusing bandwagon. . .fight for more money for Detroit? No. Will school tax revenues be apportioned on the basis of need, so that Detroit and other poor children will get the money they deserve? No. Will Detroit's housing and unemployment problems be addressed? No. Will suburban housing segregation be combated, so blacks can move to suburbs? No. Will artificial boundaries be ended? No. Will wealth assume its responsibilities? No.[185]

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[179] As quoted in *New York Times*, July 26, 1974, p. 17.

[180] Dimond, 118.

[181] *New York Times*, July 27, 1974, p. 60.

[182] As quoted in *New York Times*, July 27, 1974, p. 60.

[183] J. Harvie Wilkinson, From Brown to Bakke: The Supreme Court and School Integration: 1954-1978 (Oxford: Oxford University Press, 1979), 224.

[184] *Washington Post*, July 29, 1974, p. A26.

[185] William Serrin, "'Detroit, Where Life Is Worth Living,'" *New York Times*, August 1, 1974, p. 29.

Indeed, lead counsel Nathaniel Jones summed up the disheartening message of the decision this way:

> To whites it says that if discrimination against blacks is on a vast enough scale, remedies will prove too awesome to invoke and thus the evil can be perpetuated; and to Negro Americans it says that they have only those rights that the white majority finds convenient to concede.[186]

Jones was "deeply wounded by losing, for black children and their parents, the first school segregation case decided on the merits by the Supreme Court in a full opinion since long before *Brown.*"[187] He vowed that he would continue to pursue inter-district remedies wherever they would do some good and where cases could be made which would "meet the loopholes" in *Milliken.*[188] Realistically speaking, though, most civil rights lawyers were of the opinion that opportunities for substantial integration would be few and far between.[189] Thus, Maynard Jackson, the first black mayor of Atlanta, best summarized the feelings of pro-integrationists when he commented, "This is a helluva way to celebrate the 20th anniversary of the *Brown* decision."[190]

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[186] As quoted in Metcalf, 193.
[187] Dimond, 117.
[188] As quoted in Dimond, 116.
[189] Orfield, 35.
[190] *Washington Post*, July 26, 1974, p. A9.

VI

THE DECISION EXAMINED

Court Under Pressure

In a review of Harvie Wilkinson's From Brown to Bakke, Leslie Dunbar states that "one of the great flaws of reform-by-litigation is that courts stumble from step to step, case to case, seldom able to see beyond the supposed logic of judicially definable wrongs and judicially available remedies."[1] Indeed, one of the few things that can be said of *Milliken* with confidence is that, at the time of the case, no one involved seemed to have a clear view of the issues. Racial discrimination has been a particularly long-lived, intractable problem because it is so maddeningly mutable--notorious for continually outwitting the law, always seeming to be one step ahead of the Court's understanding of the problem.

Clearly we do not want judicial principles to fluctuate at the breakneck pace of everyday modern life. The trouble is that in everyday life African-Americans get left behind in many ways and have few allies to call upon. Though the Court has traditionally been one of those allies, it has also been relatively slow to come to the rescue of blacks who find themselves victims of the latest in a long and fast-evolving line of discriminatory tactics. For a few brief years it seemed as though the Court might catch up to--and possibly overtake--the problem, but in 1974 it stopped short.

In part this was due to the failure of the Court to deal with some of the complex realities of racism. In the cases prior to *Milliken*, the Court had attacked urban school segregation without effectively confronting the problem of residential segregation: In *Green* the Court demanded unitary school systems now, with racial ratios as guides to progress; but the Court did not indicate just how far this would have to be taken, and

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[1] Leslie W. Dunbar, "We Shall Overcome?" The Virginia Quarterly Review 56 (Winter 1980): 144.

housing patterns were not even mentioned. In *Swann*, the Court recognized the existence of residential segregation, but it also backed away from the use of racial ratios, and declined to probe the conduct of officials other than school officials. Thus the *reciprocal* ties between segregated schools and neighborhoods went unrecognized. The Court had artificially separated what is in fact inextricable; unfortunately, it would continue along that path in 1974.

Then, too, the novel idea of crossing school district lines added to the confusion. Both sides scrambled to formulate arguments that would yield the desired outcome, but neither knew what would ultimately sway the Court one way or the other. As a result, both sides advanced any argument that might conceivably make a difference. The Court itself became preoccupied with superficial issues raised in the briefs and was diverted from reaching and resolving the complex root of the problem.

The introduction of an enigmatic and unprecedented problem is not the whole story, of course, for in this case one cannot overlook the issue of expediency. The political heat in *Milliken* was blistering, even for the heavily-insulated Supreme Court. Though it did not have a solid, coherent justification for doing so, the Court decided that it had to put limits on busing or risk losing its authority and prestige among the politically powerful suburban middle class.[2] Thus, confusion and pressure account for the contradictory and tangential arguments found in the various opinions.

The case could be reduced to a single question, the question that lay at the heart of the respondents' brief: Would the Court consider the broader reality of racial discrimination--housing discrimination in particular--as it affected school segregation? In concrete terms this meant going beyond *Swann* by considering the actions of officials other

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[2] George R. Metcalf, From Little Rock to Boston: The History of School Desegregation, Contributions to the Study of Education Series, No. 8 (Westport, Conn.: Greenwood Press, 1983), 190-91.

than *school* officials. In addition, it involved expanding the "affirmative duty" of school boards described in *Green* so as to forbid the passive incorporation of residential segregation into metropolitan schools. This approach directly confronted the nature of segregation in the North, for while attention was focused on the South, the rest of the nation had established residential segregation as the new and improved underpinning for school segregation.[3]

Instead of giving a straightforward response to the respondents' question, however, the Court spoke only to the surface issues delineated in the petitioners' brief, and in many instances simply adopted the views and reasoning therein.[4] In so doing, the Court placed arbitrary limits on desegregation and based its decision on hollow principles. In order to buttress its conclusions, the majority included arguments which were not only unnecessary, but also contradictory, and which thus served to weaken its position.

Double Binds

In *Milliken* the majority reaffirmed *Keyes* by requiring district-wide desegregation in Detroit, thereby conceding that acts of segregation affecting particular Detroit schools also had reciprocal effects in schools throughout the district. However, the Court was not yet willing to carry that logic across district lines.[5] This reluctance may be attributed to the fact that, before *Milliken*, the Court dealt almost exclusively with cases of segregation which were confined to single, isolated districts. With sprawling, multi-district cities like Richmond and Detroit, things were not so simple.

