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ABSTRACT

Six papers from a variety of related disciplines discuss basic issues involved in Milliken vs Bradley, the papers reflecting the following areas: legal implications, political science perspectives, educational implications, housing implications, economic implications, and implications for desegregation centers. Scholars and authorities comment on each of the papers. The report is divided into six major sections, one for each of the subjects covered. Each section contains the pertinent paper, followed by the portion of the transcript dealing with the subject matter, including the author's summary, the remarks of the reactors, and an interchange among them and the Civil Rights Commissioners. Papers included are: Milliken vs Bradley: the meaning of the constitution in school desegregation cases; the political implications of Milliken vs Bradley; a sociological view of the post-Milliken era; Milliken vs Bradley and residential segregations; minority education; some economic questions; and, Milliken vs Bradley; implications for desegregation centers and metropolitan desegregation. (Author/AM)

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MILLIKEN v. BRADLEY: THE IMPLICATIONS FOR METROPOLITAN DESEGREGATION

Conference Before the United States
 Commission on Civil Rights

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Washington, D. C.
 November 9, 1974

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- Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to the denial of equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information concerning denials of equal protection of the laws because of race, color, religion, sex, or national origin; and
- Submit reports, findings, and recommendations to the President and Congress.

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PREFACE

The Supreme Court of the United States, on July 25, 1974, ruled against busing schoolchildren between city and suburban school districts. In the 5-4 (or, as some lawyers see it, the 4-1-4) decision in *Milliken v. Bradley*, the Court held that the plaintiffs in the "Detroit" case had not established sufficient grounds of discrimination or segregation based on State action to warrant the imposition of a proposed metropolitan desegregation plan. In doing so, it overturned the opinion of the Federal district court, which had agreed with plaintiffs, and the appeals court opinion upholding the lower court.

This was the first major setback on a desegregation case before the Supreme Court since before its historic ruling in the 1954 case of *Brown v. Board of Education of Topeka*. The first reaction of civil rights lawyers was predictable. The Court was restricting, retreating from, or abandoning its leadership role in desegregating the Nation's schools. Others saw it not so much as the loss of a victory already won as an opportunity not realized. Many who oppose desegregation saw it as a victory.

Some civil rights lawyers thought that Mr. Justice Potter Stewart, in his concurring opinion, had left the door ajar to future metropolitan desegregation. To them, he seemed to say that, while he agreed with the majority in the Detroit case, he (and perhaps the Court) might find otherwise in different factual situations in other communities.

The U.S. Commission on Civil Rights, which is committed to the constitutional right of American schoolchildren to receive unsegregated and nondiscriminatory education, recognized the need for further clarity on the basic issues involved in *Milliken v. Bradley*. The Commission invited a group of scholars and authorities, from a variety of related disciplines, to develop papers and attend a conference to discuss them.

Papers were prepared in six areas: legal implications, political science perspectives, educational implications, housing implications, economic implications, and implications for desegregation centers. Other scholars and authorities were asked to comment on each of the papers.

On Saturday, November 9, 1974, they came together at the Commission-sponsored conference, "*Milliken v. Bradley*. The Implications for Metropolitan Desegregation." This conference report is divided into six major sections, one for each of the subjects covered. Each section contains the pertinent paper, prepared and circulated in advance, followed by the portion of the transcript dealing with the subject matter, including the author's summary, the remarks of the reactors, and an interchange among them and the Commissioners.

The views stated in the papers and in the commentaries do not necessarily reflect the position or the policy of the U.S. Commission on Civil Rights. There was not agreement on all points among the participants. What follows is published to help clarify the issues involved in the Supreme Court's ruling in *Milliken v. Bradley*.

These conference proceedings were prepared by Frederick B. Routh, Director, and Everett A. Waldo, Assistant Director, of the Special Projects Unit, Office of the Staff Director, and Carol-Lee Hurley, Office of Information and Publications, U.S. Commission on Civil Rights.

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MILLIKEN v. BRADLEY: THE IMPLICATIONS FOR METROPOLITAN DESEGREGATION

Conference Before the United States

Commission on Civil Rights

November 9, 1974

CHAIRMAN FLEMMING. Will the meeting come to order, please? First, on behalf of the Commission, I am happy to welcome all who are participating in this meeting today.

The purpose of the meeting is clear. We all recognize the importance of the decision of the Supreme Court in *Milliken v. Bradley*. The Commission felt that it could be assisted in a significant way in evaluating the implications of this decision if it invited some outstanding experts in the area to prepare papers and to be with us and discuss those papers briefly. Then we will participate in a discussion of the papers with reactors who have been invited to participate in the program.

We are going to proceed in an informal way. At the same time, we are going to keep in mind time limitations. For the benefit of all here, each presenter has been asked to summarize his or her paper in 10 minutes. Each reactor has been asked to confine his or her reactions to 7 minutes.

I think most of the persons here know that it is the intent of the Commission, at some point in the future, to draw up a report based on *Milliken v. Bradley* and to make recommendations to the President and to the Congress. It is possible that, prior to drawing up such a report, the Commission will hold a public hearing on some of the issues that will be identified for us today. I don't think that it is necessary to make use of any further time in terms of preliminary remarks.

I don't think that it is necessary to introduce the members of the Commission. You see their names that appear. Many of you know the members of the Commission.

I think that it is logical for us to start with a discussion of the legal implications of *Milliken v. Bradley*. We are certainly indebted to Norman Amaker, professor of law at Rutgers University for the paper which he has developed.

LEGAL IMPLICATIONS

Milliken v. Bradley:

The Meaning of the Constitution

in School Desegregation Cases

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I. Overview

With *Milliken v. Bradley*¹ decided by the United States Supreme Court July 25, 1974, the Court has apparently come full circle in its consideration and decision of public school desegregation cases begun 20 years ago with *Brown v. Board of Education of Topeka*.² If *Brown* was, as it has properly been called, a watershed, *Milliken* may well mark the water's edge. At least a slim majority of the Court has signaled its unwillingness—with some limited exceptions which I discuss later—to test the water beyond the shores of political-geographical subdivisions of a State that mark the boundaries between the white suburbs and black cities of the Nation.³

In holding that, as general matter, approval of so-called "metropolitan" school desegregation plans that include suburban school districts adjacent to or nearby inner-city school districts are beyond the remedial powers of Federal district courts except in restricted circumstances, the Court may well have been acting on its perception, circa 1974, of the tolerable limits of judicial intermeddling with life patterns evolved during the past few decades which serve, for the most part, to insulate white suburban communities from the country's black population and its social de-

mands. That the Court's position might be so read may have prompted Justice Stewart, whose "swing vote" was crucial in forming the five-man majority, in separately explaining his views to reply to what he characterized as "some of the extravagant language of the dissenting opinions***."⁴

But, presumably, the Court was acting on its view of what the Constitution requires (and what it does not). In past school desegregation cases, the Court has stated forthrightly that the governing constitutional principles announced in *Brown* cannot "yield simply because of disagreement with them."⁵

Thus, though preservation of what many consider as the appropriate social configuration of American society is certainly one result of *Milliken*, the Court was acting in its role as the final arbiter in constitutional decisionmaking; so the central question of the meaning of *Milliken* must be addressed in these terms. Since it purports to be a legally supportable exposition of constitutional doctrine, perspective on this latest (and perhaps last) pronouncement of major significance from the Supreme Court on this subject can only be achieved if it is assessed from that standpoint.

To appreciate the significance of *Milliken* one must go back farther than *Brown v. Board of Education (Brown I)*. However, the opinion of the Chief Justice writing for the Court in the case (after reviewing preliminarily some of the facts and the procedural posture of the case) begins as does practically all exposition of doctrine in this area, with *Brown I* (Part II of the opinion)

¹418 U.S. 717 (1974).

²347 U.S. 483 (1954).

³Statements from the dissenting opinion of Mr. Justice Marshall are vivid in their description of the consequences of this phenomenon for our public schools: "an expanding core of virtually all-Negro schools immediately surrounded by a receding band of all-white schools." 94 S.Ct. 3147, "a growing core of Negro schools surrounded by a receding ring of white schools", 94 S.Ct. 3153. Compare language in the brief filed on behalf of the black parents who initiated suit in the district court. "the walling-off of blacks in a state-imposed core of overwhelmingly black schools separated from a ring of overwhelmingly white schools***." (Brief for Respondents, *Bradley et al.* Nos. 73-434-73-436, Oct. Term 1972, p. 9).

⁴94 Sup.Ct. 3131.

⁵*Brown v. Board of Education*, 349 U.S. 294, 300 (1955). *Cooper v. Aaron*, 358 U.S. 1 (1958).

and significantly, quotes *Brown's* language to the effect that:

[I]n the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. 347 U.S., at 495, 74 S. Ct., at 692.

He then states, "[t]his has been reaffirmed time and again as the meaning of the Constitution and the controlling rule of law."⁶ Thus, purporting to reaffirm this language from *Brown* as "the meaning of the Constitution and the controlling rule of law," he decides with the Court's majority that the Constitution does not mean that school desegregation measures can be made effective (absent some limited special circumstances) beyond a school district's boundaries as set by a State; "the controlling rule of law" permits separate educational facilities that may well be unequal to exist side by side in a city and its surrounding suburbs. Clearly then, the overriding legal question posed by *Milliken* is whether what the Court has done (or not done) can be squared with what it has said.

Ever since *Brown v. Board of Education (Brown II)*,⁷ courts considering the problem of school desegregation have addressed it in terms of what remedial steps were necessary in a given situation to comply with the governing rule of law announced in *Brown I*. And in that mold the *Milliken* decision was cast; so, on the face of it, the disagreement between the majority and the dissenters goes to the matter of remedy. Justice Stewart in his concurrence makes this explicit:

In the present posture of the case, therefore, 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.⁸

Ostensibly, the Justices, in the majority and the dissent, seem to be talking about remedy (with the possible exception of Mr. Justice

⁶94 Sup.Ct. 3123.

⁷349 U.S. 294 (1955).

⁸94 S.Ct. 3131.

⁹"The rights at issue in this case are too fundamental to be abridged on grounds as superficial as those relied on by the majority today. We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens." 94 S.Ct. 3146 n. (emphasis added).

Marshall).⁹ But I have said that to understand *Milliken* one needs to go much farther back than both *Brown* decisions because what clearly emerges from a close reading of the case is that the quarrel between the Court's majority and minority, despite Mr. Justice Stewart, despite the uniform assumption made since *Brown II*, is not over the question of remedy at all but really exposes a fundamental difference in the view taken of the nature of the constitutional right of the present-day black descendants of slaves who attend the Nation's public schools. How one views the necessary remedy depends—and it is graphically illustrated in this case—on how one views the nature of the right said by *Milliken* to be "the meaning of the Constitution and the controlling rule of law." It's appropriate then, before undertaking detailed examination of several subquestions raised by the decision, chief among them the question of whether the Court has jettisoned or adhered to the "practical flexibility" standard of *Brown II*,¹⁰ to address what I conceive as the main area of disagreement; i.e., a perception of the nature of the constitutional right involved.

II. The Nature of the Right

Before the adoption of the Reconstruction amendments¹¹ it was, of course, unthinkable to suggest that there were any rights that American blacks could insist upon under the Constitution. As is well known, blacks were slaves, a species of property and, as such, were not a part of the "People of the United States"¹² who had any hand in framing the Constitution or structuring government under it. As the *Dred Scott* decision¹³ with its devastatingly accurate reading of history makes clear, blacks derived no benefit from the Constitution; since not considered as part of "the people of the United States," they were not citizens and, therefore, neither the national government, any of its citizens, nor any of the State governments owed any duty

¹⁰349 U.S. at 300: "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies."

¹¹U.S. Constitution, Amendments XIII (1865), XIV (1868), XV (1870).

¹²See Preamble to U.S. Constitution.

¹³*Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

to accord them any of the rights and privileges normally associated with citizenship. Of immediate importance to our consideration, this meant that, as a practical matter, none of the States of the Union prior to the Reconstruction amendments could have been required under the Constitution to afford access of black children to what limited provisions had been made for public education at that time.

Of course, before blacks could become citizens they first had to cease being slaves. That was the principal work of the 13th amendment which, for some, was alone sufficient to change the status of blacks and make them citizens in every regard with all the attendant rights and privileges. However, the matter became academic after adoption of the 14th amendment, whose first section was quite clearly designed, with its definition for the first time in the Constitution of what United States citizenship meant, to include all those who had been formerly slaves and their descendants. Without dispute, this has been the consistent reading of the meaning of the opening words of that amendment.¹⁴ Pausing here then, without considering any of the additional language of the amendment, it is clear that to the extent that blacks were now recognized as "citizens" under the Constitution that recognition implied, in an absolute sense, the right to be accorded the full range of treatment normally given to such persons. Since one of the inescapable facets of citizenship rights is the opportunity for access to whatever public services are provided by government on whatever terms they are provided, then black people surely, at least as a matter of constitutional doctrine, were entitled to these advantages.

But beyond the grant of United States citizenship, the 14th amendment also decreed that thereafter black people were to be considered citizens of the State in which they happened to reside.¹⁵ Similarly then, to the extent that the States create and define for all their citizens certain rights and privileges (and concomitantly cast upon them certain

¹⁴"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

¹⁵See note 14 supra.

necessary burdens) then surely blacks, now citizens of the States, had to be included. Again, what this meant in practical terms as it relates to the problem exposed in *Milliken* is that State systems for educating children at public expense, to the extent that they existed or were being 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.

But, of course, the 14th amendment went even further. The equal protection clause of the amendment forbids the States from denying "to any person within its jurisdiction the equal protection of the laws." As that clause was consistently interpreted by the Supreme Court in the period from the adoption of the amendment to *Plessy v. Ferguson*,¹⁶ its purpose went beyond the grant of citizenship—which ought to have been enough—to a requirement that States must in all areas of their interaction *qua* states with their citizens treat black citizens the same as white citizens were treated.¹⁷ Of significance to an understanding of the debate in *Milliken*, is the observation that the equal protection clause speaks to the States, not their subdivisions whether county, parish, city, town, or village.¹⁸

If then the nature of the constitutional right of black citizens is not to be treated unequally with respect to whatever public benefits a given State bestows on all its citizens, then application of this principle to public schools operated by the States is clear. black students should have the same opportunity as white students (and all others) to receive whatever benefits may thought to be flowing from an educational system conducted at the State's expense and managed by persons employed by or operating under State authority. Put another way, the nature of the

¹⁶103 U.S. 527 (1896).

¹⁷*The Slaughter House Cases* 83 U.S. (16 Wall) 36 (1873); *Strader v. West Virginia*, 100 U.S. 303 (1880); *Ex Parte Virginia*, 100 U.S. 339 (1890); *Neal v. Delaware*, 103 U.S. 386 (1881); *Civil Rights Cases*, 109, U.S. 3 (1883).

¹⁸Continued emphasis of this point occurs in the dissent filed by Mr Justice White: "the State of Michigan, the entity at which the Fourteenth Amendment is directed" 94 S.Ct. at 3136; "it is the State that must respond to the command of the Fourteenth Amendment." *Id.* at 3139, "No 'state' may deny an individual the equal protection of the laws" *Id.* at 3140, "The obligation to rectify the unlawful condition nevertheless rests on the state" *Id.* at 3141.

constitutional right goes beyond—and this implicates the question of remedy—the mere permission of attendance at schools but requires State effort to assure “equal protection of the laws”, meaning surely that whatever benefits are derived from the State’s system of laws as it relates to public education must be made available to all upon whom the State can exert its power and from whom it can require obedience. In this view, to use the phrase from *Swann*¹⁹ that constantly recurs throughout the opinions, “the condition that offends the Constitution”²⁰ is any condition for which the State is responsible that prevents according black public schoolchildren throughout the State who are its citizens whatever positive educational advantages the State is in a position to bestow. This would seem to include the entire range of matters normally thought derivable from access to public education.

Thus it can be seen that a basic point of difference between those in the majority and those in the dissent in *Milliken* is the perception of the constitutional right and from that quite naturally enough, there is a differing appreciation of when the right is violated and what is needed to remedy such violation. This is quite clear from the Chief Justice’s statement in the majority opinion that, “[t]he constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district”²¹ even though the 14th amendment refers only to the State. The question quite naturally arises whether this judgment as to the nature of the right involved is consistent with what he earlier describes quoting *Brown I* (“Separate educational facilities are inherently unequal”) as “the meaning of the Constitution and the controlling rule of law.” It is difficult to know how the Court’s majority can purport to adhere to this statement from *Brown* if the nature of the right is only as described by the Chief Justice. If the nature of the right is only to prevent racially biased school assignments in the city of Detroit, then it would appear to be a refutation of the historical con-

cerns, highlighted above, from which the constitutional amendment flowed. Naturally enough, however, if that is the nature of the right, then a more restricted view of the inquiry necessary to determine when the right has been violated and to conclude what remedy is needed is justified. Given the history, the questions of what is the right and what is the remedy for its violation are inextricably interwoven.²² Certainly in *Milliken*, where one comes out on the question of an interdistrict remedy affords a complete statement of one’s view of what black children are entitled to under the Constitution.

III. The Course of Remedy

Indeed, what the Court has done in the cases since *Brown I* and prior to *Milliken* has been constantly to define and redefine the nature of the constitutional right of black children to public education during the course of the now imposing number of presumptively remedial decisions in which varying factual patterns called forth a definition. This exercise was undertaken, to be sure, to decide concrete cases, and to resolve the conflicting claims of parties—black children and their parents on the one hand as to their rights and school authorities on the other as to their immunities—under *Brown*, but it also was undertaken against the backdrop of increasing national concern over what—if any—limits the Court would eventually impose on the *Brown* doctrine.