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[3] J. Harvie Wilkinson, From Brown to Bakke: The Supreme Court and School Integration: 1954-1978 (Oxford: Oxford University Press, 1979), 145.

[4] Paul R. Dimond, Beyond Busing: Inside the Challenge to Urban Segregation (Ann Arbor: The University of Michigan Press, 1985), 110.

[5] Gary Orfield, Must We Bus? Segregated Schools and National Policy (Washington, D.C.: The Brookings Institution, 1978), 31.

The Court was venturing into unexplored territory: It was now confronting large-scale segregation among admittedly independent districts which were, nonetheless, parts of a larger, interconnected community. The Court was justifiably unwilling to infer segregatory intent on the part of one district based on the segregatory acts of another *independent* district. The plaintiffs themselves recognized this; indeed, they never did argue that the suburban districts did anything wrong *per se*. For them, suburban participation in segregation (besides being almost impossible to prove in this case) was irrelevant to the need for area-wide relief, since the underlying causes and ultimate effects of segregation were not confined to Detroit proper.

What the plaintiffs struggled to articulate was that, in the context of an interconnected metropolitan community, the actions of one district did in fact have consequences in other districts: By building upon the discriminatory *metropolitan* housing market, Detroit had contained blacks in certain of its schools. This fostered additional residential segregation *throughout* the area, making it progressively easier to maintain segregated schools--particularly for the suburbs. As long as residential segregation was a valid excuse for school segregation, suburban school officials could simply incorporate the *reciprocal* effects of black containment into their own neighborhood schools, without engaging in overt wrongdoing.[6] Meanwhile, according to *Swann*, the actions of housing authorities could not be challenged in the context of school desegregation cases.

It was clear to the plaintiffs that the white suburban schools were, in part, the reciprocal result of events in the central city. But given the lack of precedent for inter-district remedies, proof of segregation in Detroit would achieve nothing more than intra-Detroit relief. In order to prompt the Court to do more, plaintiffs would have to show a tangible connection between circumstances in Detroit and circumstances in suburbia. Their

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[6] Wilkinson, 223.

options were limited: They could attempt to prove that each of the suburban districts had engaged in intentional segregation as well; or, they could convince the Court of the critical role of area-wide residential segregation in creating and maintaining area-wide school segregation. The predicament of the plaintiffs is readily apparent: How do you "catch" suburban officials at discrimination when the black population is almost nonexistent there? The tedious process of showing discrimination in Detroit was child's play compared to the task of taking on the numerous suburban districts.[7] Under these circumstances proof of housing discrimination was not only the best hope for procuring significant relief, it was the only hope.

For this reason, Paul Dimond explains, "All of the proof about areawide housing segregation. . .was marshalled in the [respondents'] brief."[8] But that evidence was swept aside by the Supreme Court in a mere footnote: Based on the Court of Appeals' refusal to consider proof of housing discrimination, Burger determined that "in its present posture, the case does not present any question concerning possible state housing violations."[9] The Court disregarded the plaintiffs' amended complaint, the evidence and arguments in the respondents' brief, the respondents' oral argument, and even the government's suggestion that the case be remanded for further findings.[10] "This ruling," Dimond contends, "directly contradicted traditional Supreme Court practice which permits the party that prevails in the lower courts to urge *any* ground in support of the judgment, including those either rejected or ignored below."[11]

Had the Court been dissatisfied with the quality or quantity of the housing evidence, Dimond suggests, it might have sent the case back for reconsideration; it did not

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[7] Metcalf, 255.
[8] Dimond, 101.
[9] *Milliken v. Bradley*, 418 U.S. 717 (1974), at 728, n. 7.
[10] Dimond, 110.
[11] Ibid., 111.

opt to do so.[12] Instead the Court determined that if a district boundary was to be crossed a very high standard of proof would have to be met: Plaintiffs would indeed have to show misconduct on the part of school officials in each district before that district could be included in a remedy; alternatively, plaintiffs would be forced to delve into the nebulous and ill-defined "inter-district effects" of segregation. In light of the fact that the Court was unimpressed by clear evidence of black containment and the reciprocal effects of that containment, civil rights attorneys were left to wonder what proof could possibly have swayed even one member of the majority.[13] Given the limited resources of typical plaintiffs and their lawyers, the Court essentially asked the impossible.[14]

Potter Stewart's concurring opinion seemed less stringent, but was ultimately of little help. He came closer to confronting the housing issue than did the Chief Justice, yet in the end he attributed residential segregation to "unknown and perhaps unknowable factors."[15] Likewise, his willingness to consider the actions of non-school officials (specifically, the "purposeful, racially discriminatory use of state housing or zoning laws" by state authorities)[16] was of little consequence since he remained oblivious to the very arguments and evidence which called attention to such discriminatory activities.[17] Says Paul Dimond of Stewart,

> Only a justice intent on ignoring the substantial proof and the trial judge's express findings could purport to make such statements based on a review of the extensive record of housing discrimination. To Stewart, it was as if plaintiffs' overwhelming housing evidence, which converted even an unsympathetic judge and hostile adversary counsel in the trial court, vanished.[18]

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[12] Ibid.
[13] Ibid., 113.
[14] Orfield, 393.
[15] *Milliken v. Bradley* at 756, n. 2.
[16] Ibid., at 755.
[17] Howard I. Kalodner and James J. Fishman, eds., Limits of Justice: The Courts' Role in School Desegregation (Cambridge, Mass.: Ballinger Publishing Co., 1978), 271.
[18] Dimond, 113.

While some civil rights activists viewed Stewart's opinion as an "invitation" for plaintiffs to try a new angle, NAACP leadership and the lawyers involved in *Milliken* viewed it as "a largely meaningless effort to tone down the harsh impact of the Detroit decision."[19]

"Ironically," Dimond states, "the Court's opinion nevertheless made the causal interconnection between school and housing segregation a key element in future cases."[20] Burger held that remedies should reinstate blacks to the position they would otherwise have occupied sans discrimination, but this "led plaintiffs and defendants in subsequent cases back into the battles over. . .residential segregation."[21] Thanks to *Milliken*, plaintiffs were now at a distinct disadvantage going into such battles, due to the Court's failure to apply to the State the same burden it had applied to school boards in *Keyes*:

> Where segregation existed, residentially or educationally, was there not a presumption of prior state complicity which it, not black plaintiffs, was obliged to explain?. . .Had the Court's insistence in Detroit on interdistrict violations done no more than set up a fool's search for evidence of the obvious? And then, by ignoring housing, limited the search so the obvious might remain obscure?[22]

Wilkinson's rhetorical questions highlight the inconsistency and lack of resolution which characterized the Court's decision in this case.

The Court not only ignored housing, but also considered the State's violations piecemeal and divorced from context--i.e., exactly as they had been presented by petitioners in their brief. Viewed in isolation, none of the State's transgressions would likely form the basis for an inter-district violation. But as part of a larger picture (involving containment of blacks by Detroit, exclusion of blacks by the suburbs, and, when necessary, the cooperation of the State in both of these endeavors) these violations took on added pattern and substance. Further, the Chief Justice stated repeatedly that neither the

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[19] Orfield, 35.
[20] Dimond, 111.
[21] Ibid.
[22] Wilkinson, 224.

State nor the suburbs had committed acts with inter-district effects, but he seemed determined to avoid any discussion about whether the Detroit violations might have influenced the racial composition of the suburbs. In short, the majority opinion dealt flatly with the facts and findings, outside of any meaningful context. The Court could not hope to formulate a lasting resolution to a complex problem like segregation by handling it in such a manner.

Dimond points out that, while the Court proved unwilling to consider critical contextual issues such as housing, it nevertheless focused upon the supposed logistical shortcomings of Judge Roth's proposed remedy, the specifics of which were in fact *vacated* by the Court of Appeals (because the suburban districts had not been heard).[23] Justice White dismissed the majority's complaints about feasibility thusly:

> Whatever difficulties there might be, they are surmountable; for the Court itself concedes that had there been sufficient evidence of an inter-district violation, the District Court could have fashioned a single remedy for the districts implicated.[24]

Lino Graglia, who opposes busing under any circumstances, also recognizes the irrelevance of the majority's arguments on this point. Graglia's reasoning is, of course, diametrically opposed to White's: "Since '*de jure* segregation' had been found only in Detroit, a metropolitan plan would not have been constitutionally required even if it had presented no administrative problems."[25] From either point of view, the result is the same: Whether or not a multi-district remedy was constitutionally required, *in this case* the feasibility of such a remedy was not really at issue.

By throwing obstacles of feasibility and local control into the path of inter-district desegregation, the Court only succeeded in opening itself up to contradiction and criticism.

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[23] Dimond, 111.

[24] *Milliken v. Bradley* at 669-70.

[25] Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Schools (Ithaca: Cornell University Press, 1976), 235.

On the one hand, the Court acknowledged the State's responsibility for correcting segregated conditions; on the other, it offered every possible pretext for *not* requiring the State to do so: Whereas the Court had accepted the upheaval of single-district remedies as par for the course, Southern arguments concerning the trauma of desegregation suddenly had validity now that suburbs were involved. Consolidation was deemed too great an inconvenience for the various districts, despite the fact that such consolidations had, over several decades, reduced the number of districts in Michigan by some ninety percent. District judges, moreover, were now unfit to handle the intricacies of cross-district desegregation, though for years the Court had been content to let them tend to the details of Southern desegregation with little guidance from above.

Further inconsistencies abounded: The metropolitan community had voluntarily cooperated to solve numerous and varied problems, including educational questions, but in this case it seemed that the community's school districts could not possibly be expected to relinquish their autonomy in order to deal with desegregation. Voting district lines had fallen in the interest of reapportionment, but here school district lines were defended as the bulwarks of local control. District judges could not be allowed to jeopardize that control, but it was apparently of no consequence that the State, through Act 48, had seen fit to usurp power over student assignments in Detroit.

When the Court championed community control, it championed the power of the suburbs to maintain the status quo. By leaving that control intact, the Court was demonstrating the limits of minority rights vis-a-vis majority rights.[26] This, Gary Orfield suggests, was the Court's most glaring contradiction:

> In the 1950s and 1960s, southern opponents of racial change seldom argued in favor of segregation, claiming instead that they were opposed to the idea of federal infringement of "states' rights." In the 1970s in metropolitan areas where there is a history of unconstitutional segregation, opponents

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[26] Wilkinson, 232.

> defend "local control." In *Brown* and succeeding cases, the courts rejected the southern defense. In the *Milliken* decision the Supreme Court accepted the northern argument.[27]

Just as the Court had adopted the petitioners' version of their own actions, the Court also adopted their view of the trial judge as being preoccupied with racial balance. In the first place, it was the Supreme Court itself, in *Green*, which first began to use racial ratios to gauge progress in desegregation. The Court in 1968 had not turned to racial quotients out of some malevolent lust for control of schools; it turned to them reluctantly and tentatively and only because a significant number of whites refused, at every turn, to recognize the rights of blacks. Given the storm of opposition which had gathered by the time remedies were considered in 1972, the lower court's concern with results was similarly well-founded. The use of racial ratios by Judge Roth was, in fact, closely akin to the Court's use of ratios in the *Swann* case.[28] Roth's use of statistics would ensure both that the remedy would be responsive to the findings of school *and* residential segregation, and that the remedy would be properly implemented so as to yield reasonable results. Nevertheless, the District Court was now being scolded for following the lead of the Supreme Court.

In the second place, the Court's accusations put the judge in a no-win situation. Burger criticized Judge Roth for "abruptly"[29] changing the focus of the case, at the remedial stage, from Detroit desegregation to racial balance and metropolitan relief:

> The theory upon which the case proceeded related solely to the establishment of Detroit city violations as a basis for desegregating Detroit schools and. . ., at the time of trial, neither the parties nor the trial judge were concerned with a foundation for interdistrict relief.[30]

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[27] Orfield, 417-18.
[28] Graglia, 233.
[29] *Milliken v. Bradley*, at 738.
[30] Ibid., at 752.

The Court then penalized the plaintiffs because the judge had not taken evidence with regard to districts other than Detroit. Apparently Judge Roth should somehow have known from the beginning that evidence would show residential and school segregation to be present and Detroit-only remedies to be ineffective; yet if Roth had proceeded on an initial assumption that the suburbs should be involved--absent supporting charges or evidence--the petitioners and the Court would have had all the more reason to brand him a racial balancer.

In the third place, it would seem that *constitutional* issues are subject to review by the Court, and that the motives of a judge are a questionable topic for discussion in a majority opinion. The Court's use of the petitioners' racial balance charge ensured the success of the petitioners' strategy: The focus was no longer on the possible inter-district effects of the segregation which had been proven to exist in Detroit. Instead, the decision of the lower courts to pursue multi-district relief was wholly attributed to their reformist zeal, and further probing was unnecessary. The possibility that segregation in Detroit had affected the surrounding districts was not even addressed in the Court's opinion--any chance for inter-district relief was thus swept away.