Brown, of course, was a precise application of the 14th amendment, clearly mandated in the context of the cases under consideration.²³ The Court’s description in *Milliken* of the meaning of *Brown* is consistent with what I’ve described as the nature of the constitu-

²²Justice Marshall in dissent reveals the essential relatedness of the right-remedy question. “...the Court confuses the inquiry required to determine whether there has been a substantive constitutional violation with that necessary to formulate an appropriate remedy once a constitutional violation has been shown. While a finding of state action is, of course, a prerequisite to finding a violation, we have never held that after unconstitutional state action has been shown, the District Court at the remedial stage must engage in a second inquiry to determine whether additional state action exists to justify a particular remedy.” 94 S.Ct. 3154n. Of course, the comment also throws in bold relief the nature of the disagreement between the Court and the dissenters.

²³See Amaker, “Public School Desegregation: Legal Perspectives”, *Georgia State Bar Journal*, Vol. 7, No. 1, p. 102 (Aug. 1970); *Negro History Bulletin*, Vol. 33, No. 7, p. 174 (Nov. 1970).

¹⁹*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

²⁰402 U.S. at 16.

²¹94 S.Ct. 3128.

tional right. But *Brown* was limited by its facts: it needed go no further than it did to reach its result dealing as it was with school systems that historically had maintained school systems that unmistakably violated the 14th amendment; "the condition that offends the Constitution" was clear in those cases.

It was then a relatively simple step beginning with *Brown II* to launch the case-by-case development seen in the past two decades: Federal district court consideration to determine initially whether a case was "like" the *Brown I* cases,²² i.e., whether there was so-called de jure segregation;²⁴ if so, a factfinding process at that level to determine how to remedy the situation and where significant questions were raised in the litigation, appeal to the courts of appeals and finally to the Supreme Court which, in passing on the question of remedy raised in the case, revealed increasingly more about the nature of the constitutional right involved. Thus, for example, the Court declared that black children initially assigned to school on a racial basis could not be required to transfer from a school where their race was in a minority to a school where their race constituted the majority,²⁵ that black children had a right to attend nonracially segregated schools without having to resort to State administrative remedies,²⁶ that there was a right to have the public schools kept open in a given county so that desegregation could go forward if a State kept public schools open elsewhere,²⁷ that there is a constitutional right to a racially desegregated public school faculty,²⁸ that there is a right to have that plan of desegregation adopted that will affirmatively undo the effects of prior

discrimination;²⁹ that desegregation pursuant to such a plan must occur as soon as possible,³⁰ and that such a plan may include the use of schoolbuses within reasonable limits of time and distance.³¹

These things, up to *Milliken*, the Court has told us are within the intentment of *Brown* and constitute the "meaning of the Constitution."

The issues that brought *Milliken v. Bradley*, a case ultimately found to be "like" the *Brown I* cases,³² to the Court from this process of case-by-case definition of the nature of the constitutional right were fairly predictable. Eventually, the social movement of the Nation in the post-*Brown* decades (much of it no doubt, caused by *Brown*) would pose for the Court yet another choice of competing interests. Theoretically, choice of a so-called metropolitan plan of school desegregation was a logical next step based on the historical analysis outlined above.

The argument, ably made by the dissenters in *Milliken*,³³ is straightforward enough. since the 14th amendment speaks to the States, not its subdivisions; since the Constitution recognizes the equal protection right of blacks but does not similarly recognize a State's right to maintain political-geographical subdivisions, since these subdivisions are at most no more than a convenient administrative apparatus, and since in other contexts, specifically the reapportionment cases, the Court has required restructuring of a State's political subdivisions for equal protection purposes,³⁴ it follows that school district boundaries may give way also if that is required to prevent State denial of equal educational opportunity to black children.

Notwithstanding the strength of the argument, a majority of the Court declined to accept it. In so doing, we are left with the majority's view of the limits of *Brown* as "the meaning of the Constitution."

²² Cases found not to be "like" *Brown*; i.e., so-called de facto cases; have not prompted plenary consideration by the Supreme Court; see e.g., *Bell v. School City of Gary Indiana*, 324 F.2d 209 (7th Cir. 1963), cert. den. 377 U.S. 924 (1964); *Downs v. Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), cert. den. 380 U.S. 914 (1965); *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966); cert. den. 389 U.S. 847 (1967). Of course, whether a case is "de jure" or "de facto" is itself a matter of definition, see *Keyes v. School District No. 1, Denver Colorado*, 413 U.S. 189 (1973), ultimately a matter of defining the scope of the equal protection clause as it bears on the right of Negro schoolchildren to public education.

²³ *Goss v. Board of Education*, 373 U.S. 683 (1963).

²⁴ *McNeese v. Board of Education*, 373 U.S. 668 (1963).

²⁵ *Griffin v. Prince Edward County Board of Education*, 377 U.S. 218 (1964).

²⁶ *Rogers v. Paul*, 382 U.S. 198 (1965).

²⁹ *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

³⁰ *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

³¹ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

³² See 94 S.Ct. 3124, n. 18.

³³ See particularly Mr. Justice White's dissent, 94 S.Ct. at 3136 ff.

³⁴ 94 S.Ct. 3143 (Mr. Justice White); 94 S.Ct. 3157-58 (Mr. Justice Marshall).

IV. The Court's Opinion

That view is reflected throughout the Court's opinion. Note, for instance, how the Chief Justice poses the question presented at the opening of the opinion:

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multidistrict, areawide remedy to a single district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those neighboring districts.³⁵

This statement of the question for decision nowhere mentions the State of Michigan as does the question presented by counsel for the black parents (quoted in note 35 below) but rather emphasizes a concern with school district lines the State has drawn. The initial inquiry for Chief Justice Burger then is not with Michigan's responsibility as a State for alleged denial of equal protection to the plaintiffs and their class, but rather with the culpability (or lack of it) of the outlying school districts. The problem is described not in terms of State responsibility but rather as "a single district *de jure* segregation problem" thus confining the inquiry to whether the other districts have done anything to account for the problem in Detroit; if the State is to be held accountable in any way, it can only be if "the boundary lines of *any affected school*

district were established with the purpose of fostering racial segregation***" (emphasis supplied) irrespective of whatever else the State has done or failed to do. Such a contained view of where the inquiry ought to begin and end is understandable only in terms of a similarly telescoped view of what the Constitution permits plaintiffs to complain of; i.e., racially discriminatory conduct affecting their attendance in the Detroit school system rather than whether the State of Michigan is affording them, as citizens, the same kind of educational opportunity it makes available to white citizen schoolchildren.³⁶

Similarly expressive of the Court's restricted view of the nature of the constitutional right is the emphasis in the majority opinion on the district court's apparent failure to respect what is seen as the due process right of the suburban districts to notice and an opportunity to be heard on the question of the feasibility of a metropolitan plan. The opinion mentions, for example, the fact that the district court deferred a ruling on a motion, by parents of Detroit schoolchildren who had intervened as defendants, to join as additional defendants school districts in the surrounding counties until after it had ordered the defendant State officials (including in addition to the Governor and attorney general, the State board of education and its superintendent):

to submit desegregation plans encompassing the three-county metropolitan area despite the fact that the school districts of these three counties were not parties***and despite the fact that there had been no claim that these outlying counties encompassing some 85 separate school districts had committed constitutional violations.³⁷

³⁵A similar divergence of views occurred last term with respect to a State's—*as* opposed to an individual district's—responsibility for financing public education. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Mr. Justice Douglas who also dissented in *Rodriguez* makes essentially the same point in his dissent here as in that case, i.e., that the cases taken together mean that the Court, by not requiring the States as a part of their constitutional duty under the equal protection clause to do whatever they can to assure that public educational benefits are, in fact, made available to all children throughout the State on terms as nearly equal as human ingenuity can make them, has itself defaulted in its duty under the Constitution. See below.

³⁶94 S.Ct. 3120 (Court's footnotes omitted). The Court however, also notes in note 9 at 94 S.Ct. 3119 that the plaintiff parents opposed intervention because they felt "the presence of the state defendants was sufficient." Their view of the nature of the right, of its violation, and of where responsibility lay for correcting such violation obviously differed from that of Court's majority.

³⁷94 Sup.Ct. 3116 (Court's footnote omitted). One can't help but be impressed with the Chief Justice's advocacy skills. As every lawyer knows, how one frames the question(s) to be decided is critical to the decision ultimately made. See e.g., the alternate way counsel for the black plaintiffs—respondents in the Supreme Court—framed the question. "May the State of Michigan continue the intentional confinement of black children to an expanding core of state-imposed black schools within a line, in a way no less effective than intentionally drawing a line around them, merely because petitioners seek to interpose an existing school district boundary as the latest line of containment?" (Brief for Respondents, Ronald G. Bradley et al., Nos. 73-434-73-436 Oct. Term, 1973, pp. 1-2). It is of course, a tremendous aid to advocacy when the advocate is a Justice (let alone Chief Justice) of the Nation's highest court.

Described as "significant factors"³⁸ were: that the district court eventually permitted intervention by the suburban districts on the second day of the hearings scheduled on the desegregation plans submitted by the Detroit school officials and the State officials (notice of the hearing having been given only a week before), but the intervenors' roles were limited to that of filing a brief within 1 week thereafter on the legal propriety of the metroplan and counsel for the intervenors was limited in oral argument to how the plan would operate rather than whether it was appropriate. Perhaps weightiest of all in this aspect of the Court's consideration, was the district court's admission that it had not taken proof "with respect to the establishment of the boundaries of the 86 public school districts*** nor on the issue of whether***such school districts have committed acts of *de jure* segregation"³⁹

No one, of course, contends that the districts surrounding Detroit, whose educational facilities and personnel and whose parents and children were ultimately to be involved in a metropolitan plan should not have had some opportunity to become involved in the details of how such a plan would be implemented. But the question of *whether* such a plan should be implemented was ultimately for the Court to decide, with the overarching consideration being the constitutional commands. The legal process would be divorced from reality if the Supreme Court did not consider how the district court performed its function in arriving at its decision, but in the delicate process of drawing the line between apparent due process deprivations of the rights of school districts and the obvious deprivations of the rights of the plaintiffs under the equal protection clause, the line was apparently drawn by the Court in this case to embrace concerns which in the context of the litigation were of relatively less moment.

Similarly, the Court, in disagreeing with the court of appeals' affirmance of the district court's requirement of a metropolitan plan,

³⁸ *Ibid.*

³⁹ 94 S.Ct. 3120, n. 11. The Court at a later point mentions that the panel appointed by the district court to prepare a plan for the metropolitan area included only one member representing the intervening suburban districts (94 S.Ct. 3122, n. 14.) This too, apparently, was not viewed favorably by the Court's majority.

commented on the court of appeals' failure to discuss in its opinion claims that the outlying suburban districts had not themselves committed any constitutional violation and "that no evidence on that point had been allowed***"⁴⁰ The Court seemed particularly troubled that the court of appeals, in remanding the case to the district court, did not require that court to receive evidence "on the question of whether the affected districts had committed any violation of the constitutional rights of Detroit pupils or others***"⁴¹ Here again, such concerns are significant only because of the view taken by the Court of the nature of the basic constitutional right.

After having taken the lower courts to task as I've noted, the Court opened Part II of its opinion with the quote from *Brown* that "separate educational facilities are inherently unequal." Moving next to advert to *Swann's* admonition that courts are to correct "the condition that offends the Constitution," the Court relates both standards to the same frame of reference, that adumbrated by its opening statement of the question presented. The frame of reference is the city of Detroit: emphasis in the quote from *Brown*, is laid on "separate" and thus "the condition" that "offends the Constitution" is the separateness of black children *within* Detroit rather than their lack of equality vis-a-vis other schoolchildren in Michigan. From this stance, the Court moved to criticism of the district court for having "abruptly rejected"⁴² the Detroit-only school desegregation plan and its further comments underline what clearly emerged as a major stumbling block for the Court's majority, i.e., the catchphrase "racial balance." The lower courts are accused of endorsing a metroplan because a Detroit-only plan "would not produce the racial balance which they perceived as desirable."⁴³ Of course, the Court at this point has moved as far away from the central point respecting the constitutional rights of black children as it accused the lower courts of doing in requiring a metroplan.

⁴⁰ 94 Sup.Ct. 3123.

⁴¹ *Ibid.*

⁴² 94 S.Ct. 3124.

⁴³ 94 S.Ct. 3125.

Finally, the Court shifts the focus entirely away from the constitutional right of black schoolchildren and a remedy for its violation to a concern with local autonomy in the management of school systems within a State. This focus on school autonomy leads the Court to speculate on the possible consequences of implementation of any metropolitan school remedy;⁴⁴ the Court seems horrified at the notion that the tradition of local control of schools in its present form might be altered, thus choosing this value rather than the constitutionally mandated requirements of actual equality of resort to educational opportunities. This emphasis on local autonomy quite naturally leads to its clearest statement that, "[t]he constitutional right of the Negro respondents residing in Detroit is, to attend a unitary school system in that district."⁴⁵ Thus, the constitutional right is the right of attendance in a given district no matter what deficiencies of educational opportunity may exist; anything else is a "drastic expansion of the constitutional right itself."⁴⁶

Mr. Justice Stewart in his concurrence shows a similar refractory approach to the problem. One might agree in the abstract that "the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation of the Equal Protection Clause."⁴⁷ But the problem is hardly abstract. His conclusion that the Court is not dealing with substantive constitutional law questions is, as I've previously indicated, simply not right. In seeking to confine the scope of the majority opinion to the matter of remedy, he, of course, joined the view that prevailed as to the remedy thought appropriate by the district court. In sum, there must be some kind of factual showing involving a relationship between where children go to school and the use of State power to that end. Hence, it is dispositive for him that evidence of the drawing or redrawing of school district lines, or the transfer of school units by the districts, or the discriminatory use of housing and zoning laws by the State is

⁴⁴94 S.Ct. at 3126.

⁴⁵94 S.Ct. 2138.

⁴⁶*Ibid.*

⁴⁷94 S.Ct. 3133.

absent. Because of this absence he finds the interdistrict remedy "simply not responsive to the factual record."⁴⁸

But, of course, what leads him to this conclusion, though he takes care to frame his opinion in remedial guise and specifically disallows its impact on "questions of substantive constitutional law," is precisely a reading of the Constitution and a rendering of *Brown I* that obviates for him the necessity of looking at the impact of what the State has failed to do to assure maximum access to educational benefits it bestows rather than whether the State may be said to be "innocent" of the kind of conduct that for him might prompt a different conclusion. Clearly, a more searching light thrown on the seeming historical purpose of the equal protection clause might alter his notion of the remedial excesses of the district court.

V. The Impact of the Decision

With *Milliken*, we have now been afforded what many have sought from the Supreme Court in the years since *Brown I*: a definitive answer to the questions of what that decision means and what it requires of State authorities, local school officials, the lower Federal courts, and finally the lawyers who by taking school desegregation cases to court on behalf of Negro parents and their children have sought to give living reality to the break with the past that *Brown* represented. *Milliken* in quoting *Brown I*'s exhortation that: "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."⁴⁹ and equating it with "the meaning of the Constitution"⁵⁰ has determined the scope of constitutional doctrine and described for us the practical limits of *Brown I*, thus stilling, at least for the moment, the debate that has occurred during the last two decades of what the quoted language means.

As to the scope of constitutional doctrine: the "meaning of the Constitution," despite its grant of citizenship to blacks and proscription of State denial of equal protection of the laws,

⁴⁸94 S.Ct. 3133.

⁴⁹94 S.Ct. 3123.

⁵⁰*Ibid.*

is that State authorities have no affirmative duty to expend any effort toward guaranteeing that the yield from its educational harvest is actually shared with its black citizens as well as with its white. Their duty at most is to remain innocent of any conduct that may be seen as causing racial separation within a district. As to the practical limits of *Brown I*, there is no literal quality to the quoted text; 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" or "school district," even though one or more of the lines touches immediately a similarly labeled school system or district in which the fruits of education are richer and more flourishing. Thus, the doctrine of "separate but equal" continues to have a place in the field of boundaries around school districts drawn with no purpose of racial containment irrespective of whether actual equality of educational opportunity results. Local school authorities, to be sure, must continue to do what they can to prevent public schools in their charge from being racially identifiable with respect to students, teachers, administrators, and staff, must still justify obvious inequalities regarding sharing of facilities and expenditure of monies at their disposal, must be careful about where schools are built and how their school transportation systems operate; but they will not be held responsible if, in the end, racial identifiability does result and the children attending their schools are not being educated as well as the children who go to school in the neighboring district; their "local autonomy" will assure that they will not be called to account. Given the Court's definitive interpretation in *Milliken* of *Brown I*, the fears of school authorities at State and local levels that *Brown* may indeed have meant they would be required to pay strict attention to how effectively their educational system was educating black children are quieted and the de jure-de facto distinction has been reemphasized.⁵¹

In terms of what *Milliken* means for the lower courts, there is clearly a jettisoning of

⁵¹"The record before us...contains evidence of de jure segregated conditions only in the Detroit schools..." 94 S.Ct. 3127.

the "practical flexibility" standard of *Brown II*. This standard, as reinterpreted in *Swann*,⁵² does not permit district courts to require or approve plans for school desegregation that involve school districts other than the one in suit except in what will be relatively rare instances in which parties successfully undertake a major burden of proof not heretofore thought necessary. The instances mentioned in a general way in the opinion-in-chief are "where the racially discriminatory acts of one or more school districts cause[d] racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race."⁵³ The former presumably might include cases where it could be shown that school officials in one district had located a school or a number of them in such a way—either by construction or change of attendance areas—to encourage white flight from a district to a neighboring district.⁵⁴ The latter might involve a showing of territorial annexations or detachments and/or the shifting of boundary lines such as occurred in one case.⁵⁵ Not only will the occasions be rare when such a showing can be made, but in order to make such a showing even on these rare occasions, it seems clear that one would have to prove purposeful conduct which, given the sophistication of the deceptive art in race cases, is increasingly harder to do. Beyond this, the rarity of the instances makes this particular game not worth the candle; the vast majority of intrastate school district arrangements will be seen under the *Milliken* standard as innocently arrived at.⁵⁶ Once school officials show—as they can in practically all cases—that the boundaries of their district weren't drawn (as least not so

⁵²402 U.S. 1 (1971).