The dispute over racial balance signified an unresolved issue: the validity of the *de jure/de facto* distinction. Lino Graglia criticizes both the majority and the dissenters for failing to discuss the problem candidly. In his view the majority, in a mere footnote,[31] used the *Keyes* ruling to sidestep the question of *de jure* segregation in Detroit, so that "an issue of the greatest magnitude--the constitutionality of school racial imbalance or of majority-black schools--was apparently resolved. . .without being anywhere expressly considered."[32] Graglia believes that, had they reviewed the lower court findings and applied a simple "plain error" test, the majority would have concluded (as does Graglia)

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[31] Ibid., at 738, n. 18.
[32] Graglia, 231.

that "the lower courts. . .had in effect held that it was racial imbalance itself that was unconstitutional."[33] Indeed, Graglia describes the dissenting opinions as

> inexplicable except as a simple condemnation of racially imbalanced or. . . predominantly black schools, yet. . .they resolutely purport to accept and apply the "desegregation" rationale of *Green*, *Swann*, *Keyes*, and the present Court: that racially balanced or majority-white schools are not constitutionally required as such but only to remedy "*de jure* segregation."[34]

Gary Orfield grasps what Graglia seemingly cannot:

> The fundamental social insight of the 1954 *Brown* decision by the Supreme Court was that a system in which minority children were forced to attend segregated schools was "inherently unequal." It was unequal not because there was something wrong with black children but because there were deep social prejudices about the inferiority of black institutions. This meant that the dominant society would not treat the minority schools equally and would assume that the children who attended them were inferior and would devalue their education, both by expecting less during the educational process and by assuming that graduates had had inferior training.[35]

Though Graglia completely misses the point of the respondents' brief and the dissents, he is nevertheless right about one thing: The Court as a body failed to address this issue in a manner which was at all helpful either to plaintiffs seeking relief or lower courts seeking to provide it.

If the Supreme Court majority was responsible for injecting various irrelevancies into the debate, the dissenters did their part by allowing themselves to be overly distracted by such arguments. Justices Marshall and White (White in particular) were preoccupied with problems of equitability,[36] and all three dissents devoted significant space to the matter of State responsibility for desegregation, a fact which the majority never disputed.[37] While the dissenters' passionate reactions to these issues are understandable, their positions

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[33] Ibid.
[34] Ibid., 241.
[35] Orfield, 405.
[36] Ibid., 243.
[37] Ibid., 250.

might have been better served by more elaborate treatment of the respondents' containment theory.

Opportunities Lost

Given an outcome favoring the status quo, the implications of this case are often couched in terms of might-have-beens. Had the respondents prevailed, integration would finally have been required in all regions of the country--urban and rural, North and South--on equal terms. One would hope that once the initial shock and turmoil had been worked through, unprecedented massive integration would actually have taken place, bringing further growth in racial understanding. The acceleration of white flight and the proliferation of private segregated schools might have been avoided, and the decay of inner-city schools slowed and eventually reversed. Author William Serrin observed:

> No one was happy with the idea of busing. It would have been accompanied by great traumas. But busing would have forced suburban communities to become interested in Detroit's schools. White wealth and power could not have ignored Detroit's schools without ignoring white suburban children. Money would have been forced into Detroit. Busing was no magic cure. But it was something.[38]

Indeed, Serrin's comments serve to highlight the fact that greater class interaction was inevitably implied in any plan to bring city and suburb together. In Harvie Wilkinson's view, this possibility is especially intriguing.

The Court, Wilkinson says, could have guaranteed both class and racial integration, thus softening the effects of *Rodriguez*. The urban poor--black and white--would have benefited from the influx of middle-class suburban students, because better funding would have accompanied them. The status of schools was not all about race: Poor schools, even when integrated, carried a lower status. Wilkinson explains:

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[38] William Serrin, "'Detroit, Where Life Is Worth Living,'" *New York Times*, August 1, 1974, p. 29.

> The poor of whatever race or ethnicity often brought to school the same educational deficiencies and the same limited home backgrounds. . . . Deprived home backgrounds created educational deficiencies in minority students that were expensive to overcome. Yet urban school systems possessed paltry funds with which to do so, primarily because public health, welfare, housing, sanitation, and safety costs badly drained municipal budgets. Due to this overburden, the average city devoted about 30 percent of its budget to schools, the average suburb, about half. Beset also by white exodus and declining property values, urban school finance was in desperate shape.[39]

At long last, the middle class might have been required to carry their share of the burden of integration. *Milliken*, then, had the potential for realizing unprecedented equality of educational opportunity in terms of race *and* socioeconomics.

This was not to be. Yet not everyone had placed all their hopes in busing. Some believed that "the only durable solution to the school problem lay not in such artificial, court-imposed remedies, but in the black man's natural, inevitable rise."[40] That is, continued legal progress and increasing political leverage would guarantee economic improvement and better housing opportunities for blacks, so that eventually suburban neighborhoods and schools would be penetrated and significantly integrated. But Wilkinson points out that integration through better housing is an individual remedy, while integration through busing is a class remedy. One requires individual achievement, while the other provides a safety net:

> Integrated schools through integrated neighborhoods will benefit those individual blacks determined and prosperous enough to escape the ghetto and buy into white areas. Busing, on the other hand, seeks to aid those whom fate has left stranded. Integrated neighborhoods largely await those blacks who have already made it in other ways--in employment, for instance, or education. Busing was to provide an opportunity for those deprived in other ways to make it still.[41]

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[39] Wilkinson, 220-21.
[40] Ibid., 236.
[41] Ibid., 242.

Thus *Milliken v. Bradley* crippled prospects for "mass betterment of America's blacks."[42] Rather than facilitate a shortcut to equality, the Court left minorities to endure the long haul. The Court gambled that black achievement and white tolerance had developed enough to be weaned from judicial activism.[43]

Various commentators have suggested that social reform does indeed belong in the hands of legislators, not judges and justices.[44] This notion does not account for occasions such as that in Detroit, where the aspirations of the majority--to whom those legislators are accountable--and the aspirations of the minority were mutually exclusive. The economic and political power of middle- and upper-class white Americans was successfully mustered against metropolitan solutions; as long as those groups remained opposed, elected officials were unlikely to respond to minority pleas.[45] Under such circumstances, the courts were the only hope.[46] But for one vote, the members of the Supreme Court might have awakened to the realities of racism and done something about them. Logic, evidence, and the rulings below would have been on their side. The decision they did make demonstrates that the Court is perhaps not as far removed from public wrath as the founders would have hoped.

The Court ruled in favor of a new form of tokenism: State and local officials could allow residential segregation to do its work, then throw up their hands in apparent helplessness. Cities, with their poor and minority populations, were left to bear the brunt of reform while affluent suburbs stood aloof and impregnable.[47] And yet, the Court's

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[42] Ibid.

[43] Ibid.

[44] See, for example, Nathan Glazer, "In Uplifting, Get Underneath," National Review 28 (October 15, 1976).

[45] Orfield, 196-97.

[46] Wilkinson, 229

[47] Orfield, 407.

decision merely *reflected* the real problem: the tendency of many whites to reject responsibility for the deeply discriminatory condition of American society:

> The failure of white America to bear its responsibility for the welfare of all children regardless of color. . . .shows itself in the parent who places his or her child in a private school rather than uniting with other citizens--neighbors--to build a better school for the entire community. It shows itself in the family who flees the city to get away from the school that is increasingly black. In both instances, the family is unconcerned over what happens to another's child through its action. It is their own, theirs alone, that counts. That pulling out reduces the quality level in the school left behind causes little regret.[48]

There is a collective responsibility that, like it or not, requires the kind of sacrifice from each white individual that has already been made by every African-American.

In 1974 it did not seem so easy to keep the promise of *Brown* as when the nation had first started. The causes of segregation were harder to identify, easier to excuse--the issues were no longer so clear-cut. To their credit, Americans had decided that it would not do to have segregation in their law books; nor could they accept the defiance of the rural South. But when it came to the tangled web of discrimination which separated schoolchildren in the urban areas, the problem became too complicated to deal with. When it came to overcoming the inertia which allowed segregation to flourish in the North, America decided that it was too much to ask of whites that they send their children to the ghetto for eight hours a day, though blacks and poor whites had to face the bleakness unceasingly. The avoidance of unpleasantness continued to be a luxury that only the politically powerful could afford.

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[48] Metcalf, 269.

VII

CONCLUSION

"Feeding the Backlash"[1]

After the *Milliken* decision many observers predicted that effective alternatives to metropolitan desegregation would not be vigorously pursued by either the government or the citizenry.[2] Unfortunately, this was an accurate assessment of the majority's attitude toward the problems of inner cities and the poor whites and minorities who populated them. As soon as the suburbs had what they wanted, it was back to business as usual: "The drive for a constitutional amendment dissipated, politics in Michigan returned to normal, and the threat of a direct congressional confrontation with the courts became less serious"[3] A scant three months after the decision, the *New York Times* was reporting that "antibusing candidates in particular" were not faring well in off-year elections, having become politically obsolete.[4]

In 1978, after observing four years of stagnant urban policies and unchanged inner-city conditions, Gary Orfield wrote:

> If nothing is done it will not be because minority families like segregation. It will not be because nothing can be done, because there are no legal grounds, or because education would deteriorate from the change. It will be because most Americans strongly prefer things the way they are, and the courts will not bear the burden of flying in the face of these deep convictions.[5]

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[1] The title of chapter seven of Tom Wicker's Tragic Failure: Racial Integration in America (New York: William Morrow and Company, Inc., 1996).

[2] See, for example, William Serrin, "'Detroit, Where Life Is Worth Living,'" *New York Times*, August 1, 1974, p. 29.

[3] Gary Orfield, Must We Bus? Segregated Schools and National Policy (Washington, D.C.: The Brookings Institution, 1978), 391.

[4] *New York Times*, October 20, 1974, p. 57.

[5] Orfield, 197.

Some twenty years later, political columnist Tom Wicker has come to the conclusion that this is precisely what has happened.

Wicker contends that over the last three-and-a-half decades--thanks largely to the sensationalist portrayal of blacks by the media--whites have increasingly reacted in fear and anger to the development of ghettos and the "undisciplined ghetto behavior" of their inhabitants.[6] This preoccupation with ghetto life has masked the growth of a stable black middle class, and has eroded support for substantial desegregation and other programs which would be helpful to the inner-city poor. Sensing the public's growing aversion to integrationist policies, the executive and legislative branches of government have been less and less indulgent of demands for a level playing field for blacks and whites--and thus for the rich and poor as well.[7]

Indeed, Wicker suggests, the association of racial equality with the Democratic Party has in fact been a great liability with much of the white electorate, especially in Southern states.[8] Since the pro-civil rights Johnson administration, Republicans have dominated the White House, interrupted only by the Carter and Clinton administrations, which Wicker claims were "political aberrations."[9] Desegregation efforts have wilted in the inhospitable political climate: Shortly after *Milliken*, Congress prohibited Legal Services offices from pursuing further school desegregation cases; since the Nixon HEW and Justice Department were similarly restrained, this left further progress solely in the hands of private organizations with limited resources.[10]

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[6] Wicker, 4.
[7] Ibid., 4.
[8] Ibid., 7.
[9] Ibid., 28.
[10] Paul R. Dimond, Beyond Busing: Inside the Challenge to Urban Segregation (Ann Arbor: The University of Michigan Press, 1985), 116.

The Reagan and Bush administrations were particularly unfriendly to black interests. Reagan not only reduced funds for desegregation,[11] but also attempted to grant tax exemption to segregated private schools and to roll back court-ordered school desegregation in several cities, such as Norfolk, Virginia and Oklahoma City, Oklahoma.[12] In light of *Milliken*, his urban policies had the grimmest implications: Confined as they were to the job-deprived inner city, blacks were hard-hit by Reagan's "trickle-down" economic policies,[13] his termination of revenue sharing, by which cities had received additional federal funds,[14] and his successor's continued cutbacks in urban programs. Between 1980 and 1990, the federal portion of city budgets fell from 18 percent to 6.4 percent.[15] Reagan also opposed affirmative action and the strengthening of the Voting Rights Act, and, according to Wicker, effectively "neutered" the Equal Employment Opportunity Commission.[16] In action, if not in words, Reagan and Bush validated public opposition to the integration of American society.[17]

Not to be discounted is the Reagan-Bush influence upon the judiciary. When Bush left the White House he and Reagan had appointed over half of the federal judges in office at the time.[18] Together they built what Wicker terms a "fluctuating conservative majority" on the Supreme Court (meaning there are still a couple of "swing" voters who defy categorization); thus the Court as a body has been increasingly reluctant to support desegregation and racial preferences.[19] The fact of a long-standing conservative majority

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[11] Wicker, 95.
[12] Ibid., 16.
[13] Ibid., 17.
[14] Ibid., 20.
[15] Ibid., 22.
[16] Ibid., 15.
[17] Ibid., 13.
[18] Ibid.
[19] Ibid., 108.

on the Supreme Court (since the Nixon years) has kept desegregation efforts in a virtual legal limbo.