⁵³94 S.Ct. 3127.

⁵⁴But note that Mr Justice Marshall's criticism of the State of Michigan's ultimate responsibility for the "white flight" phenomenon went unheeded. Apparently, it is the individual district that must be shown responsible.

⁵⁵*United States v. Texas*, 321 F.Supp. 1063 (E.D. Texas 1971), *aff'd* 447 F.2d 441 (5th Cir. 1971). Both the Chief Justice and Justice Stewart cite this case as an example of a situation in which an interdistrict remedy might be appropriate. 94 S.Ct. 3127; 3132.

⁵⁶Note for instance, that, according to Chief Justice Burger, the constitutional violation within one district, whether that of the local district or of the State, must have "a significant segregative effect in another district." 94 S.Ct. 3127. But he failed to construe, as did the dissenters, what the record showed the State had done here as sufficiently "significant" to warrant an interdistrict remedy. So much for the problem of proof.

recently as to be noticed), deliberately with racial segregation in mind, that will be the end of the matter and the hand of the courts will be stayed.

Much has been made of Mr. Justice Stewart's rendering of the majority holding with his emphasis on what factual showing would be necessary to sustain a cross-district decree as a possibility for lessening the impact of the majority decision. However, upon analysis his statement of what the Court's opinion means is substantially the same as that of the opinion of the Court. With one exception, a district court case involving a legislative effort in North Carolina to carve out of an existing county two racially separate school districts,⁵⁷ he cites the same cases as Chief Justice Burger cited earlier.⁵⁸ None of these cases are particularly helpful in blunting the essential thrust of the *Milliken* holding. All involved some demonstrable effort by local school authorities or State officials to arrange or rearrange school district boundaries to maintain segregation and in all the purposefulness of what was attempted could be readily seen. Thus the compelling nature of the proof burden as I've described it (totally dispositive for Mr. Justice Stewart) seems the same whether one reads the main opinion or the concurrence. This is so even if one seizes upon Justice Stewart's advertence to the use of State housing or zoning laws by State authorities to maintain segregation as one means of demonstrating the need for a metropolitan remedy.⁵⁹ There is no question at least since *Buchanan v. Warley*⁶⁰ that use of such laws by State or local school authorities to maintain racial segregation (as, e.g., by placing schools to serve black and white residential communities created by such laws) is proscribed, but there is still under Justice

Stewart's formulation the twin necessity for showing that their use by a district is "purposeful" not adventitious, and moreover that the communities created across school district boundaries are a direct result of such use.

In sum, notwithstanding Mr. Justice Stewart's interpolation, litigants who argue the necessity of a metropolitan plan in school cases must be prepared to carry the burden of proving purposeful discrimination with respect to the creation of school district boundaries; they will no longer be permitted—in the absence of a suit against the State as a whole in which all of a State's districts are named as defendants or, more modestly, suits against several but fewer than all districts within a State⁶¹—to rest solely on a showing of racial isolation within a district and inequality with respect to a neighboring district. That avenue is closed.

Perhaps the greatest impact of the decision, beyond these nice lawyers' questions relating to proof burdens, is what it augurs for the future with respect to efforts to fulfill the historic purpose of the 14th amendment. In that light, Mr. Justice Douglas' comment referring to last term's 5-4 decision on the responsibility of State governments with respect to school financing⁶² takes on added significance:

Today's decision given *Rodriguez* means that there is no violation of the Equal Protection Clause though the Black schools are not only "separate" but "inferior."⁶³

Focusing on the equal protection aspect of the 14th amendment as it applies to public education, Justice Douglas concludes, considering the observable social facts described in his dissent; i.e., that the Detroit inner city is almost solidly black; that blacks attending school there "are likely to be poorer"; that the black schools in Detroit are inferior to those in neighboring districts;⁶⁴ that given both *Rodriguez* and *Milliken* the Court has ignored State responsibility for doing all it

⁵⁷ *Turner v. Warren County Board of Education*, 313, F.Supp. 380 (E.D.N.C. 1970).

⁵⁸ 94 S.Ct. 3127.

⁵⁹ 94 S.Ct. 3132. See however, the recent decision on rehearing of the Seventh Circuit Court of Appeals in *Gaultreaux v. Chicago Housing Authority*, 503 F.2d 930 (1974) rendered after the decision in *Milliken* endorsing the principle of metropolitan relief to remedy housing discrimination in Chicago on the ground that discrimination in Chicago may have affected housing patterns throughout the Chicago metropolitan region. How the Supreme Court might respond if the metropolitan remedy problem were presented in a housing rather than a school context is a matter of speculation but, given *Milliken*, this avenue must be explored.

⁶⁰ 245 U.S. 60 (1917).

⁶¹ The enormity of the proof burden under these circumstances is evident.

⁶² *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

⁶³ 94 S.Ct. 3135.

⁶⁴ 94 S.Ct. 3135, n. 10.

can to guarantee all its citizens (including those who are black and poor—and in Detroit as elsewhere they amount to the same people) that educational opportunity will be the same throughout the State. In his view, a view apparently supported, as I've attempted to show, by the historic framework in which the 14th amendment was adopted, the decisions taken together signal an abandonment of the amendment's central purpose and focus inadequately on the question, on the one hand, of whether schools in a given district of the State are racially segregated and, on the other, whether the amount of expenditures for education made by the State are minimally nondiscriminatory from district to district; but the continued racial separateness of schools which are also poorer is condoned. His comment accurately takes into account the prevalence of the same approximate set of social conditions that it was the work of the 14th amendment to change; he has, essentially said to the Court's majority, and to us, that it simply will not do to say to the States to whom the 14th amendment speaks directly, that you may continue to do nothing about the underlying social facts of racially separate and inferior public education. The issues for him, then, are not as they apparently were for the majority of the court—whether the 14th amendment's equal protection clause requires racial balance or whether local autonomy is sacrificed—but rather whether, given the existing social conditions, the State as a whole must do everything in its power to change them since only in this way will equal protection of the laws not be denied.

VI. Conclusion

A final set of observations by way of conclusion. It, of course, understates the truth by a great deal to say that questions relating to public school desegregation are "often strongly entangled in popular feeling."⁶⁵ One need only reflect on the history of these past years, from Clinton, Tennessee, to Boston to confirm this. Thus, quite aside from the importance and relevancy of constitutional analysis that I've attempted to put forth here, ul-

⁶⁵Mr. Justice Frankfurter dissenting in *Baker v. Carr*, 369 U.S. 186; 267 (1962).

timately the Court's decision in *Milliken* will be judged—despite any protestations to the contrary—on the basis of the majority's considered choice of what in these times appeared to it "the greater evil: a judgment upholding, with some restrictions, the power of communities to deal with their educational systems locally, or a judgment that more nearly reflects what the 14th amendment would seem to be all about. In successive terms now, the Court has opted for the former in the face of historically supportable competing claims as to what the 14th amendment requires of the States, *qua* states. Its judgment no doubt has inescapably been formed with knowledge of the pressures generated not only from those who would deny black rights altogether, but also from those of whom it can be fairly said that their primary interest is in having as much to do as possible with where and how their children are educated. Thus the question of busing, for example, is important not because of the 14th amendment but because existing social arrangements including the fact of residential segregation and city-suburban separation make it so. And it would be naive to think that the Court does not recognize this.⁶⁶ Hence *Milliken* can be seen as a response to the play of forces that overlays the continuing debate surrounding complex questions of race, poverty, and education.

Having said this much and given the need to know the nature of things in which our feelings are involved, one ought candidly to recognize that the goal—important to some—of mixing the races in the public schools for its own sake or because, as Mr. Justice Marshall says in dissent, this may be the only way "that our people will ever learn to live together"⁶⁷ is not central to the meaning of the 14th amendment. There is no hard evidence that this is or ever was a condition precedent for learning to live together. But what there is hard evidence of—and that evidence still exists—is that "separate but equal" has not achieved in American society the goals that the 14th amendment was in-

⁶⁶Indeed, Mr. Justice Marshall in dissent states his belief that the decision is "a reflection of a perceived public mood." 94 S.Ct. 3161.

⁶⁷94 S.Ct. 3146.

tended to accomplish; i.e., full accordance to blacks of the rights of citizenship on equal terms. Given our history and our experience as a nation, we know that those who ultimately control benefits at the State level are members of the white majority who to date have not shown, without compulsion, any desire to bestow these benefits on children of the black minority to the same degree as they do on their own children. Thus, *Brown v. Board of Education* was a necessary way to begin the achievement of true educational equality for the simple reason that those who control educational policy and educational finance presumably would be compelled thereby to provide the same education to blacks as to whites. This remains true today and so the point of *Brown* is still valid and will be for generations to come given the extent of the pre-existing historical conditions.

But if *Brown* is limited—as apparently *Milliken* appears to do—to a constitutional right only of attendance on more or less nondiscriminatory terms within a school district, then what remains of the rest of the 14th amendment, given the compelling nature of the fact of largely affluent white suburban communities surrounding largely poor black cities? Surely, the controllers of State policy and finance who have historically paid little or no attention to the educational needs of their black citizen-schoolchildren will continue to do so. So it is not a question at all of whether schools are “majority black” or “racially balanced”—that colloquy misses the point of

equal protection of the laws. The prime reason for desegregation of public schools is to assure, in light of our history and experience, that conduct by officials not be racially discriminatory insofar as the permissible exertions of State power or the valid objectives of State conduct are concerned. Thus, where education is the function involved, the equal protection clause says that the States must assure, as an affirmative matter, that benefits and burdens are equally shared and imposed to the extent that human ingenuity can assure that result.

This is the failure of *Milliken*. Of course, practical limits must always be observed with respect to the realization of any constitutional right.⁶⁸ It would, for example, be extreme to suggest that any parent, black or white, whose children live in New York City send them to school in Buffalo, or that children living in St. Louis must attend school in Kansas City, or those living in Tallahassee must attend school in Miami. But such extreme results were neither sought nor intended in Detroit. Rather, plaintiffs there were asking only that the Court require the State of Michigan to do what it could in fact do with relatively little expenditure of human capacity. It would seem that given the nature of the constitutional right this was not asking too much and the real tragedy of *Milliken* consists in the Court's view that these parents, under our Constitution, had no right to ask at least this much.

⁶⁸ Everyone knows one can't falsely shout “fire” in a crowded theater.

CHAIRMAN FLEMMING. At this time I recognize Professor Amaker. I will ask him to give us a 10-minute summary of a very helpful paper.

DR. AMAKER. Thank you, Commissioner Flemming. The mission, as I recall, is to summarize and highlight the paper within 10 minutes.

I reflect that there is both an advantage and disadvantage in being the first person to speak in a program that has as many speakers throughout the day. The obvious disadvantage is that everyone who follows will be in a position to say what you said was wrong, or parts of it.

CHAIRMAN FLEMMING. If you request it, we will give you a chance to defend yourself.

DR. AMAKER. They may seize the advantage perhaps by saying some things that many other people may say. I will try to put myself in a position of a man in the back of the church. When the preacher tired after an hour or so, he extended his remarks and said, "What more can I say?" A voice from the back of the church said, "Say amen, Reverend, and sit down."

I want to begin by describing the way in which I approached the subject. On the assumption many of you have not had the opportunity to read the paper, I will begin with what I call an overview of the problem. It is a description of what the apparent effect of the *Milliken* decision is.

In my judgment, it is one in which the Court has come full circle since *Brown v. Board of Education* 20 years ago. The decision may mark a boundary that I see as the Court approaching the water's edge. Is *Brown* properly considered to have been the watershed decision as it was?

A comment at the outset on the social effect—referring particularly to the dissenting opinion of Justice Marshall and others—as far as the public schools are concerned that describes the impact of the decision. One is this. There will be a growing core of all-black schools surrounded by a receding ring of all-white schools.

It is easy to see. Apparently, some of the dissenters say what the Court was doing was acting on the perception of what now the Nation is willing to permit with respect to any further interference in this matter. Questions of the social impact and questions of the political responsiveness that may have been involved in the decision are put aside to address the legal significance. The legal significance is in two senses.

I put the question of whether the decision can be considered to be legally right based upon all the relevant material that we have. Down the line, I address the impact of the decision. Taking it from that standpoint, that leads to a consideration of the United States Constitution, on the assumption we must say the Court was acting in its role as the final arbiter of constitutional decisionmaking.

The Court began by quoting the statement from *Brown v. Board of Education* that separate but equal has no place in the field of public education. "Separate educational facilities are inherently unequal." In a sentence following that, it says that quote has been reaffirmed time and time again as the meaning of the Constitution and the controlling rule of law.

The first step in the analysis is to take a look at the meaning of the Constitution and to ask the overriding question of whether what the Court has done in *Milliken* is consistent with what it has said it has been doing in quoting the language from *Brown*. The Court wants to begin with the *Brown* decision.

That is where the analysis usually begins in terms of school desegregation cases. In my judgment, one needs to go farther back than the *Brown* case itself. The Court is talking about the question of whether a metropolitan remedy is usable to enforce the rights described in *Brown*.

The thesis I have developed rests on a basic principle, a person has a remedy, then he has no right. It is the thesis that what the Court has, in fact, been doing and what the Court has, in fact, done in *Milliken*—particularly when it describes the language of *Brown* as the meaning of the Constitution and the controlling rule of law—is to enter a decision in 1974 of what the Constitution means as far as the right of equal education and opportunity in school desegregation cases.

So, I began, not where the Court began, I thought it appropriate to begin a century or more earlier than the *Brown* case, itself—indeed, before the Reconstruction amendments. As I have said earlier, that is always appropriate in trying to determine what the Constitution means. A page of history is worth a volume of logic, as Holmes reminds us. That is how I began part two of the paper. It was an analysis of the nature of the constitutional right described by the *Milliken* court as the meaning of the Constitution and the controlling rule of law.

There is a certain bit of trepidation at this point. One shies away from reminding people of things which we all know about which are so obvious. Sometimes, it is important to recall things we know, to have a bit of education in the obvious to understand what we are about.

So, I began by recalling the Dred Scott decision—the impact it had occasioned—and the Reconstruction amendments. In a random reflection which does not amount to what could be called a scientific principle, I was thinking the other day on the amount of ink expended in the Supreme Court decisions and their social value that we might describe, it is interesting to put the cases in that perspective.

The opinions of Dred Scott consume 241 pages. *Brown v. Board of Education* consumes 14. *Milliken* is 50. So, that gives you some sense in a nonscientific but a rough gauge as to where *Milliken* stands—somewhere fairly removed from Dred Scott but not close enough to *Brown*.

Let's talk about them in turn. The position of part two of the paper is that, before the adoption of the Reconstruction amendments, it was unthinkable to suggest that there were any rights that American blacks could insist upon under the Constitution. As the Dred Scott decision with its devastatingly accurate reading of history makes clear, blacks derived no benefit from the Constitution, since they were not considered as part of the people of the United States, they were not citizens. Nor did any of the State governments owe any duty to accord them any of the rights and privileges normally associated with citizenship.

The Dred Scott case reminds us that the people of the United States and citizens were synonymous. It was unthinkable prior to the Reconstruction amendments that blacks had any right under any founding document to an education provided by the States to the extent it was provided to anybody else.

Moving from there, we get to the obvious point that it was the work of the Reconstruction amendments to change that. Principally, beyond the 13th amendment, the opening clause of the 14th amendment defined for the first time what being a citizen of the United States was all about. Without going any further, it is clear that, in the Dred Scott terms, after blacks became citizens under the 14th amendment they were entitled to whatever benefits citizens could get, from the national government and the States of which they were made citizens.

But the equal protection clause of the amendment went beyond the granting of citizenship to a requirement that the States now treat their black citizens equally with respect to whatever advantages, rights, privileges, and benefits they bestowed on citizens generally, that is, the same way they treated their white citizens.

Some of the cases which I have cited in the paper bear this out. Just to pick at random, "The true spirit and meaning of the amendments cannot be understood without keeping in view the history of the times in which they were adopted and the general objects they plainly sought to accomplish."

What follows is State responsibility for bestowing benefits on citizens generally and particularly, because of that overriding purpose of the amendments, on blacks. The implication for our discussion is the extent to which there were State systems coming into being of education at public expense. Black people were now citizens with an equal protection right. They were to be admitted to whatever benefits flowed from the system.

CHAIRMAN FLEMMING. If I may interrupt, the 10 minutes is up. Some time has been reserved for members of the Commission to ask questions. I will yield 5 minutes of my time to you.

DR. AMAKER. While the 14th amendment enjoined no particular model upon the States, the question of the *Brown* decision which I have described as a precise application of the commands of the amendments as I described them in light of the situation before the *Brown* court of dual school systems operating in the Southern States which had histories of racial discrimination, which meant inferiority in education.

The meaning of the Constitution in the description in the *Brown* case as the meaning of the Constitution is correct. What is incorrect is the *Milliken* meaning of the further extension of that right as we have it in the *Milliken* case.

The metropolitan plan that was involved in the terms I have described becomes a very logical next step in the case development from *Brown* to *Milliken*. As I have indicated in the paper, the argument put forth is, the 14th amendment speaks only to the State and not subdivisions. The historical impact, if I am right, is. It ought not matter in terms of making sure the educational benefits are made available to the black schoolchildren that there is a political geographic boundary which is an administrative apparatus.

The concern of the Court, however, is a concern for precisely something the 14th amendment does not appear to involve. The 14th amendment speaks to the States. The 14th amendment deals with the question of equal protection of the laws rather than with any questions of the sanctity of geographic boundaries and units the States have set up.