Desegregation after *Milliken*

The few chinks left in the suburban fortress did allow a small number of metropolitan-wide desegregation orders to stand up to judicial review. The Supreme Court affirmed one such desegregation order for Wilmington, Delaware (*Evans v. Buchanan*, 1975) and denied *certiorari* in a case arising out of Louisville, Kentucky, thus leaving it under court order to integrate across district lines (*Newburg Area Council v. Jefferson County Board of Education*, 1974).[20] In both cases, district boundaries had been disregarded "in the interests of student segregation," thereby satisfying Burger's inter-district violation requirements as stated in *Milliken*.[21] Harvie Wilkinson suggests that the smaller geographic and demographic scope of the remedies in these cases may also have had something to do with the outcome: Compared to the involvement of 54 districts and 780,000 students in three Michigan counties, integration of New Castle County's 88,000 students in twelve school districts must have seemed much more reasonable; in Louisville only three districts were at issue, all within one county.[22] In 1981, after a volley of remands stretching over thirteen years (including one trip to the Supreme Court in 1977),[23] Indianapolis also squeezed a metropolitan remedy through the *Milliken* screen (*U.S. v. Board of School Commissioners of the City of Indianapolis, Indiana*).[24]

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[20] J. Harvie Wilkinson, From Brown to Bakke: The Supreme Court and School Integration: 1954-1978 (Oxford: Oxford University Press, 1979), 243, n. 148.

[21] Ibid., 243.

[22] Ibid., 242-43.

[23] George R. Metcalf, From Little Rock to Boston: The History of School Desegregation, Contributions to the Study of Education Series, No. 8 (Westport, Conn.: Greenwood Press, 1983), 264, n. 54.

[24] Ibid., 265.

Elsewhere, however, *Milliken* severely restricted the ability of plaintiffs to secure metropolitan relief. Detroit had actually been a progressive model compared to other city school districts in the sixties; the findings of *de jure* segregation there meant that it would be fairly easy to demonstrate segregation in places like Chicago and Philadelphia, where segregation was even more pronounced.[25] But this was of little consequence when meaningful remedies were out of reach: "Almost immediately [after *Milliken*] the steam went out of plans to press for metropolitan solutions in a number of the older cities."[26] New York, Los Angeles, Chicago, Philadelphia,[27] Baltimore, Richmond, Cleveland, St. Louis--all of these cities faced the same dilemma as Detroit: predominantly black inner-city districts surrounded by virtually all-white suburban enclaves.[28]

The arbitrary nature of the *Milliken* ruling is evident in the way that desegregation played out in different cities. For example, the Charlotte metropolitan area happened to be encompassed within one school district, while Richmond's suburbs were school districts unto themselves. Thus "a black student in Richmond is, in effect, denied the right to a desegregated education, though the bus ride would be no longer than that already provided for children living in the inner city of Charlotte."[29] Further comparison of these two cities also lends credence to the Detroiters' fears concerning white flight: "Whereas the percentage of white enrollment stabilized after metropolitan desegregation in Charlotte, it continued to decline after central-city desegregation in Richmond."[30]

And what of Detroit itself? In January of 1975 Judge Robert DeMascio--a Nixon appointee who was quite inexperienced with school desegregation law--took over the case on remand. The Supreme Court having ordered him to do so, he perused the wreckage of

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[25] Orfield, 167.
[26] Ibid., 391.
[27] Metcalf, 268.
[28] Orfield, 404.
[29] Ibid., 63.
[30] Ibid.

Roth's work with the help of several well-known expert advisors.[31] DeMascio could not see the use in diluting a rapidly dwindling white student population; he therefore ordered "the minimum [desegregation] law will allow."[32] Beginning in January, 1976, approximately eleven percent of the district's students were reassigned (with nine percent requiring transportation) in order to integrate the white schools; but 83,000 black children remained in all-black schools which were essentially unaffected by DeMascio's plan.[33] Elwood Hain describes the desegregation order as "openly solicitous of the fears of Detroit's remaining white population;" indeed, it placed the burden and inconvenience of the process largely on black students and their parents.[34]

Judge DeMascio's plan did serve to break new ground in the area of desegregation by including "'components' designed to improve education or to smooth the transition to a desegregated system."[35] These involved remedial reading courses, expanded vocational programs, bilingual-bicultural education, and a strict student conduct code "to prevent the discriminatory use of discipline that often accompanies school desegregation."[36] But the State of Michigan balked when the judge required it to bear half the cost of the educational improvements (in addition to three-quarters the cost of new buses).[37] Such remedial steps were not justified by the violations found in Detroit, the State argued.[38]

The Sixth Circuit rejected the State's reasoning when it reviewed DeMascio's measures in 1976. Since the State had contributed to the condition of segregation, it should help defray the cost of educational reforms in order to counter the effects of past

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[31] Howard I. Kalodner and James J. Fishman, eds., Limits of Justice: The Courts' Role in School Desegregation (Cambridge, Mass.: Ballinger Publishing Co., 1978), 273.

[32] As quoted in Orfield, 26.

[33] See Kalodner, 284 and Orfield, 26.

[34] Kalodner, 281.

[35] Ibid., 275.

[36] Ibid., 294; see generally 292-296.

[37] Ibid., 308.