However, the Court in its slim majority apparently sees something that was not there. It overlooks something which was plainly there. the larger question of the impact of what had occurred here on the blacks in Detroit.

The person who sees that problem in its present-day terms, in terms of social conditions like those in *Brown*, ought to prompt a different decision, as Justice Douglas in combining what the Court had done in the *Rodriguez* case in respect to school financing with what it has done here. He tells us the 14th amendment's basic concern is whether the State has done what it can to make sure all citizens, including blacks, share whatever advantages the States make available. Where *Milliken* leaves us is a situation in which we not only have separation by race but an inequality of education as a consequence of the impact of unequal financing. Presumably, these matters could be changed if one were to adopt seriously a Stewart approach, which I have indicated in the paper. It does not substantially vary the kind of burden required to meet the standards.

The bottom line is we are left with a decision which does not effectively carry out the dominant overriding purpose of the 14th amendment.

CHAIRMAN FLEMMING. Thank you very much. I will introduce the reactors in alphabetical order. Following that order, the first reactor is Nathaniel R. Jones, general counsel of the NAACP. We are glad to have you with us. As I indicated, after the presentation by the person who prepared the paper, we would ask each reactor to comment and utilize 7 minutes for that purpose.

MR. JONES. Thank you, Mr. Chairman and the Commission. I read with considerable interest Professor Amaker's paper. I think it precisely analyzes the present position that we are in, in the wake of *Milliken*. I read with interest a few weeks ago a column by Tom Wicker in the *New York Times*. He stated that he did not see how the Court could continue to order desegregation if Presidents, Governors, and Congressmen are going to persist in saying they are opposed to busing. He was writing in the context of what was happening in Boston.

That kind of reservation by such an eminent writer pretty much brings us around to the basis of the result in *Milliken*. I think we have to look at that decision in the context in which the decision was handed down. It was a political decision. Congress was in session considering antibusing legislation at that time. Joint committees were in conference. There were all kinds of statements being printed as to what the Detroit case was and was not.

In terms of the political climate in which that decision came down, we have to understand some of the unspoken and unwritten things that may have brought about the result, and develop strategies accordingly. Before we can expect a significant change in the posture of metropolitan desegregation, we have to consider strategies that will bring about a change in the political climate.

I think there are a number of district courts that will continue to follow the *Roth* precedent, or a similar record. In some cases in which the geographical areas are substantially smaller than the Detroit area, and in which the number of students to be involved in the desegregation problem is not as numerous, the Supreme Court may find that the standards set forth in Justice Stewart's opinion have been satisfied and might, therefore, order a metroplan into effect.

If it should reach the Supreme Court, the Court might back into an affirmation of such a plan. Be that as it may, I think it is important that steps be taken to deal with the political ramifications of school desegregation.

I read with interest the background papers that were provided. I note in one of them that the majority opinion in *Milliken* is a contradiction of the Court's previous position, particularly as it elevated administrative problems involved in remedies to the level of constitutional concerns. It allowed its concern over the practicalities involved in a metropolitan plan to override the concerns of the constitutional rights of the children, which were clearly demonstrated to have been violated by the State of Michigan.

So, in summary, I think the question of the hour is: How can this political climate be altered so courts can do their job in obeying the oaths that they have taken?

Such a need was clearly demonstrated by the unfortunate statement made by the President in the context of Boston, in which he stated that he disagrees with the decision by Judge Garrity. At the same time, he deplored violence. Obviously, he did not realize he was doing two things. He said to the mob, "I agree with you." He also said to all district judges, irrespective of the violations of the Constitution, "You should disavow your oath of office and do nothing."

I feel that that was the message that went out. As part of this process of altering the political climate, I think persons in high office, Presidents, Governors, or whoever, have to watch their rhetoric.

That raises a question as to the role of the media. I think the media has become an unwilling partner or accomplice by continuing to use the term "forced busing" in describing plans

involving desegregation. The *Milliken* case dealt with the narrow issue as to whether a court had power to order pupils reassigned across district lines. For the media to continue to talk about forced busing, and politicians, too, is to create a difficult climate for the judges and the courts to weigh these questions and to do their job.

These are the aspects of the problem we have to address. I compliment the Commission for holding this conference. As Justice Marshall said, we took a giant step backward in *Milliken*. Maybe this hearing is a giant step forward.

CHAIRMAN FLEMMING. Thank you.

The next rector is James Nabrit, associate counsel, Legal Defense and Educational Fund.

MR. NABRIT. I appreciate very much this opportunity to share my thoughts about school segregation law with the Civil Rights Commission and your distinguished guests, and I thank you for the invitation. Let me also say that I enjoyed Norman Amaker's paper and that it has stimulated me to think about how the *Milliken* case affects the Legal Defense Fund's program of school desegregation litigation.

The other night I was in my office reading the opinions of the lower courts and the briefs of counsel in *Milliken* and one of my colleagues dropped by and asked what I was doing. I made a wisecrack and said that I felt like a coroner doing an autopsy, and that I was trying to figure out why interdistrict school desegregation had died on the operating table. My young visitor immediately challenged my assumption that the patient was dead by pointing out that the *Milliken* opinion left hope for a future recovery. My first response was to brush this off as akin to a belief in reincarnation. On second thought, I am willing to concede that perhaps interdistrict relief is not completely dead, but only frozen like the hero of Woody Allen's movie, *Sleeper*, and that it may be defrosted and revitalized in some distant future era when different ideas predominate.

I will listen eagerly to the views of my fellow panelists on whether our patient is departed or merely moribund. But I should say that in our litigation program at the Legal Defense Fund, at least for the short run future, we have no plans to pursue requests for interdistrict relief in the courts. I take the *Milliken* case to send us a broad signal that such cases are unlikely to succeed. The law which the Congress enacted on the subject last summer is even more restrictive than the Supreme Court decision and adds a new dimension to the problem.

The fact that the issue was twice argued to the Supreme Court in the Richmond and Detroit cases makes it unlikely that the result of the case stems from any peculiarity of the Detroit situation. I believe that a vast change in the Federal executive and legislative policy on school integration is needed to make interdistrict litigation fruitful.

I think that it is instructive to recall that with a handful of exceptions the Supreme Court has followed the recommendations of the Solicitor General in deciding school segregation issues over the past 20 years. If you want to predict the outcome of such cases, read the Solicitor General's brief. This certainly applied to the interdistrict issue. The cases where the Court did not follow the Government's lead—*Swann*, *Alexander*, and *Keyes*—are exceptions to the long term pattern.

So that I say that, if this Commission is to work for school integration, your most important mission is to affect the policy of Federal Government agencies on school integration—most particularly, the Department of Justice. The fact is that in most of the major cases in the Supreme Court since 1968 the Justice Department has aligned itself with school authorities defending the status quo. Only when this pattern changes can we have strong hope for the courts to take bold steps forward to attack the problem.

Let me briefly address another set of issues. The first question that I asked about the *Milliken* decision was this. Did the Court cut back on any of the recently developed doctrine of

school segregation law represented by the Charlotte or Denver cases or any earlier cases? What are the implications of *Milliken* for other Northern school cases seeking integration within a single school unit?

To discuss the busing issue first, I find nothing in the holding of the *Milliken* case which repudiates the Charlotte decision. In 1973, Justice Powell's partial dissent in the Denver case stated a strong challenge to the idea that courts should order desegregation plans which depend on substantial transportation. But I find none of that language adopted by the majority in the Detroit decision.

Although there is surely no overt repudiation of the *Swann* case in the Detroit decision, there is a disturbing element. The Court may have begun to create a theoretical framework to restrict the remedial discretion of Federal courts within single school systems. I refer to the Court's use of the principle that the "nature of the violation determines the scope of the remedy" to limit the district court's remedial powers and discretion. I am also disturbed by the suggestion that part of the obligation of plaintiffs is to prove segregative cause and effect. If that ever came to apply within school districts—and the *Keyes* case gives us hope that it does not—school cases would be tried on an even slipperier slope.

I guess my basic worry about the Detroit decision is that the Court has departed from the practical approach which has dominated school segregation decisions in the recent past and moved toward a more theoretical and doctrinal analysis of judicial powers. I have always thought that, if school segregation cases depend on fine theoretical analysis and intellectual subtlety, we will never get anywhere. To my mind the small success which the courts have had in recent years in bringing about school integration has been the direct product of the Supreme Court's practical approach. Only a rule of law which has told the lower Federal courts to use their common sense to work out solutions to school segregation problems, and that the way to evaluate desegregation plans is to observe whether or not they really worked to bring about integration, has broken through the miasma of calculated analytical confusion which is used to defend segregation laws and practices.

I am convinced that the Supreme Court's unanimous decision in the Charlotte case was not the product of unanimous thinking about the philosophical and analytical issues of school integration. It was the product of unanimous agreement that relatively short bus rides were a part of American life to stay and don't do kids any harm. I think that this Commission's published studies played an important role in bringing about the Court's understanding of that fact of life. I think that it is your proper mission to undertake to bring a little common sense about bus rides to the White House and the Congress.

Let me add an optimistic observation about the Detroit case. Although it has been 20 years since *Brown*, only a little over 1 year has passed since the Supreme Court's first decision in a fully argued Northern school case. Detroit is but the second such case, following the Denver case a year earlier. In both cases the Court did order that integration must proceed within a school unit. That part of the Detroit case seems to be unanimous, unlike the Denver case where Justice Rehnquist dissented, Justice Powell dissented in part, and Mr. Justice White did not vote. Now all nine Justices have upheld findings of constitutional violations in a Northern case.

How different this is than the treatment Northern cases received a few short years ago. Not long ago Northern school litigation was totally frustrated in Gary, in Cincinnati, and in Kansas City, cases where the Supreme Court refused review and allowed lower court decisions upholding school segregation to stand unreviewed. At least now we have a theoretical basis upon which to build a legal attack on school segregation in all the States of the Union.

There are still many important legal issues to be won or lost. Notwithstanding the practical difficulties imposed by *Milliken*, much can still be done. The successful Northern cases require

long and difficult trials. Proof of the Detroit violation required a 41-day trial. In the Denver case we passed a milestone recently when we placed in evidence Plaintiffs' Exhibit No. 1,000. And the Supreme Court record in that case cost over \$30,000 in printing costs.

The requirement that we prove that Northern school segregation results from intentional discriminatory conduct remains a substantial barrier to widespread progress. Perhaps in the end this will be a greater barrier than school district lines. But a handful of Northern cases have shown the way. We have important work to do in the courts.

Let me conclude by showing you a bit of demonstrative evidence. On the day after the Supreme Court decision, the headline of the New York *Daily News* said something like "High Court Kills Busing." In my view, this obituary did not get the name of the deceased quite straight. But we got the point. So that the *Daily News* and others will not misunderstand our position, one of our lawyers has designed a new LDF uniform that is cast in the *Daily News'* own idiom. Here it is on public display for the first time. Thank you.

[Laughter.]

CHAIRMAN FLEMMING. If this were a formal hearing, I suspect we would receive that as an exhibit. Thank you very much.

Next, we will hear from Cruz Reynoso, professor of law at the University of New Mexico.

MR. REYNOSO. Thank you, Mr. Chairman and fellow reactors. I note first that we do have a record. For purposes of the record, the previous speaker demonstrated to the audience a T shirt, blue in color, with the words: "Support Massive Cross Town Busing."

It appears as though I may turn out to be an optimist in a relatively pessimistic setting. I agree with the basic notion in Professor Amaker's paper — to try to distinguish the right and the remedy in constitutional cases is to act in an unlawful manner. If there is no remedy, there is no right. We do have to focus on what right the schoolchildren have in the type of situation we are discussing.

Secondly, I suppose I don't share the notion expressed in two places in the paper that this may be "perhaps the last" major decision in defining what *Brown I* and *II* meant. Nor do I agree, as is said in another part of the paper, that this is a definitive "answer." I suppose in reviewing Supreme Court decisions, I never see it as the last word or definitive answer. I am sure the Court would not be offended if I reminded it of an obscenity case. What was obscene was a matter of local decision, the Court had held.

One year later, when a local jury decided that the movie *Carnal Knowledge* was obscene, the Supreme Court said it was a matter of law and that the factfinders were wrong. It does not take too long sometimes to reach different decisions.

I suppose I would be concerned about too careful a reading, from a lawyer's point of view, of what the case means. Invariably, we see other cases with slightly different factual situations coming before the Court and the Court's being able to sidestep previous decisions and find great disparities in the backgrounds of the different situations. I suggest that we look at the reality of the case and what perhaps may lead the Court to think differently in the future.

The lawyers who handled the case entitled *San Antonio Independent School District v. Rodriguez* had a massively important case in the field of school financing and the rights of poor and minorities to get the type of schooling that others received. Those lawyers indicated to me the very brief note in the case that, if the Court were to decide differently, it would affect 49 other States—that was the key. The Court seemed to be unwilling in *Rodriguez* to take a step forward.

We really have not lost anything at this point in terms of the Court decisions. The Court has refused to take a step forward. In *San Antonio*, it declined to take a step forward as it viewed forcing States to review the financial education system.

The Court has been reluctant to take a step forward to do what it would consider massive redistribution and political reassessment of the school system as founded in most of the States that happen to have within them large cities, mostly with a core of minorities, blacks and Chicanos.

When I see a case and review it as a political decision, I have to ask myself questions like this: What would happen if the Court got before it a case that had to do with cross-district remedies but where the numbers of pupils were smaller in number and the geographic area was less extended than is true in this case? What would happen in a case where there had been more of a record showing more State control?

I suppose I am not persuaded by the lengthy discussions about this being an important case on the negative side of equal protection. In this case, the State clearly was in control of the entire educational school system.

It seems, necessarily, that the public educational school system will be under State control even if the State's constitution says the State will have nothing to do with public education and will leave it up to the local school districts. It is still the State's constitution that set that up. I don't view State control in that relationship as very important. I do view the involvement of the State in helping to set up districts that end up with such a disparity as important.

I suppose, in this case, I simply would not assume that in a future case, knowing what the Supreme Court has said, there is a lot more evidence obtainable about setting up that type of school district so that the Court would come out differently.

I think the same applies to the matter of other districts in involvement of segregated effect. It seems by a study, as indicated in a paper pertaining to housing, that a sociological and political study will invariably show that it is not just Detroit but surrounding districts that have had a series of governmental activities pertaining to housing, financing, and education that has led to the core city's being black and brown. Those things don't happen by accident. I think government is heavily involved. I think one of the messages of the case is that lawyers have to do a lot more building of records in terms of showing that.

Finally, I guess I would say this. The Court really is putting the burden on the lawyers and too heavy a burden when, in its political response it says, "We will go this far, the district, but no farther, not beyond the district."

Since I want to be an optimist, my reaction is we as lawyers have to take the Court—by that I mean the majority opinion including the five Justices—at their word. The next case around, in a less dramatic case in terms of numbers, we will bring forth the type of evidence that the Court has called for. I don't view that as an impossible task.

I have one final word. The Court has always followed the political atmosphere of the country. I was rereading the *Cox I* and *II* civil rights decisions where the Supreme Court was seeking to protect the rights of blacks in the South to have massive demonstrations and how the Court on some occasions strained to be sure that that first amendment right was going to be protected.

In one case, the Court said that even the law against demonstrating and picketing courthouses could not stand in the face of groups concerning rights under the first amendment. The Court went out of its way to stretch the constitutional protection to make sure they were protected. In the light of history, the Court was convinced that that needed to be done.

I don't disagree with the previous speakers that one of our jobs, too, is to change the light of history. This Commission has been important in that respect. I look forward to the drawing up of the report by this Commission and adding a sense of reality rather than legality to what makes for good educational common sense.

CHAIRMAN FLEMMING. Thank you very much.

I am happy to recognize William Taylor, director of the Center for National Policy Review. He is also a past Staff Director of this Commission.

MR. TAYLOR. Thank you, Mr. Chairman and members of the Commission. It is nice to come home for a visit. As usual, I find myself in a very large measure of agreement with Norman Amaker in his analysis of the decision and his basic conclusion of its inconsistency with the equal protection clause and the principles enunciated in *Brown*.

I do think the relevant practical question for all of us is, what is left open by the Court's decision and what are we to do about it? In that respect, I would like to join Cruz Reynoso in the ranks of the optimists.

It is an objective fact that the Court said that it was not closing the door to interdistrict remedies for segregation under certain kinds of circumstances. It is an objective fact that one of the five Justices in the majority took the time to write a separate opinion. It appeared that he wanted to separate himself in some respects from his four colleagues and set out perhaps a broader framework for possible relief in the future.

I agree all of this, in a sense, is like trying to read tea leaves. All of us who have been involved are searching for helpful clues, sir. Last week I was sitting in New Haven listening to one Yale law graduate, Justice White, introduce another one, Justice Stewart, at a Yale reunion. In the course of the introduction Justice White described Justice Stewart as the flywheel of the Supreme Court.

He went on to define a flywheel as a heavy wheel opposing or modifying by its inertia any fluctuation of speed in the machinery with which it revolves. He said that Justice Stewart sometimes slows and sometimes speeds the machinery of the Court.

I will admit I was thinking in rather parochial terms, but I immediately applied that to the case we are concerned with here today. Maybe it is just a sophisticated application of Mr. Dooley's principle that the Constitution may not follow the flag, but the Supreme Court follows the election returns. Maybe it is a combination of things more complex than that.

Among the grounds that the Court said might give rise to interdistrict relief are where the action of one district has a significant segregative effect on another district. Second, in a broader formulation than the majority opinion, Justice Stewart says that, where there has been a redrawing of district lines in a way that contributes to segregation, this may justify interdistrict relief. A third ground is if the State contributed to separation of the races by purposeful, racially discriminatory use of State housing or zoning laws.

The first two are of some importance, but it is the third we must concentrate heavily on. Wilmington is one case that may fit under the second criteria because there has been a drawing or redrawing of lines that may fit within Justice Stewart's formula. In Wilmington logistics are such that the case won't seem as massive as Detroit was.