[38] Ibid., 307.

segregation. On the other hand, the Court of Appeals was *not* as pleased with the results of the District Court's pupil reassignments:

> The court of appeals noted that Ronald Bradley, the black student whose parents had sued the school system when he was assigned to a 97 percent black kindergarten, would now be attending a 100 percent black sixth grade after six years of litigation and full implementation of the "desegregation" plan.[39]

To demonstrate its dissatisfaction with the actual amount of racial mixing that had taken place, the Sixth Circuit ordered further desegregation, yet it could offer no suggestions as to how this might be done without intensifying the white exodus.[40] In frustration Judge Edwards (of the Sixth Circuit) accused the Supreme Court of providing, through the original *Milliken* decision, a "formula for American Apartheid. . . .I know of no decision by the Supreme Court of the United States since the *Dred Scott* decision which is so fraught with disaster for this country."[41]

On June 27, 1977, the high court upheld the Sixth Circuit with regard to remedial education and state liability in the case that has become know as *Milliken II*.[42] Detroit, in the mean time, had "integrated" as planned. Thanks to the leadership of the Coalition for Peaceful Integration (formerly the *Metropolitan* Coalition for Peaceful Integration, up until the *Milliken* decision) and other city-wide organizations, the transition was a peaceful one despite continuing white opposition. Student boycotts subsided after the first few weeks, with a permanent loss of 800 white students from the system after one month.[43] By 1984, however, "integration" had succeeded in placing the typical black student in a school which was only 9 percent white.[44]

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[39] Orfield, 26.
[40] Ibid., 26.
[41] Dimond, 117.
[42] Kalodner, 308.
[43] Ibid., 302-306.
[44] Wicker, 95.

The Detroit case not only foreshadowed the future of metropolitan desegregation, but also indicated what lay ahead for desegregation in general. For George Metcalf, *Milliken* was the "dividing line" between expansion and contraction of the Court's interpretation of *de jure* segregation.[45] For Donald Lively, the narrowing of the desegregation principle began even farther back, in *Keyes* (1973). In that case, the Court did recognize that not all intentional segregation was formally sanctioned by law, but it also went on to require substantial proof of segregatory intent on the part of officials. Then, in *Milliken* (1974), the Court used school district lines to impose spatial limits on desegregation remedies. In a 1976 case, *Pasadena City Board of Education v. Spangler*, the Court decided that time was a limiting factor as well, holding that resegregation after a period of desegregation would be tolerated in the absence of intent to segregate.[46]

These limitations were borne out in subsequent cases, such as *Dayton Board of Education v. Brinkman* (1977), where the Court required more convincing proof of intentional segregation than was originally provided. (In 1979 additional evidence presented in *Dayton II* persuaded the Court to uphold system-wide relief).[47] In two companion cases decided in 1982 (*Washington v. Seattle School District No. I* and *Crawford v. Board of Education of the City of Los Angeles*) the Court essentially approved termination of busing efforts to address *de facto* segregation.[48] And the 1991 decision in *Board of Education of City Public Schools v. Dowell* held that after "good faith compliance" with a court order, remedies to eliminate *de jure* segregation could be discontinued as well.[49] Donald Lively, in congruence with Wicker's theory of white

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[45] Metcalf, 255.

[46] Donald E. Lively, The Constitution and Race (New York: Praeger Publishers, 1992), 120.

[47] Metcalf, 260.

[48] Girardeau A. Spann, Race Against the Court: The Supreme Court and Minorities in Contemporary America (New York: New York University Press, 1993), 79.

[49] Ibid., 80.

rejection of integration, notes that desegregation plans have increasingly been formulated to minimize white hostility in the interest of achieving *some* successful integration.[50]

One hundred years after *Plessy*, the *Milliken* case is serving to perpetuate the legacy of "separate but equal" education. Its influence upon the progress (or lack thereof) of desegregation is evident, for example, in a Connecticut ruling which relieved that state of any responsibility for the isolation of poor and minority students in inner-city Hartford. Despite intra-district desegregation and substantial aid from the State, student performance continued to falter, convincing plaintiffs that integration with the suburbs was the only real solution. However, the state court decision in *Sheff v. O'Neill* (1995) "closely followed the thinking in the landmark. . .Supreme Court decisions in the 1970s, like *Milliken v. Bradley*": The racial separation between Hartford and its suburbs simply resulted "from Hartford being predominantly black and Hispanic."[51]

Also in 1995, the Supreme Court issued a ruling in *Missouri v. Jenkins*, a case dealing with a desegregation plan ordered into effect in Kansas City. Because effective desegregation was not to be had within the city district, the lower courts sought to recruit whites back into the system by ordering the State to help pay for magnet schools and salary increases for teachers and staff. Once more, state aid failed to help students achieve, and the State was now seeking to terminate its role in reviving the school system. While the five-member Supreme Court majority did not order the plan out of existence altogether, Chief Justice Rehnquist indicated that more convincing rationales (i.e., suburban violations) would have to be found for continuing what was "merely an indirect way of accomplishing what Supreme Court precedents forbid doing directly: transferring students from one school district to another in the name of desegregation."[52]

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[50] Lively, 127.
[51] *New York Times*, April 13, 1995, p. B6.
[52] *New York Times*, June 13, 1995, p. A1, continued to p. D25.

The Kansas City case is part of what the *New York Times* describes as a "renewed [campaign] to end Federal desegregation initiatives and the busing plans that come with them."[53] Anti-integrationists, "encouraged by conservative electoral successes and a string of Supreme Court decisions limiting the responsibilities of schools to foster desegregation," are calling for a return to neighborhood schools.[54] Norfolk, Oklahoma City,[55] and Denver[56] are among cities which have already done so, and Cleveland, Indianapolis, Minneapolis, Pittsburgh, Seattle, and Wilmington are considering this avenue.[57] Critics of the anti-busing movement say that neighborhood schools have failed to halt white flight or rejuvenate cities as proponents had insisted they would. Nor is the NAACP standing idly by; it recently announced the filing of an "old-fashioned" desegregation suit in Minneapolis calling for cross-district desegregation.[58] Given current public opinion and the political climate both inside and outside the Court, even the president of the local Association chapter admits that they are "swimming against the tide."[59]

Tomorrow's Task

Where does all of this leave blacks today? The answer will sound familiar: Discrimination and segregation in urban housing "continue virtually unchecked;" the same tactics found to be in use in Detroit in 1974 are still carried on, including unfair lending and real estate tactics.[60] Blacks are still, for the most part, unwelcome in the suburbs.[61] The housing situation has been compounded by the fact that school desegregation efforts have

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[53] *New York Times*, September 26, 1995, p. 1.
[54] Ibid.
[55] Ibid.
[56] Ibid., p. B6.
[57] Ibid., p. 1.
[58] Ibid., p. B6.
[59] Ibid.
[60] Wicker, 130-31.
[61] Ibid., 71.

"lagged" since *Milliken*, a reality which is reflected in big-city school enrollments.[62] By 1984, the average black student in Chicago or Newark attended schools only 9 percent white; in New York the percentage was 11, in Baltimore, 16, Philadelphia, 17, Boston and Cincinnati, 32, and Milwaukee, 35; and 63.5 percent of black students were in predominantly minority schools.[63] By 1992, 66 percent of black pupils were still in schools with minority enrollments greater than 50 percent, so that America's schools were "more segregated than they had been since 1967, a quarter century earlier."[64] The allocation of educational resources has not been equalized after the passage of more than two decades since *Milliken*;[65] on the contrary, poor (and largely minority) districts have gotten poorer.[66] As a result, minority schools continue to feature higher dropout levels, lower attendance rates, and lower college entrance and scholastic achievement test scores when compared to predominantly white schools.[67]

In the seventies and eighties urban areas suffered a staggering loss of the kinds of jobs for which blacks were most likely to qualify--due in no small part to the decay of cities and the flight of whites from them.[68] Because today's employers can find "more willing and skilled workers, at the same or lower wages, in better social and working conditions . . .almost anywhere outside the big-city ghetto," employment opportunities are unlikely to return to inner cities in significant numbers.[69] Without jobs, better housing and schools are still out of the reach of poor (i.e., minority) city-dwellers--and the vicious circle remains complete. Meanwhile, politicians court middle-class whites with Republican Congressman Newt Gingrich's "Contract with America," President Bill Clinton's middle-

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[62] Ibid., 132.
[63] Ibid., 95.
[64] Ibid., 96.
[65] Ibid., 72.
[66] Ibid., 95.
[67] Ibid., 132.
[68] Ibid., 124-25.
[69] Ibid., 70.

class tax cuts,[70] and Republican presidential candidate Robert Dole's campaign pledge to end affirmative action.

Today racial parity may seem *more* elusive for the fact that Americans have struggled toward it for so long now and have accomplished so much less than was hoped for. With time it has become clear that it is a far more tangled problem than anyone imagined. It is easy to talk about the way things should be--that racism is evil, inhumane, inexcusable. But to solve the problem reformers have to deal with reality: Some people are racist, and cannot be coerced into a different world view. Close personal contact between the races is perhaps the best hope for overcoming distrust, and integrated education is a significant step toward that end. At the same time, forcing the races together (as through forced busing) can cause backlashes (such as white flight) which lead to renewed racism and racial separation. This is the dilemma that the judicial system faces. As the branch of government which is most removed from politics, it can and must push forward to guarantee minority rights; yet it cannot act without considering the disposition of the majority. A middle ground must be sought where fears are assuaged and changes are eased into place, but where efforts are never allowed to halt until racism is overcome.

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[70] Ibid., 25.

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Chronology of Events

April 7, 1970	Detroit School Board adopts April 7 Plan attempting limited desegregation within Detroit.
July 9, 1970	Michigan legislature passes Public Act 48, neutralizing the April 7 Plan and imposing segregatory neighborhood student assignments.
August 4, 1970	School board members who supported April 7 Plan are recalled.
August 18, 1970	NAACP files complaint alleging *de jure* segregation in Detroit, asking for establishment of unitary school system, and challenging constitutionality of Act 48.
August 27, 1970	Preliminary hearing begins.
September 3, 1970	Group of white Detroit parents are allowed to intervene as defendants. Preliminary injunction to prevent enforcement of Act 48 is denied by District Court.
October 13, 1970	Sixth Circuit Court of Appeals also denies preliminary injunction but declares Act 48 unconstitutional.
December 3, 1970	District Court orders MacDonald "Magnet" Plan to take effect in September, 1971, in lieu of April 7 Plan.
April 6, 1971	Trial on merits of issue of Detroit segregation begins.
April, 1971	The *Swann* ruling is handed down, approving busing as a means to desegregate Charlotte, North Carolina.
July 16, 1971	Detroit intervenors move to join all tri-county school districts as defendants. This motion is never acted upon and is later withdrawn.
July 22, 1971	Trial on Detroit segregation ends.
September 27, 1971	District Court rules that State of Michigan and Detroit Board have acted to cause segregation in Detroit.
October 4, 1971	Detroit Board is given 60 days to submit Detroit-only desegregation plan; State defendants are ordered to submit metropolitan plan within 120 days.

January, 1972	Richmond, Virginia is ordered to desegregate across district lines.
February 4, 1972	Deadline for desegregation plans.
February 9-17, 1972	43 school districts move to intervene as defendants.
February 23, 1972	Sixth Circuit Court of Appeals rules that Roth's segregation ruling and planning orders are unappealable.
March 14, 1972	Hearings on intra-city plans commence.
March 15, 1972	43 school districts are granted intervention under limited conditions.
March 21, 1972	Hearings on intra-district plans end.
March 22, 1972	Deadline for briefs on propriety of metropolitan remedy--intervening districts were asked to adhere to this deadline (set on March 6, before intervention was granted).
March 24, 1972	District Court rules that metropolitan desegregation is appropriate.
March 28, 1972	Hearings on metropolitan remedy commence. Later that day, District Court rules that Detroit-only plans are insufficient.
June 14, 1972	District Court rules on desegregation area and orders development of metropolitan desegregation plan by appointed panel.
July 11, 1972	On panel's recommendation, District Court orders State to bear cost of acquisition of buses for metropolitan desegregation in 1972-73 school year.
December 8, 1972	Court of Appeals panel affirms District Court's rulings in substance.
December, 1972	Fourth Circuit Court of Appeals invalidates cross-district desegregation in Richmond.
May, 1973	Supreme Court splits four-to-four over busing in Richmond; the Fourth Circuit's reversal of the busing order stands.
June 12, 1973	*En banc* Court of Appeals affirms District Court's rulings in substance.
June, 1973	Supreme Court issues its *Keyes* ruling, mandating district-wide desegregation in Denver, Colorado, based on findings of intentional segregation in one part of the district.

August 6, 1973	Plaintiffs move for joinder of suburban districts not already party to the case.
September 4, 1973	Plaintiffs file amended complaint to conform to evidence.
September 6, 1973	District Court orders joinder of suburban districts. Defendants Milliken, et al., file petition for *certiorari*.
November 19, 1973	*Certiorari* is granted by the Supreme Court.
February 27, 1974	Oral argument before the Court.
July 11, 1974	Judge Stephen Roth dies after his third heart attack in two years.
July 24, 1974	The Supreme Court rules against executive privilege.
July 25, 1974	The Supreme Court overturns Judge Roth.