The third case, the housing, raises the question more broadly for communities around the country. It may be interesting to take another minute to see how Justice Stewart treats this in Detroit.

He says that it is this essential fact of the predominantly Negro school population in Detroit "caused by unknown and perhaps unknowable factors, birth rates, economic changes or cumulative acts of private racial fears that accounts for the growing core of Negro schools which have grown to include virtually the entire city." The Constitution, he says, does not allow courts to change that situation unless it is shown that the State has contributed to cause it to exist. What comes out of this opinion is a suggestion that we have large black populations in cities because of immigration and birth rates. Declining white population in central cities and increasing white population of suburbs have come about because of economic changes, presumably the relocation of industry to the suburbs and the growing affluence of whites and cumulative acts of racial fears which can be said to be white flight.

But this leaves a gap as to why black people are not found in significant numbers in the suburbs. It is on this question that Justice Stewart suggests he has no knowledge and that it has not been proven to him that it is racial policies that have played the major role.

I think there is evidence of this view of the urban reality in other cases. Some members of the Court have constructed a rather hopeful view of the urban reality which may enable them to avoid what is admittedly a difficult issue.

I have done a freehand translation of what I read into the Court's decision, which may suggest a job that lies in front of us. This is my translation of where the Court is. It would run as follows:

"Blacks came to the cities because they were forced off farms and sought better-paying jobs and, in the view of some Justices, perhaps they were attracted by higher welfare payments. Unfortunately, they arrived just as whites became prosperous enough to move to the suburbs.

"The racial fears of whites probably accelerated after blacks arrived, but this was private fear, not something that government stimulated. Blacks clustered in the cities because that is where the low-skilled jobs they qualified for were and that is where their friends and relatives were.

"Racial discrimination played a role, but this has changed dramatically in the past decade. Now, we have fair housing laws that permit blacks to live where they choose to live provided only they have the means to do so. It is true a great deal of racial discrimination persists, but it could not have been expected to disappear overnight. The job situation of black people is improving because of our decision in the *Griggs* case and the social and employment programs of the sixties.

"As they become better trained, black families will become more mobile and follow whites to the suburbs. What we were being asked to do in Detroit, was very controversial. It would have made the Court more vulnerable to political attack and would have further jeopardized the public school system which is already in bad shape. After all, there is only so much 'baggage' the schools can be asked to bear.

"The drastic remedies sought should be granted only in the face of dire necessity. Blacks, who along with Spanish-speaking groups may be viewed as the last immigrants to cities, are making progress and in time large numbers of them will achieve the mobility needed to escape from the ghetto. All the time lost is preferable to a decision that might arouse such adverse reaction as to set things back even more."

That is a freehand rendering, but I truly believe that is the purport of the Court's decision. If so, that leaves the question for the Commission and all of us as to whether we believe that is an objective description of the urban reality. If we disagree, I think it is our job to put the issue in a legal setting in which the Court will be impelled to address it and address it more constructively. Part of the job is also to address ourselves to popular beliefs in the political area, and I believe the Commission can play an important leadership role in this task.

CHAIRMAN FLEMMING. Thank you. I will ask my colleagues if they have any questions. I will recognize the Vice Chairman, Mr. Horn.

VICE CHAIRMAN HORN. Professor Amaker, moving to a broader territory, do you believe the Constitution provides a basis for the Court to authorize metropolitan busing across State lines such as Chicago-Gary, New York City-New Jersey-Connecticut, District of Columbia-Maryland-Virginia; and on what basis would you rationalize that?

DR. AMAKER. I have problems with the District and Maryland. I will put that aside. I think my answer would have to be, absent some kind of interstate compact, the Constitution does not authorize cross-busing across State lines.

I think we get that reading from the fact the 14th amendment speaks to what is defined as a State. No State shall deny the equal protection of the laws. I assume the most that one could expect absent an interstate compact would be a statement of whatever realization of the constitutional rights would end with the boundaries of the particular State.

VICE CHAIRMAN HORN. Do any reactors disagree?

MR. NABRIT. I don't know if I disagree. I would add, prior to *Brown*, the States did work together by interstate compacts to prohibit desegregation. They had it at the second Gary level. I don't have difficulties with theoretical matters. Even in the framework of *Milliken*, if it could be shown two States worked together to effect segregation, a remedy addressed to both of them might work. There are a lot of difficult procedural matters that you have to address. Where do you stand to get hold of it?

VICE CHAIRMAN HORN. It would not be enough for two States to work together accidentally in concert? Would not they have to work together consciously?

MR. NABRIT. I don't know.

DR. AMAKER. That answer does not change the conditions. Instead of a State denying protection of law, they would have two. The Supreme Court could hold States A and B. The fact they joined in denial of the equal protection right would not change it. I did not take that to be the basis on which you asked the question.

VICE CHAIRMAN HORN. In defining discrimination, could the Court act on a socioeconomic basis rather than simply on a racial basis?

DR. AMAKER. What do you mean by socioeconomic?

VICE CHAIRMAN HORN. Economically, you prove governments have acted to discriminate against poor people regardless of their race.

DR. AMAKER. As a theoretical matter, it could. There are certain things which cut both ways. The question of economic discrimination is in the *Rodriguez* case. There was an effort to describe what had been going on there as an economic discrimination situation and to get the Court to recognize that fundamental right with respect to poverty as opposed to race.

One can read some of the decisions, such as those in the welfare area. There are housing cases in the sixties that the Court will, in circumstances recognize a right of equal treatment between the rich and poor. Going further back, when what was involved was certain economic protection with respect to corporations, the Court clearly indicated or applied equal protection analysis to economic matters.

The hesitancy creeps in because of what the Court said in *Rodriguez* against the argument that the Court ought to for all time recognize poverty as well as race. The possibility is certainly there.

MR. REYNOSO. I will add, in a 1971 housing case the Court clearly said we could find poverty to be or poor people to be those if we wished to do so. The Court has declined to go that way in 1971. From the litigator's point of view, you would have to put poverty and race together. If you did that, the Court would protect you. It is not if you went only to poverty and socioeconomic bases. The policy is that they don't do that.

DR. AMAKER. The purpose of the amendment is the area—

MR. TAYLOR. On the question of economic discrimination, the Court, I believe, is afraid to extend the civil rights revolution to deal with it. I would be constrained to add, when distinguishing what is appropriate in the Court as against other kinds of forums, I think it is of the greatest importance to deal with economic as well as racial discrimination. I was heartened that the new Housing and Community Development Act takes into consideration the economic separation and states a policy against it. There are other arenas we have to address ourselves to.

VICE CHAIRMAN HORN. I have one last question. I am more optimistic than most of the Court's holding. What would you think of judicial behavior if in a case involving water in a metropolitan area or in the readjustment of election boundaries where the judge ordered the suburbs to provide water for all or part of a city and where suburban-city electoral boundaries were readjusted without a hearing being held on the factual situation in the suburbs in relation to what had occurred within the city? In brief, a judicial decision where the record of evidence was not sufficiently laid down?

DR. AMAKER. I think you are talking about two things. I don't think that is really central to the opinion. I addressed that in my paper as one example of the Court's telescoped view dealing with details.

The fact is that there was the case. It could have been remanded for hearing. The fact is, at the time the case went on appeal, the district judge was on the verge of having a hearing. There were criticisms about procedures antecedent to the appeal route. There was no objection at any point that the parties were not entitled to a hearing.

The hearing aside, you asked about the question on evidence. Given the way I see the Court to have looked at this situation—and it may well be because of large political implications—it is very, very difficult to know what kind of evidence prior to this decision could have been produced that would have occasioned a different result.

If you look at what the Court cites and even giving a few, the question of manipulation of boundaries or the transferring of students between districts, it indicates the cases the Court talks about are cases of discrete political boundaries.

The question of the sewer from Justice Douglas' opinion, I don't see a very big difference in terms of what the hearing prospects were in this case as in these cases that you spoke of. I don't think what we are left with is simply a question of the parties whose suburban communities are going to be affected not to be given their day in court.

I think it entered into the Chief Justice's judgment overall but that could have been remedied. The Court does that time and time again. If it was concerned about that, it could have remanded the case for appropriate hearings.

VICE CHAIRMAN HORN. Certainly, the Chief Justice's language leaves it open to lay down that record.

DR. AMAKER. Let me tell you from a standpoint of a lawyer how pessimistic one ought to be about something like that. Justice Stewart was called the flywheel. He has a record of clarifying the decisions by the separate concurring opinions. It is that thing that puts the situation reasoning out there and invites you to the door.

I have a recollection of another situation. This was a situation where Justice White was the concurrer in a case involving jury discrimination. He wrote the majority opinion. In the course of that case, which involved the prosecutor using his discretion to strike all blacks off the jury, he said that, if you could show me that in case after case the prosecutor used the strikes to knock off the jury, the 14th amendment claim might take on a different dimension.

So, yours truly decided to test that and got involved in a long trail in Alabama trying to go back in 12 years of records to prove that the prosecutor in case after case had done what Justice White said might give the 14th amendment a different dimension. I have undertaken that kind of burden that the burden holds out there. I am the kind who wants to know how he votes when the case was before him. I know how my man voted on this one.

What happened eventually was the jury situation was changed, but not as a consequence of anything that I or other lawyers were able to do. It was the consequence of factors, the vote, political changes, and what-have-you. That is ultimately what is going to change the *Milliken* doctrine. I will keep the impression of the containment of *Milliken* until the Court gives me another one.

CHAIRMAN FLEMMING. Commissioner Freeman?

COMMISSIONER FREEMAN. Professor Amaker, you had a very exciting paper. You made a perceptive analysis of the Supreme Court's perception of the 14th amendment. If you take Bill Taylor's "tea leaf" reading and you read some tea leaves, give us your opinion of what the Supreme Court might do with respect to other areas of Supreme Court litigation other than school desegregation.

DR. AMAKER. That seems to me more hopeful. I note in the paper that the Seventh Circuit in the latest phase of the Chicago housing case against the Chicago housing authority opted for a metropolitan remedy. They had reaffirmed its conclusion in light of the *Milliken* case. That leads me to the conclusion, and here I think we may have something in Justice Stewart's offhand remark about showing discriminatory application of housing and zoning laws. But in a housing case, as the Chicago case where the Court has now sent it back to the district court to determine whether there could be a metropolitan remedy in housing which would take in the suburban communities surrounding Chicago, I think the Court would have far less trouble with that.

Part of the problem that the Court apparently had with *Milliken* is something Bill Taylor suggested. We tried over these last few decades to ask school desegregation cases to carry too much baggage in terms of social patterns and lifestyles. Maybe what we are seeing is the Court's marking the water's edge and saying to us, "We cannot put this kind of burden any more on schoolchildren or district courts and school cases. Maybe we ought to place it someplace else."

The place to put it is in the housing area. I think a case like the *Gautreaux* case is hopeful. Maybe other things can be suggested where the Court would be less reluctant, like employment situations where it seems there is the proof that we are talking about of discrimination.

The question is the extent to which that record can impact upon the schools. If those cases were housing patterns and could demonstrate a concerted State action which accounted for the residential segregation, I think that you might well get a different response in that situation.

COMMISSIONER FREEMAN. Using another example, the port authorities, such as New York and New Jersey, and the bistate regional plans that are becoming very effective with respect to medical services, transportation, and the sewer systems—these are areas that seem to bring into play the possibility of government services crossing State lines. Can you comment on this area of litigation?

DR. AMAKER. I think I partially answered that. What you are talking about on the face of it is an agreement between the States to cooperate in a particular area. Given that fact, I think it is possible to argue in a piece of appropriate litigation where there is a bistate compact that that equal protection clause takes hold and that any kind of action taken under the auspices of the two States has to be measured against equal protection standards to determine whether or not particular rights are being denied. I see that certainly as a possibility.

CHAIRMAN FLEMMING. Mr. Ruiz?

COMMISSIONER RUIZ. Yes. This question is directed to not only Dr. Amaker but to the reactors. Is it the opinion of any one of you, from *Milliken*, that "culpability" is the overriding consideration for a need to the violation of the 14th amendment in outlying districts? Is the finding of "discrimination" indispensable to the violation of the 14th amendment?

We know that the question of outlying district culpability was not gone into. Was the undecided issue of "culpability" simply a stalling or delaying tactic to give an opportunity to exercise options upon remand by the Supreme Court as suggested by William Taylor? Or does the issue of lack of "culpability" close the door to interdistrict desegregation unless the States are shown to discriminate? I asked several questions in order to focus on "culpability."

DR. AMAKER. Whether it is a false issue or not, my analysis answers that affirmatively from the standpoint of what the 14th amendment is all about. Clearly, beyond the legal analysis is a very intense array of practical concerns.

What the Court is saying, certainly as a practical political and social matter, is we will not require or permit certain kinds of remedies in school cases absent the kind of showing we say must be made. For example, culpability with respect to outlying districts. There is a great deal in our social life of the moment which the Court is willing to recognize and permit, so that it will require that of litigants. As I have indicated before, you might get a different answer if what you are talking about is not school desegregation but some other problem.

MR. TAYLOR. In a narrow sense, the Court did not say culpability on the part of suburban jurisdictions was indispensable. If there was a violation in one area that affected another area, the other area could be included whether or not it committed culpable acts. In that sense, culpability is not required.

In a broader sense, the Court is saying in one way or another, showing us that government is responsible and that this situation is not going to get remedied without the hand of government is required. In that sense, the question of causation in governmental involvement is very, very important.

I would like to share Norman's hope on the housing issues. I think the opinion of former Justice Clark in the *Gautreaux* case is a hopeful sign. Following Jim Nabrit's suggestion that the Supreme Court follows the Solicitor General, we ought to look at *Gautreaux* case coming up. The Government's position may be of the greatest importance and it may be reasonable for the Commission to make this a matter for discussion with the Solicitor General.

I think a variety of approaches have to be tried. Nobody is suggesting there is one single answer.

DR. AMAKER. On the culpability question and how it relates to the problem of showing culpability, when a decision of this kind comes down, it affects not only people in Detroit but other parties who might be in the position of the parties in the suburban districts around Detroit. They also read the tea leaves.

The tea leaves are what the Supreme Court has said with respect to the narrow set of circumstances under which they might be required to have or take part in an interdistrict remedy. What makes the burden of proof so hard is precisely because they will read that. They will note that there has to be a showing of certain kinds of purposefulness. They will be in a position to survey what they are doing to put themselves in a posture to make it very, very difficult for any litigants to make that kind of showing.

COMMISSIONER RUIZ. In California, Pasadena, a desegregation case, it is my understanding the Federal district court ordered desegregation without making culpability a necessary ingredient to the case, given the social conditions of race, poverty, inferior schools, and those areas where there is an expanding black core and a receding ring of white without State faculty and culpability. The *Milliken* case was, nevertheless, making culpability a case.

MR. REYNOSO. It don't believe the Supreme Court makes that requirement. My view is that *Milliken*, as indicated, is only the second of those cases dealing with Northern desegregation. The Court is in a settling-down period. I don't know whether the Court has decided which way it is going to go on these cases. On this case, it decided to go one way. It has not said, so that we will have interdistrict segregation we will—

CHAIRMAN FLEMMING. I hate to have to stop this, but I have permitted it to go beyond the set period of time. A number of the reactors will not be able to be with us, but we are almost at the outer boundaries now.

I think this has been extremely helpful. We are very indebted to Professor Amaker and all members of the panel. This is the kind of discussion that we hoped would take place. I know it will be helpful to us as we endeavor to determine what recommendations we should make to the President and the Congress. I know we will return to some of these issues. I hope as many of you as possible will be able to stay. I think we have carried on informally enough so that we may come back to some of these issues.

I recognize the members of the next panel. Next is Marilyn Gittell, associate provost of Brooklyn College.

POLITICAL SCIENCE PERSPECTIVES

The Political Implications of

Milliken v. Bradley

**Marilyn Gittell
Brooklyn College**

The *Milliken* decision adds a new dimension to the context of school segregation issues. Although relating to the matter of de facto segregation, the Court chose in this decision to give priority to the question of the sanctity of local school district boundaries. In contrast to the Richmond decision (*Bradley v. School Board of Richmond*, 462 F.2d 1058, 412 U.S.92), the Court in *Milliken* relied on the practice of local autonomy, relieving the State of its final legal responsibility for all local governments, including school districts. It determined that enforced integration, as prescribed by the *Brown* decision, was not applicable outside individual district boundaries, unless proof could be offered to the court that such districts were guilty of de jure segregation.

Undoubtedly, cases will be developed to suggest that the legal responsibility of the State cannot be ignored, and its lack of affirmative decisionmaking, in regard to local housing and zoning regulations produced de facto

segregation throughout suburbia. Certainly, States were in a position to impose restrictions on local governments who are, after all, legally creatures of the State. Such State guidelines could have produced somewhat different growth patterns.⁶⁹ Local governments will also be subject to review regarding their zoning practices and their contribution to de facto segregation.

The *Milliken* decision, however, suggests that the only possible solution for those who seek areawide integration of schools is some form of regional consolidation of school districts, either voluntary or involuntary. The evidence is clear that the suburban growth of the last three decades resulted in increased concentration of working-class blacks in central cities and almost exclusive movement of white middle-class population to the suburbs. (See tables 1 and 2.)

⁶⁹Syed, Anwar, *The Political Theory of American Local Government* Random House, 1966, p. 68.

TABLE 1
POPULATION BY LOCATION, INSIDE AND OUTSIDE METROPOLITAN AREAS,
1950, 1960, AND 1969

Location	Total population (millions)					
	Negro			White		
	1950	1960	1969	1950	1960	1969
United States total	15.0	18.8	22.3	135.2	158.1	175.3
Metropolitan areas	8.4	12.2	15.6	80.3	99.2	111.7
Central cities	6.5	9.7	12.3	45.5	47.5	45.3
Outside central cities	1.9	2.5	3.3	34.8	51.7	66.4
Smaller cities, towns, and rural	6.7	6.7	6.7	54.8	58.9	63.6

TABLE 2
POPULATION, URBAN AND RURAL, BY RACE, 1950 TO 1970

In thousands, except percent. An urbanized area comprises at least 1 city of 50,000 inhabitants (central city) plus contiguous, closely settled areas (urban fringe). Data for 1950 and 1960 according to urban definition used in the 1960 census. 1970 data according to the 1970 definition.

Year and Area	Total	White	Negro and other	Percent Distribution		
				Total	White	Negro and other
1950, total population	151,326	135,150	16,176	100.0	100.0	100.0
Urban	96,847	86,864	9,983	64.0	64.3	61.7
Inside urbanized areas	69,249	61,925	7,324	45.8	45.8	45.3
Central cities	48,377	42,042	6,335	32.0	31.1	39.2
Urban fringe	20,872	19,853	989	13.8	14.7	6.1
Outside urbanized areas	27,598	24,939	2,659	18.2	18.5	16.4
Rural	54,479	48,286	6,193	36.0	35.7	38.3
1960, total population	179,323	158,832	20,491	100.0	100.0	100.0
Urban	125,269	110,428	14,840	69.9	69.5	72.4
Inside urbanized areas	95,848	83,770	12,079	53.5	52.7	58.9
Central cities	57,975	47,027	10,348	32.3	30.0	50.5
Urban fringe	37,873	36,143	1,731	21.1	22.8	8.4
Outside urbanized areas	29,420	26,658	2,762	16.4	16.8	13.5
Rural	54,054	48,403	5,651	30.1	30.5	27.6
1970, total population	203,212	177,749	25,463	100.0	100.0	100.0
Urban	149,325	128,773	20,552	73.5	72.4	80.7
Inside urbanized areas	118,447	100,952	17,495	58.3	56.8	68.7
Central cities	63,922	49,547	14,375	31.5	27.9	56.5
Urban fringe	54,525	51,405	3,120	26.8	28.9	12.3
Outside urbanized areas	30,878	27,822	3,057	15.2	15.7	12.0
Rural	53,887	48,976	4,911	26.5	27.6	19.3

Source: U.S. Bureau of the Census, *U.S. Census of Population: 1960 and 1970*, vol. I.

In fact, it is this basic distinction that differentiates 19th and early 20th century outward population movement from post World War II patterns. Adjustment of governmental boundaries also reflects and probably is a product of that difference.

In the earlier periods, State annexation and consolidation laws were more flexible, allowing for continued expansion of central city boundaries without too much difficulty.⁷⁰ The data show the general acceptance of such practices throughout the country. Although State legislatures historically protected rural interests and resisted city independence, it was not until this modern era of suburban growth that new constraints were placed on the expansion of city boundaries.⁷¹ Consolidations in that early era, for instance, required an areawide majority vote. The city population could, therefore, determine the outcome of such elections. Resistance in the suburban areas of that era was easily eschewed.

More recently, State law has required that any consolidation must be approved by majorities within each unit considering the plan.⁷² City interests under these arrangements are readily undermined. For those who seek some form of voluntary consolidation, the experience of the metropolitan government movement of the 1950's and 1960's is particularly instructive. Almost the only successful efforts were in transfers of functions to a larger unit (i.e., a county), rather than the creation of a metropolitan government or the adoption of a consolidation plan. (See table 3.)

The history of defeats of such plans suggests the strong resistance of suburban communities to any association with central city governments. Even voluntary cooperative ar-

⁷⁰ Mandelker, Daniel, *Managing our Urban Environment* 2nd ed.; Bobbs-Merrill Co., Inc., 1961, pp. 288-388.

⁷¹ *Ibid.* pp. 350-388.

⁷² Bollens, John C. and Henry J. Schmandt; *The Metropolis* Harper and Row, 1965, p. 406.

TABLE 3
VOTER DEFEATS OF CITY-COUNTY
CONSOLIDATION, SINCE 1950*

Year	Area
1950	Newport News—Warwick County— Elizabeth City County, Virginia
1953	Miami—Dade County, Florida
1958	Nashville—Davidson County, Tennessee
1959	Albuquerque—Bernalillo County, New Mexico
	Knoxville—Knox County, Tennessee
1960	Macon—Bibb County, Georgia
1961	Durham—Durham County, North Carolina
	Richmond—Henrico County, Virginia
1962	Columbus—Muscogee County, Georgia
	Memphis—Shelby County, Tennessee
	St. Louis—St. Louis County, Missouri
1964	Chattanooga—Hamilton County, Tennessee

* Similar proposals were defeated earlier in two of these areas: in St. Louis—St. Louis County and Macon—Bibb County in 1926 and 1933, respectively.

Source: John C. Bollens and Henry J. Schmandt, *The Metropolis* (Harper & Row, 1965), p. 433.

rangements within the metropolitan regions have withered away. Although in the 1950's and 1960's opposition to regional or metropolitan government came largely from the outlying areas that wanted to preserve their autonomy, more recently some question has been raised by inner-city leaders and populations regarding the feasibility of such arrangements.

Dyckman, in "Social Planning in the American Democracy" lists the following objections,

First, it [metropolitan plans] stresses efficiency considerations at the expense of equity. Second, it opts for a product-mix different from that which would be chosen by the poor or by minority groups. It is an upper-white consumer package offered to the whole population. Third, it gives low priority to the social programs favored by the poor. And fourth, it diffuses the power of militant minorities.⁷³

Piven and Cloward noted in 1967 that "metropolitan government will dilute the political power of Negroes just at the time that they are on the brink of political control in several large cities."⁷⁴ Mayor Hatcher of Gary, Indiana, suggested that plans for metropolitan government were an attempt to undermine emerging black power in cities.

This feeling that metropolitanism is an attempt by whites to maintain control of the central cities cannot lightly be dismissed. In Detroit, the NAACP spent a great deal of time debating whether it should press the *Milliken* case. Detroit in 1969-70 saw much of the black community abandon the demand for integration and take up the cry for black control of black schools and that raised serious questions regarding priorities.⁷⁵

In the Richmond case, CORE and other black interest groups argued against the need for regional school district consolidation to achieve integration. Their emphasis was on the need to maintain black control of black schools.

The lower court *Milliken* decision makes a number of comments on the judicial view of metropolitan reorganization and the court's power to enforce such a reorganization. The respondents argued that the segregation of the Detroit public school system was a result of actions of State and city officials. The district court concluded, "in that various acts by petitioner Detroit Board of Education had created and perpetuated school segregation in Detroit, and that acts of the Board, as a subordinate entity of the State, were attributable to the State***."⁷⁶ It, therefore, found that a Detroit-only desegregation plan was inadequate and ruled that metropolitan plans

encompassing 85 school districts in three counties would have to be considered. The district court concluded, "[s]chool district lines are simply matters of political convenience and may not be used to deny constitutional rights."⁷⁷

On appeal, the major findings of the district court were upheld. The court of appeals found that constitutional violations were committed by the Detroit board and by the State defendants. The court of appeals went on to state that, "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelming white majority population in the total metropolitan area."⁷⁸

Based on this position, the court of appeals concluded that the only possible effective desegregation plan would involve the crossing of school district lines. It recognized that such a plan was appropriate because of the State's authority over local school districts: "[T]he State has committed de jure acts of segregation and***the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts."⁷⁹

The Supreme Court majority, in contrast to the lower court, relies on the principle that constitutional violation occurred only in Detroit, "****the remedy is necessarily designed****to restore the victims of discriminatory conduct. Disparate treatment of White and Negro students occurred within the Detroit school system, and not elsewhere, and on this record, the remedy must be limited to that system";⁸⁰ "****in this case, the Court of Appeals approved the concept of a remedial decree that would go beyond the boundaries of the district where the constitutional violation was found, and include schools and school children in many other school districts that have presumptively been administered in complete record with the Constitution."⁸¹ Based on the majority position, we cannot reasonably expect to see this Court taking a position requiring urban-suburban school district consolidation.

⁷³Dyckman, "Social Planning in the American Democracy," quoted in Mandelker, *supra*, at 397.

⁷⁴*Ibid.* p. 397.

⁷⁵Grant, William; "Can Busing Save Detroit?" in *Detroit Free Press*, Dec. 10, 1972.

⁷⁶*Milliken v. Bradley*, July 25, 1970 (Slip Opinion) at I.

⁷⁷*Ibid.*, at II.

⁷⁸*Milliken v. Bradley*, 484 F.2d at 245.

⁷⁹*Milliken*, *supra* at 16.

⁸⁰*Milliken*, *Ibid.* at 27.

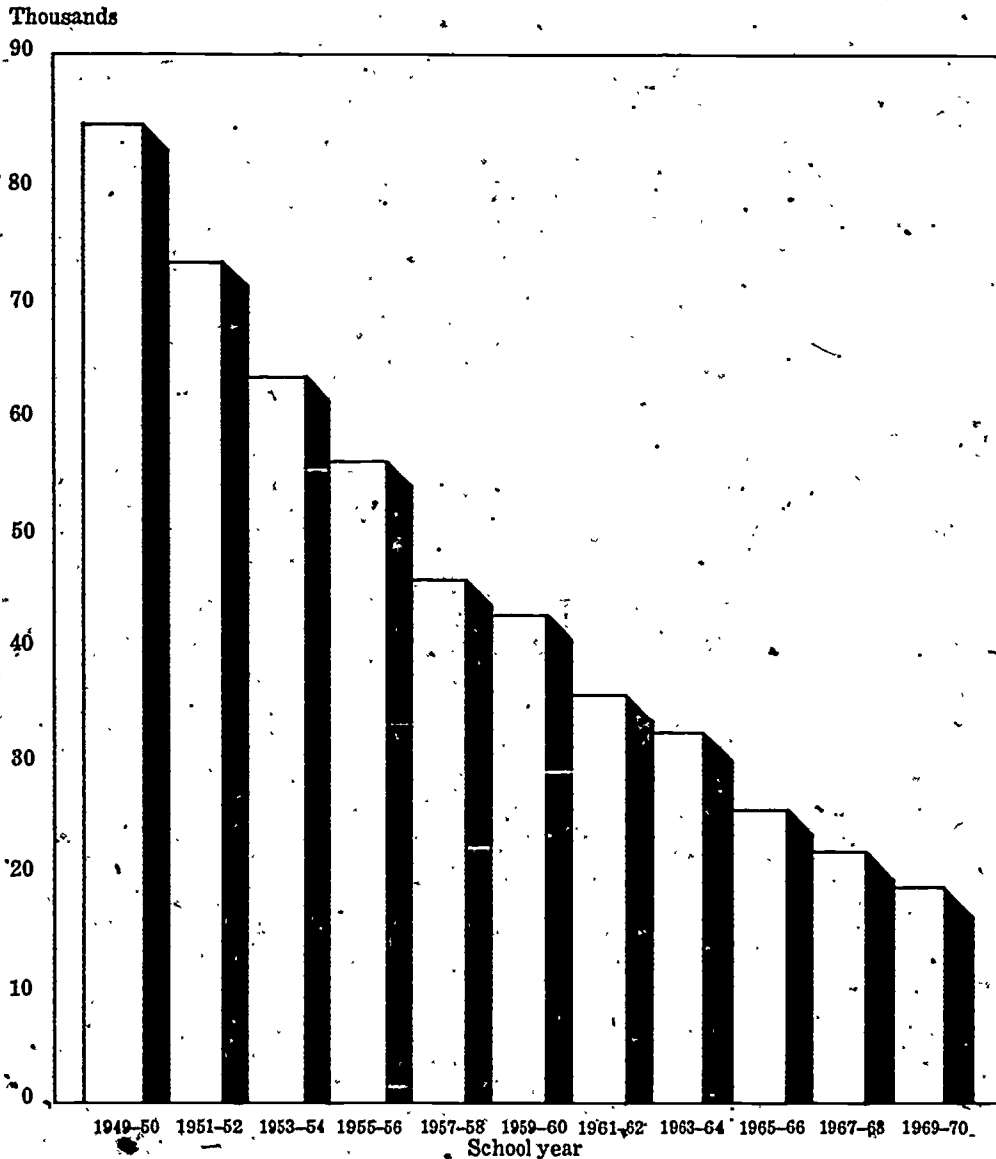
⁸¹*Milliken*, concurring opinion of Mr. Justice Stewart, at 3.

Beyond the experience of the metropolitan or regional government movement, the history of school consolidation might also prove informative. The consolidation of school districts is an ongoing trend. The dissent by Justice Marshall in *Milliken* cites the data for

Michigan. the State had 7,362 local districts in 1912, 1,438 in 1964, 738 in 1968, and 608 in 1972.²² The national trend following the same pattern is clear from chart 1.

²²*Milliken*, dissenting opinion of Mr. Justice Marshall, at 16.

CHART 1
NUMBER OF PUBLIC SCHOOL DISTRICTS: UNITED STATES, 1949-50 TO 1969-70



Source: U.S. Department of Health, Education, and Welfare, Office of Education, *Digest of Educational Statistics and Fall 1969 Statistics of Public Schools*, figure 1.

In the period from 1949-50 to 1969-70, the number of school districts decreased over 75 percent. It is, of course, true that such national, aggregate figures can serve to obscure certain variations, however, the trend toward consolidation seems clear and it has apparently carried over into the 1970's. The one point that should be made is that the consolidations, for the most part, do not represent urban/rural or urban-suburban consolidations. The separation between urban and suburban districts remains strong but is coming under increasing pressure.

Why has the school district consolidation movement had a different history from that of the metropolitan consolidation movement? The answer lies in the role of State governments. As has been indicated, State legislative constraints made metropolitan consolidations virtually impossible. However, many States have taken a more positive position with regard to school district consolidation. One reason has been the recognition by many State legislatures of the need to foster such reorganizations.

State legislatures have used two means to prompt school district consolidations. They have made major changes in the school reorganization laws, which formerly had required local initiation of a proposal and often majority consent of the voters in each affected district. Areawide votes are now more common requirements. States have further made financial grants available to districts that merge, thus supplying an incentive for action.

The consolidation legislation has taken various forms, some quite drastic. In a number of instances, existing county boards of education or specially constituted county school reorganization committees have been empowered to order a merger without a local popular vote. In others, the law has specified that on a certain date all school districts (or all except those in particular large municipalities or those not operating schools or not containing a specific number of students) would be combined into one school district.⁸³

According to a number of observers, the school district consolidation movement represents the first such consolidation movement in United States history. It is one of the

few instances in which States have asserted their power decisively. No small part of the incentive for State legislators was the financial savings to be achieved by such consolidations. Early resistance to consolidation was overcome by undermining voluntary action. This is in direct contrast to the experience under the general government consolidation efforts of the 1950's or 1960's.

The school district consolidation movement to date has largely affected rural areas where class, ethnic, and racial differences were not primary factors of concern. It would be naive to assume that expansion of this movement to urban-suburban districts would not raise major new issues. The experience is instructive, however, for those who would look to State governments as the initiator of solutions to regional school integration. Clearly, a possible response to the *Milliken* decision involves an assertion of the role of State government.

Throughout American history, States have abdicated a great deal of power to local governments, and there was a revitalization of the dependence on local governments in the post World War II era of suburban growth. However, legal authority still resides in the States, and local governments are creatures of the State. The status of local government is defined by the so-called "Dillon Rule":

The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from its existence all of the municipal corporations in the State, and the corporations could not prevent it. ***They are, so to phrase it, the mere tenants at will of the legislature.⁸⁴

This notion of the powers of local government has been challenged. Judge Cooley in *People v. Hurlburt* (24 Mich. 44; 1871) noted the historical roots of local self-government and concluded that there are limits to the control that the State can exercise over local

⁸³Bollens and Schmandt, *supra*, p. 435.

⁸⁴Quoted in Syed, *supra*, p. 68.

governments. However, the Dillon Rule is currently the widely accepted principle regarding the powers of local government and has been affirmed several times by the Supreme Court.^{85 86}

Under the State supremacy rule, municipalities have two sources of power: home rule legislation and specific enabling statutes. Under this system, education is a State function—administered by local districts.

The question of State control of education is an important issue in the *Milliken* decision. The Douglas dissent particularly stresses the State role. "The State controls the boundaries of school districts. The State supervised school site selection. The construction was done through municipal bonds, approved by several state agencies. Education in Michigan is a state project***the school districts are by state law agencies of the State."⁸⁷ The dissent by Mr. Justice White makes the same point. Given this legal justification, one should explore how State governments can be encouraged to assume a more direct political role in these matters.

Evaluations of the effectiveness and innovativeness of State government are uniformly discouraging. Roscoe C. Martin, in his unsparing critique of the failure of the States to cope with urban problems, describes what he calls the "state mind"—compounded of "rural orientation, provincial outlook, commitment to a strict moral code, a philosophy of individualism"; characterized by a "spirit of nostalgia"; and enjoying only "intermittent and imperfect contact with the realities of the modern world." The "state mind" is reflected in "a hard bitten and almost uniform conservatism," a distrust of big government and especially the Federal Government, and a dislike of cities and especially big cities. It accounts for the failure of the States to modernize their constitutions and to rally the leadership and find the revenues for the solution of urban problems.⁸⁸ Many who have risen to power in the States are those who have succeeded in this general environment, and it is unlikely they will risk losing power

by this kind of approach. Reapportionment of State legislatures in recent years has added to the suburban orientation of many State legislatures, contributing to the pessimism expressed by Martin.

One strong impetus for change at the State level, however, is the concept of the New Federalism. Taking into account the great diversity of the States, the New Federalism attempts to redefine the role of the States. Sundquist and Davis present a plan which would change the emphasis in State-Federal relations from matching funds to competence in State government administration. The key to this approach is that understanding must be arrived at with individual States rather than establishing guidelines for all to follow. If such an approach were to be adopted, it could help revitalize the State machinery. If the Federal Government required the States to update their administrative structures and begin to exercise powers that they have as a prerequisite for Federal funding, changes might be forthcoming in at least several States. It cannot be expected that even under such arrangements all States would choose to comply with the Federal requirements.

A more recent controversy which will have an important impact on the State's role in desegregation as well as general education, is the question of school financing. The recent Federal court decisions in Texas, California, and Minnesota striking down the local property tax as the basis for school funding can potentially have a considerable effect on regional school desegregation efforts and the States' role in education.

Despite the fact that the Supreme Court overturned the *Rodriguez* decision, there are increasing calls for action adjusting school finances on a State basis throughout the country. Pressure for full State assumption of school funding and/or statewide equalizing of school funding will force a new role and new power in relation to schools on State governments.

The adoption of a statewide system of financing would resolve one of the issues the majority of the Court raises in *Milliken*. Under such a system, there could no longer be any question of education being a local function and thus limiting the Federal courts'

⁸⁵ *Ibid.* p. 70.

⁸⁶ Mandelker, *supra*, pp. 95-143.

⁸⁷ *Milliken*; dissenting opinion of Mr. Justice Douglas at 2.

⁸⁸ Sundquist, James L., and David W. Davis, *Making Federalism Work*. The Brookings Institution, 1969, p. 262.

interference. Court rulings or adoption of such plans would clarify that the State clearly is responsible for school district boundaries, and, if such districting resulted in a pattern of segregation, the Federal courts could intervene.

There are those who view the drive toward statewide funding as another way to maintain segregated schools, while giving the appearance of equal opportunity, "the equal financing effort is seen by some as a means of compromising on the integration question. They argue that, if you give the black city schools the money they need to operate them, the blacks will no longer push for integration."⁸⁹ Clearly, if statewide funding becomes a reality, concerned observers will have to insure that it is used to further school integration and not to make segregation acceptable.

State governments should be encouraged to use the technique of aid incentives to achieve consolidation of schools on a regional basis. Such additional aid would not necessarily mean total State control of the education function. It is not true that whoever controls the purse strings must necessarily control all policy decisions. That certainly was not true of Federal control under Title I, as we have discovered.

It may appear to some that my comments so far are in conflict with most of my work on community control. Many observers of community control view it as an all-or-nothing situation. Centralization can coexist with decentralization. There is no reason why certain functions cannot be assigned to the State, some to the metropolitan school district, the neighborhood district, and even to the individual school. Our Federal system of government is an example of how such a structure can function. I see no conflict in stating that the State would have the responsibility for insuring desegregation and equitable funding while at the same time arguing that local communities should have control over personnel practices, budget, and curriculum at the individual school or district level.

Beyond the political alternatives suggested

as possible means to achieving area integration, further court action is still possible. The courts' decision in *Bradley v. School Board of Richmond* required school district consolidation. The difference between *Milliken* and *Bradley*, according to the majority, lies in the differences between the two State constitutions and statutes. Education in Virginia is, according to the majority, so clearly a State function that urban-suburban consolidation can be ordered.

The district court judge in the Richmond case noted that school assignments cannot be built on segregated housing patterns. He noted, "school authorities may not constitutionally arrange an attendance system which serves only to reproduce in school facilities the prevalent pattern of housing segregation, be it publicly or privately enforced. To do so is only to endorse with official approval the product of private racism."⁹⁰ He further noted the parallel between reapportionment cases and school district boundaries, indicating that both are political creations which must be altered to meet the demands of the Constitution. The judge concluded by noting that the State cannot escape its obligation to insure equal access to schools by delegating or relinquishing its authority to local governments.⁹¹

This statement by the district court judge has wide implications for all government services and can be applied to fire protection, police, water supply, sanitation, etc. The decision is broad enough to mandate State responsibility for all services. The same impact is evident in the implications of the *Serrano* decision. Such a thrust would, of course, reverse the historical relationship between State and local governments. The imposition of the remedy proposed in the Richmond case could effectively destroy local autonomy and would be forcefully resisted by local governments. Some readjustments in the division of power and responsibility, however, might be forthcoming.

The lower courts in Michigan did not take such a broad view, even though they recommended metropolitan consolidation. The dis-

⁸⁹Taylor, "The Richmond Decision" in the *Washington Post*, Jan. 16, 1972.

⁹⁰*Ibid.*

⁹¹Grant, *supra*.

senting opinions in *Milliken* made an important point regarding the States' role. It has not been a decision of the States to segregate the suburbs; rather it has been the nondecision of the States regarding issues such as zoning which have produced the current situation. This nondecision is a reflection of the general reluctance of State governments to act on local issues.

Recognition of the past failure of States to act, combined with an interest in making them more viable governmental units, offers some direction for the future. Unfortunately, the past history of attempts to reorganize and enhance the role of State governments has not been promising. Local party structure and local interest groups have benefited greatly from constraining the sphere of operation of State governments, particularly in relation to

suburban governments. These local representatives exercise the major power in State governments and are unlikely to be receptive to any movement which would find the States asserting a new role infringing on what they perceive as matters of local prerogative. The current financial crisis for State and local governments might offer the most effective pressure for change. The need to review funding arrangements offers the opportunity to review governance and structure.

It would be naive, however, to assume that the political circumstances which produced the present distribution of power and functions between States and localities can be ignored. Federal pressure and incentives can provide some of the stimulant necessary to foster rethinking these questions, but there must be interest and concern within State leadership to move in this direction.

CHAIRMAN FLEMMING. We are deeply indebted to Dr. Gittell for the political science perspective of this issue. We are happy that you are here to present a 10-minute summary of the very fine paper that you have made available to us.

DR. GITTELL. The perspective I took, given the *Milliken* decision, is what we know about the political circumstances in the States and localities that would indicate some direction to move in, notwithstanding the fact the *Milliken* decision itself might influence that behavior.

What I suggested was, there are two general areas of experience that are particularly relevant in terms of consolidation of local governmental units. One is our experience over the late 19th century and early 20th century. The second area is that of school district consolidation.

The paper points out a real change in the terms of the politics of consolidation from the latter part of the 19th century through the early part of the 20th century to the post World War II era. In the earlier period, expansion of city boundaries, city-county consolidation, and separation were more acceptable solutions. State regulations of that era were flexible. The earlier history shows expansion of city boundaries and a lack of concern for the autonomy of local areas. The vote on consolidations was an areawide vote. The citywide population represented a majority of that vote; the individual units not part of the city were often overridden.

What we find in the period after World War II, not divorced from the kind of movement that took place, its racial character was a reversal in State regulation on consolidation, which is not very restrictive and requires individual units to vote in favor of consolidation to carry forth a consolidation plan and any kind of metropolitan consolidation across the board. Obviously, that is a negative indicator in terms of any movement towards consolidation within the metropolitan area. The paper indicates some of the results of voting during the post World War II period around the country in large metropolitan areas, all of which are negative.

Our experience, except for an occasional number of instances, is that consolidation has taken place within a county. We have generally negative results in terms of metropolitan consolidation.

The other experience is the school district consolidation around the country. In that, you have the opposite result. Either through State legislation or grant-made arrangements, we have successfully encouraged consolidation of school districts. The number of school districts by State and nationally has been reduced as a result of that movement, which is primarily a post World War II movement. Those districts are, however, largely rural and/or suburban. We have no experience with urban and suburban units.

While there is a positive result, it is pretty obvious that population characteristics or the political issues that we faced in metropolitan consolidation are not evident.

The important factor is the role of the State. If you are not dealing with the legal technicalities of the problem as described by the first panel, much hinges on the output as a result of *Milliken* and what role State government plays in this arena.

The record on that is quite negative, except in that rural school consolidation experience. We had a whole series of efforts and tons of literature asking for revitalization of State governments over the last several generations and the movement on the part of the last administration and the Johnson administration to encourage Federal action which would stimulate State leadership so the States would assume their proper roles vis-a-vis efficient administration and dealing with the problems of metropolitan areas.

The results have been minimal. However, the pressures have grown. It has been mentioned that the *Rodriguez* decision brings pressure on the State level regarding school financing. Certainly, the New Jersey decision has the legislature concerned about what the State's new role should be in New Jersey vis-a-vis State-financed education. A number of highly urban, particularly Northern, States are dealing with equitable funding for education. Moving in that direction might lead to restructuring in terms of metropolitan consolidations. The key issue is how much initiative States will take combining financing reform with revision of boundaries. The paper is skeptical about those possibilities because State policy is a product of local politics and interests.

State legislation is controlled by suburban legislators who are not likely to be encouraged by this kind of plan. The question is whether financial pressures can be used as a handle for encouraging consolidation.

Certainly, States have not been involved in urban as in rural school district consolidation along metropolitan lines. The Federal Government has not taken a position either. Such commitments and policies would have to be developed.

The paper relates to another issue that is becoming more significant as a result of the *Milliken* decision. That is the opposition within the black and Chicano and Puerto Rican community to moving towards consolidation because of the fact it might undermine the power developed within those communities. The movement towards community control and black-controlled schools has become more important to people in those communities. Already we have strong objections raised. Mayor Hatcher was first to raise the question in terms of looking at metropolitan consolidation plans as a means for undermining the power of the black community in the city.

The people in the Detroit NAACP struggled with that issue in terms of whether they should even bring the *Milliken* case to court. Community control and integration are received by many as conflicting issues. These concepts are not in conflict. If you view community control on a local school level, there is no reason that distribution of power in different areas of decisionmaking cannot be made from the State to the metropolitan district to the local districts to the individual school level.

There is no reason to think you must choose one position and not the other. It is also true that State funding for education does not necessarily mean destruction of local discretion in the operation of schools. I suggest in my paper that our experience under Title I is proof of that. The Federal Government under Title I did not control what happened to those funds. The notion of who controls the purse strings controls the decisions is not necessarily true.

The general conclusion of the paper is rather negative. I think some of the discussion in the first panel indicated moving away from the battle for integration in education and towards housing. I would suggest any effort to move toward integrated housing will not be well received in suburbia. Obviously, the environment is not conducive to talking about consolidation on any level. It would seem to me, however, that there is some wedge to have the States move in. Our own commissioner of education has stated no school integration can happen except on a metropolitan-area basis. There are others who feel that way. That offers the greatest hope.

CHAIRMAN FLEMMING. One of the reactors in connection with this presentation is Mr. Gary Orfield, research associate of The Brookings Institution and a former Scholar-in-Residence with this Commission. We are happy to have you with us.

MR. ORFIELD. In reading the paper one thing that struck me mostly was the statement that Professor Gittell saw no contradiction between a metropolitan remedy and substantial local control. Dr. Gittell has been one of the most influential academic commentators on the community control movement. I think this is a significant statement on an issue the Court was clearly troubled by in the *Milliken* decision. The Court was troubled by the prospects of becoming a super-legislature and not having a structure to manage schools. I strongly urge Dr. Gittell to develop a model of how school policymaking in desegregated cities would be decentralized. I agree decentralization to the individual school level is by far the most important and by no means incompatible with the metropolitan remedy.

Legally, I think any scholar of State and local government will agree that Dr. Gittell's conclusion is right that State governments exercise vast power on local agencies and school districts. The Supreme Court did not choose to recognize that. It is almost universally accepted among political scientists. The Court chose to give constitutional status to the idea of localism in the country although local control of the schools is an ideology not based on fact.

Many of the school systems were not constructed on the local levels but built as a result of statewide movements, powerfully influenced by State departments of education. This political history makes it very difficult for the Court to actually say the State governments don't have a role in providing remedies of these violations. Constitutional law decisions in the Supreme Court, however, often turn more on perceptions of general social conditions than on strictly legal issues. The Supreme Court was wrong on these issues. The State does have a strong role.

What can political scientists say about the *Milliken* decision and how it will work out and further cases? I think we can say a few brief things.

Metropolitan institutions work already in a few places. The few existing metropolitan government consolidations seem to function reasonably well and come to terms with areawide problems. We know we have a large number of school districts operating on a metropolitan basis. We have large areas where schools are organized on a county basis. There are a number of metro desegregation plans in Florida and South Carolina and North Carolina. Also, Nevada, Tennessee, and other States. They seem to be working out well without any substantial loss of white students.

We have had experience with school consolidation. That experience is largely a rural experience. We don't have a great deal to say about consolidating suburban systems. We have a body of political literature analyzing the community consolidation movements that gives us ability to predict with a high level of certainty that it is not going to happen voluntarily. It happens in a few circumstances in the United States. They have been special. The most recent is in Indiana. The schools were excluded from the machinery established in the Indianapolis countywide Unigov.

Another interesting political development is that we are beginning to see a constituency developing among institutions in the society for the metropolitan remedies, with movement of central cities into this litigation. They now recognize they have a strong interest in this litigation. It may become apparent to the suburbs that they also have a strong interest in this litigation. We may begin to see a new political constituency for it. The recent elections were interesting from a political scientist's perspective. As far as I know, the busing issue did not figure substantially in defeating any candidates such as Congresswoman Schroeder, who defended the controversial Denver integration plan. She survived.

What kind of data do we have available? There is a lot of information on State powers, empirical studies on decisionmaking running against the grain of the Court's decision, for whatever worth that might have. I think it may be possible to draw on analogies from other forms of metropolitan governments to provide structures of metropolitan governments of school systems that might answer some of the Chief Justice's worries. I think they are legitimate worries.

The Supreme Court did not have models for how schools would be governed. They did not give the lower courts a chance to devise a remedy. There is a need to think about democratic control and decentralization within the system. I think that is a profitable area of investigation.

Another thing that political scientists should be able to talk about concerns the cities as institutions, a major preoccupation of students of urban policy. What is going to happen to the future of the cities as institutions if we don't move in this direction? How can we prevent what is going on now? When you look at Detroit and realize that they lost 20 percent of their job base in the last 4 years of 1969 to 1973, or look at the differential in property tax and what it means for education expenditures, you see the central city in very severe trouble. You can grossly relate that to the fact, to the migration effect of getting increased minority-dominated school systems. That is a problem that ought to enter into this litigation.

Something that probably seems true in the minds of the Justices is, if you don't do anything, somehow things will stay the same. That runs against exactly what we know. If we don't do anything, things will get worse. The inner suburbs will likely be more vulnerable to rapid ghettoization than the central city. They have smaller bases. Political scientists could help with housing violations. There was a good deal of evidence in the Detroit case. More could be produced on the role of HUD and a variety of other governmental forces.

What can be done within the *Milliken* decision? There is a liberal tendency to say this is the end of the line. If you look at the structure of the cities around the country, you realize this decision, as Mr. Nabrit said, gives us a clear path for litigating desegregation complaints within any major city. There are many major cities that have a substantial minority of white students.

This is true of the majority of suburban communities going through racial change now. There is a substantial minority movement into some suburban areas. In Washington, more than 30 percent of the black students are in suburban schools. In Baltimore County, there was an increase of 12 percent of black enrollment in the county. Whether we get remedies that will absorb the new students is important. Otherwise segregated ghetto schools will spread into suburbia. That can be done within the context of existing law. I guess I have overrun my time.

CHAIRMAN FLEMMING. Thank you very, very much. We will have further discussion with you. I am happy to present now Professor Joe Feagin from the University of Texas, who currently is with the U.S. Commission on Civil Rights as the Scholar-in-Residence.

DR. FEAGIN. I think Dr. Gittell's paper strongly underlines the political importance of the *Milliken* decision. What I would like to do is give emphasis to some things she said and perhaps go beyond them a bit. Let me point out what I consider to be two or three major and political implications of the decision.

Ten years from now social and political historians will look back on the *Milliken* decision. This decision will loom as large as the *Brown* decision in the ongoing racial, political, and legal history of the United States. For the last two decades the move has been to slowly give equal educational opportunity to black pupils in the United States. This decision marks a turning back from that 20 years of advancement since 1954. I think the critical point is that the Supreme Court, the highest court in the United States, has now given official sanction to separate and unequal education for black children and perhaps for other minority children in our larger urban areas.

It is truly a *separate and unequal* decision in regard to large metropolitan areas. In this sense, the *Milliken* decision has given a seal of approval to demographic and political trends which have been occurring in our large metropolitan cities and areas for a number of years now. Residential segregation, suburbanization, and the resulting decreasing tax base of the central cities have made an economic and political fact of life that is separate and unequal. The Supreme Court has now sanctioned that. I think there is no way out of that conclusion.

Mr. Justice Stewart's concurring opinion notwithstanding, the problem of segregation in our larger cities is a *metropolitan* problem. The solution to that problem has to be a metropolitan solution. An example of what is going to happen comes clearly out of the *Milliken* case. The district court in Detroit has been ordered by the Court to provide a desegregation plan that will cover the city of Detroit only. It is a plan which will eventually increase the segregation of black and white schoolchildren in metropolitan Detroit. In the short run, the plan may decrease segregation. In the long run, focusing on central cities themselves, it will increase the segregation of black and white schoolchildren in our larger metropolitan areas.

The basic reason is the increasing suburbanization of whites that this kind of a plan will foster together with the decreasing tax base that is available to central city school systems. So, we have and will continue to have separate and unequal education in our larger metropolitan areas.

Moreover, the *Milliken* decision flies in the face of political realities that social scientists have recognized for years. Areas such as Detroit are metropolitan areas if you look at them economically, at their job distribution, at transportation systems, and at dozens of other social, economic, and political aspects. Detroit is a metropolitan area. I think Justice Douglas in his dissent was on target. "Metropolitan treatment of metropolitan problems is commonplace. If this were a sewage problem or a water problem or an energy problem, there can be no doubt that she [Detroit] would stay well within the constitutional boundaries if she sought a metropolitan remedy."

The point is metropolitan areas have sought remedies for many, many other urban problems. It is almost a must for the areas to look at problems in a metropolitan perspective. A metropolitan area is a political and economic unit. School district lines have been drawn and redrawn for a variety of reasons already and are continuing to be redrawn. They could easily be redrawn for black students' greater education.

The second implication I see is one touched on already. That is that the Supreme Court is increasingly as a result of the Nixon strategy sensitive to public opinion and election returns. It is sensitive to the immediate political context. The *Milliken* decision reflects Supreme Court acceptance of public opposition to cross-district pupils. In recent surveys, opinion runs seven to one against interdistrict busing. It is a highly politicized decision. The Court has behaved like a Congress reacting to fears in its white constituency. I think it is clearly a victory for the Nixon political strategy of packing the Court with Justices extremely sensitive to political opinions of rank-and-file citizens.

These are Justices who, in the matter of the 14th amendment rights, bow to the weight of the public opinion, at least four of them. I think it stands in contrast to the *Brown* decision. If you had taken a poll at the time of the *Brown* decision, it would be that the Supreme Court was flying in the face of the majority of public opinion in this country.

I will make one final point. The seriousness of what the Supreme Court has done is underlined by the fact that the executive branch seems to be doing the same thing. They, too, have affirmed a separate and unequal approach to desegregation or segregation in our larger metropolitan areas.

I have here a Xeroxed copy of an article from the *Baltimore Sun*. In this story Mr. Peter F. Holmes of the Department of Health, Education, and Welfare—the Federal official in charge of overseeing the desegregation of Baltimore public schools—says it is impossible to achieve full integration of the urban, largely black, educational system. The fact of the matter is that in a school district 70 percent black like Baltimore you are going to have all-black schools, and there is no getting around that. It is there. It is a reality. That comment is from Peter F. Holmes of HEW.

CHAIRMAN FLEMMING. Thank you very much.

Mr. Horn?

VICE CHAIRMAN HORN. Dr. Gittell, I will ask for clarification. You cite the difference in mood in law as far as consolidation. In the post Second World War period there was a rapid annexation. Cities moved out to grab territory in advance of the people's arrival as well as after the people arrived.

Is there any evidence in either the political science or the legal literature as to the relationship between race as a factor in determining the outcome of elections on annexation or consolidation? I don't mean the metropolitan government type. I am talking about the thousands of annexations that took place in this country in the post world war period. Is there any literature on that?

DR. GITTELL. I don't know of any empirical study over a period of time. The only evidence is statistical. The tightening of requirements in State legislation came after the movement of blacks to the inner cities. I don't think one can avoid the suggestion that the race factor must have been a factor in the changes made. Specific votes in the context you are putting it, in an analysis of those votes, I don't know.

VICE CHAIRMAN HORN. There was a great loss in land in the twenties before race became a consideration.

DR. GITTELL. That is the point of my paper. In that period, either State legislation allowed for that to happen or there was no reaction against it. In post World War II, where change in population movement is racial change in the composition of the population, that somehow the laws get tightened up, I would say it is a factor.

VICE CHAIRMAN HORN. Do we have an analysis of the 50 States and the legislative votes after the Second World War and the relationship of what happened in relation to race?

DR. GITTELL. No.

VICE CHAIRMAN HORN. I have heard some say for years that race caused the move to the suburbs. There are few blacks in Minnesota. I wonder what is happening there.

DR. GITTELL. I would say race is not exclusively an issue.

VICE CHAIRMAN HORN. I have one last question. This is to Dr. Feagin. Would you believe metropolitan solutions should come about through metropolitan consent? Presumably, political scientists have had a feeling that the people ought to decide the issues, or at least some of them, for themselves. Do you feel "consent" on a metropolitan basis is essential whether we talk about education, rapid transit, or whatever? We lost a rapid transit issue in a southern California election last week. How do you feel about it?

DR. GITTELL. I have already indicated in the paper and my statement that it seems to be the only way such plans are going to be acceptable, recognizing the reality of State politics, is to develop incentive arrangements for encouraging consolidation to take place. It is obvious that as long as each unit votes independently it will not result in consolidation. It is my view you are not going to get State legislation to be mandatory for an entire metropolitan area. We would probably be in the courts for 100 years on that issue.

From the perspective of my paper in response to the request, what do you do, given the *Milliken* decision? We have to look for a way to get some of those plans out of the way. There is a plan that came out of Boston last week. It calls for metropolitan district consolidation with local control. It seems what we are going to have to devise are means such as those. If we argue the point you are raising now, we will get lost in the same jungle we are in.

VICE CHAIRMAN HORN. Is there a reaction?

DR. FEAGIN. The rights of the black children to an equal educational opportunity take precedence over majority opinion. It is clear that probably in every central city that has had a desegregation plan imposed on it by a court, if you had taken a vote, the people would have

voted against desegregation. I think expanding desegregation plans to the metropolitan area does not raise new issues as to whether the majority vote of the whites in central cities should take precedence over the legal rights of the black child.

VICE CHAIRMAN HORN. Where there is a constitutional right involved, don't you believe that, if the procedure for securing consent in local electorate matters in an area results in discrimination and is not satisfactory, that in such an instance the constitutional right should prevail over the consent process?

DR. FEAGIN. Yes. I think there is much more you could do to improve the relations between the suburban areas and the cities. I think Boston is a classic example. There has been a tremendous failure of leadership, particularly in Boston itself. Many white leaders in Boston told the people they would never desegregate in Boston. If you tell people that long enough, you are going to have serious problems when you eventually have to desegregate the schools.

If the courts and leaders, Presidents, tell the people again, again, and again, the metropolitan remedy will not happen. If it does happen, people will be unprepared. There is probably something you can do to encourage the white population to accept these kinds of records. So, I would go beyond.

VICE CHAIRMAN HORN. You mentioned poll data. You are probably correct that, if you sampled or held an election on the issue in any urban area, that the people there would not favor desegregation of the public schools. Do you have data showing the growing "antibusing" attitude in the black community which we read about occasionally and which seems to reflect attitudes perhaps similar to whites but held for different reasons because the burden has been placed on the black rather than the white children to move to the educational opportunity. Do you see changing attitudes in the black community as to that? Mr. Orfield?

MR. ORFIELD. I think the poll the Commission did was informative in showing a substantial majority of blacks in favor of busing when they were asked if that was the only way to achieve the goal of integration. Every poll I have seen shows eight or nine to one black support of integration.

CHAIRMAN FLEMMING. In the interest of letting everyone participate in this discussion, I would like to recognize Commissioner Freeman at this time.

COMMISSIONER FREEMAN. You state that throughout history the States have advocated a great deal of power to local governments. In your reference about the funding of schools by the State, you say "pressure for full State financing." You assume statewide equalization will force a new role and power on State governments in relation to schools. Would you clarify? It would seem it really may not. You say this is the power they had in the beginning. It is not really a new power. Is it not the State resuming responsibility it had in the beginning?

DR. GITTELL. Or taking on something it did not take on before. While it is true I paint a picture that indicates a lack of State initiative in these areas, I suggest the present financial crisis and ineffectiveness of the property tax, which is a major source of revenue for school districts, is forcing reconsideration on the part of the States in terms of ways in which resources can be allocated for financing education that go beyond the property tax, that would be statewide in nature.

That may change from how it has been in the past. There is evidence that four or five States are seriously considering what kinds of programs and plans they can adopt to create either some form of equalization or take on a full State funding. If they take on a full role, that is entirely a new role. I suggest it might lead to questions of structure in governments and other issues which the States had previously ignored.

COMMISSIONER FREEMAN. You cited the *Rodriguez* decision and said that there are four or five States which are trying equalization programs. Would you comment on the extent to which the State has an affirmative duty without regard to whether it wants to do it or not and the extent to which pressure should be brought to get additional States involved?

DR. GITTELL. I have heard different attorneys interpreting the decisions of the Court. Some say on *Rodriguez* that we really have a way to go. In the legal end of it, the constitutional testing end, there are many people in the country working on that issue of forcing the State to take on that responsibility.

On the political end, there are other pressures forcing States to consider the issue. There are several studies and a number of organizations making that a major issue in terms of their effort. New York and California are two. They are forcing the issue of political equalization of funding for school districts. While I have mentioned only four States seriously considering it, there are movements afoot that are more widespread and meaningful on a political level.

COMMISSIONER FREEMAN. Would you give examples of those pressures?

DR. GITTELL. Specifically, in New Jersey and California, there are statewide organizations developing data showing inequities as a result of the present condition of funding for school districts. Quite extensive organization exists on the local level of community people to back that kind of issue for forcing the State to take action.

CHAIRMAN FLEMMING. Mr. Ruiz?

COMMISSIONER RUIZ. William Taylor reacted to the legal implications the panel spoke about; that is, of an evolutionary process apparently taking place outside of court decisions. Your paper focuses on the assertion of local autonomy and the slowdown of consolidation.

We know, as far as California goes, it never goes with the Nation. Are blacks in Los Angeles County, generally speaking, desegregating themselves throughout the county?

As you know, we have a black mayor. Our State superintendent of public schools is an elected black. We elected a black lieutenant governor. In East Los Angeles, Chicanos refused to consolidate themselves into an independent city in favor of dismemberment by members from the surrounding communities.

Would you say this is a voluntary desegregation by an ethnic group to better integrate itself with the surrounding community or do you simply think this is simply a California phenomenon?

DR. GITTELL. I would have to know more about it. I would say there is a lack of gain in separation that was a factor, not contradicting the other interest. I don't really know enough about the situation.

VICE CHAIRMAN HORN. I know I raised a question as to whether the constitutional standard should be disposed of in local areas. In the dissertation it was brought out, insofar as that is concerned, as long it is applied to race it should be decided that way. In the case of *James v. Valtierra*, where there was a vote held on public housing, it did not violate the Constitution, absent the showing a requirement was aimed at a racial minority. So, there is a California case on that.

Thank you, Mr. Chairman.

CHAIRMAN FLEMMING. Mr. Buggs?

MR. BUGGS. Dr. Gittell, you indicate in your paper that the adoption of a statewide system of financing will resolve one of the issues, and that under such a system there could no longer be a question of funding. Why would such a system bring about any change, inasmuch as the States regulate the schools now?

DR. GITTELL. That is taken out of context. From a political scientist's point of view, there is no question in any of our minds that the Court has made a mistake. My statement on that precedes that statement.

CHAIRMAN FLEMMING. Thank you very, very much. This has been a very valuable contribution.

Our next panel will deal with the educational implications. Our speaker will be Dr. Thomas Pettigrew, professor of sociology and social psychology at Harvard University.

EDUCATIONAL IMPLICATIONS

**A Sociological View
of the Post-Milliken Era**

**Thomas F. Pettigrew
Harvard University**

I. Introduction

Imagine yourself as an amoral social scientist who was called in as a consultant by segregationists back in 1954. Imagine further that you were requested to design an effective strategy of blunting the impact of the U.S. Supreme Court's historic decision against de jure public school segregation by race. In retrospect, you might have recommended the following procedures.

(1) Stall as long as possible; appeal every desegregation decision; plead for "time" and use the gained time to bolster popular resistance to the process; and deny in every way any claims that desegregation is morally "right" and historically inevitable.

(2) Encourage politicians and the mass media to emphasize the immediate dangers of the process to educational standards and the welfare of white children. And utilize these aroused racial fears in organized and publicized resistance to school desegregation.

(3) Isolate the Federal courts in their desegregation initiative by making certain that neither executive nor legislative action at the State or Federal levels supports the judicial rulings. Presidents, for example, can be persuaded to denounce violence but continually reiterate their personal opposition to the process.

(4) Try at first to contain the process in the ex-Confederate States as if segregation were strictly a Southern problem. If and when this fails, exploit the growing Northern and Western resistance to form a national political base for developing racial segregation as a Presidential issue. The defense of racial segregation may be made

more respectable and credible by packaging it in such ostensibly nonracial labels as demands for "neighborhood schools" and no "busing."

(5) Further these trends by ensuring the failure of newly desegregated institutions and making the costs of racial change appear excessive. Then secure the services of one or more social scientists who will authoritatively assert that "busing fails" on the basis of carefully selected evidence.

(6) Be careful to prevent desegregated institutions from evolving into integrated ones; this can best be done by continuing to apply traditional methods of placing the major burden for the change upon black Americans. Thus, avoid efficient transportation planning and insist on one-way busing for black students only. Enlarge on black disenchantment with these arrangements by offering to increase black employment in and apparent "control" of segregated schools. Then assert that "black people don't want desegregation either," thereby defusing the moral thrust of the movement.

(7) Expand private schools as rapidly as possible so as to drain the public schools of middle-class whites and to pave the way for decreased expenditures to public schools.

(8) Remember that demography is on the side of segregation. The last and most effective urban bastion of resistance is the combination of intensive housing segregation with the impenetrability of the boundaries between the central city and its suburbs. Place the highest priority on maintaining these housing patterns and the sanctity of municipal boundaries. Indeed, use such Federal programs as urban renewal, concentrated public housing, so-

called "model cities," VA and FHA mortgages, highway construction, and "revenue sharing" to enhance these seemingly "natural" barriers to all forms of racial desegregation. It can always be maintained later that this system of "dual cities" instead of "dual systems" was "****caused by unknown and perhaps unknowable factors****"

It never occurred to segregationists, of course, to seek such social science counsel back in 1954. Nor, perhaps, was the state of the art in social science at that point advanced enough to have been so foresighted. No matter, however, for white America unerringly evolved the strategy anyway over the past two decades. The narrow 5-4 denial of metropolitanism in *Milliken v. Bradley* by the Supreme Court in July of 1974 marked the culminating act in the scenario.

Remarkably enough, despite the operation of these intense methods of resistance, considerable racial desegregation has taken place in the Nation's public schools. The sharpest gains came in the South during the late 1960's and early 1970's. Black children in all-black Southern schools declined from 40 percent in 1968 to 12 percent in 1971; and those in predominantly white schools rose from 18 percent in 1968 to 44 percent by 1971. Indeed, by the fall of 1970 a greater percentage of black children in the South attended majority-white public schools than in the North (38 percent to 28 percent). A more sensitive indicator, the racial segregation index (RSI),²² reveals the same trends. Farley (1974) has demonstrated that 42 Southern urban districts nearly cut their degree of student segregation in half between 1967 and 1972 (from 88 to 48). This compares to only modest reductions during these same 5 years in 8 Border urban districts, (from 80 to 69), 62

²²The racial segregation index is another application of the widely-used dissimilarity index that determines how far the distributions of two populations are from a random pattern. The dissimilarity index is best known to readers of race relations research as an indicator of housing segregation (Taeuber and Taeuber, 1965). Here schools are substituted for neighborhoods as the unit of analysis. And unlike the index employing majority-white school percentages, the RSI takes into account the percentage of black children in the district as well as the degree of student separation across schools. The RSI can be read as indicating the percentage of the smaller group (usually blacks) who would have to shift schools to produce a racially random pattern across schools.

Northern urban districts (from 68 to 61), and 16 Western urban districts (from 67 to 50). Note that on this index, too, the South reveals the lowest degree of racial school segregation by 1972.

Yet these significant gains should not be allowed to blind us to the fact that all eight of the resistance mechanisms are still in full operation. In fact, the last and most critical of the eight was vastly strengthened by *Milliken*. Perhaps, Justice Douglas was engaging in "extravagant language," as charged by Justice Stewart, when he wrote: "When we rule against the metropolitan area remedy we take a step that will likely put the problems of the Blacks and our society back to the period that antedated the 'separate but equal' regime of *Plessy v. Ferguson*****." But a sober social science assessment certainly leads to the conclusion that Justice Marshall was painfully accurate when he described *Milliken* as "a giant step backward."

Within this perspective, this paper will consider briefly four specific questions raised by *Milliken*:

- (a) How much public school desegregation remains to be accomplished *within* city boundaries?
- (b) How can we generate genuine racial integration in those schools that are desegregated?
- (c) What are the broad demographic trends that make metropolitan efforts in the future essential?
- (d) Could social science be of value in meeting Justice Stewart's "metropolitan criteria"?

II. Further Public School Desegregation Within Central City Boundaries

Even the majority opinion in *Milliken* further confirmed the *Alexander v. Holmes* principle that desegregation must take place within a district where schools can be racially identified. And there is still much to be accomplished within this framework.

Table 1, adapted from Farley (1974), highlights this point with elementary school RSI's for a number of critical cities over the years from 1967 to 1972. The first group illustrates what can be achieved within a central

TABLE 1
 URBAN INDICES OF RACIAL SEGREGATION IN
 PUBLIC ELEMENTARY SCHOOLS, 1967-1972*

	1967	1970	1972
I. Cities with Extensive Court Orders			
Fort Lauderdale	93	80	43
Norfolk	90	67	16
Oklahoma City	97	88	25
San Francisco	67	63	20
II. Mildly Pressured Cities			
Atlanta	95	84	81
Birmingham	94	80	81
Dallas	n.a.	93	89
Fort Worth	93	91	72
Houston	92	86	80
Miami	92	74	67
New Orleans	86	82	80
San Antonio	88	81	78
San Diego	78	72	69
III. Unchanged Cities			
Baltimore	89	87	87
Boston	74	74	74
Chicago	92	92	93
Cincinnati	77	74	76
Cleveland	90	91	92
Detroit	79	80	78
Los Angeles	89	88	87
Milwaukee	88	87	84
Minneapolis	74	72	71
New York	52	53	54
Philadelphia	76	79	81
Pittsburgh	72	85	74
St. Louis	91	88	92
Seattle	65	62	62

*Adapted from Farley (1974). See note 92 of text for an explanation of the racial segregation index; "n.a." means not available.

city's boundaries by a sweeping court order. The changes for Norfolk and Oklahoma City are particularly striking; both were among the most thoroughly segregated of all major urban districts in 1967 and 5 years later ranked among the least segregated.

The second group of cities illustrate the modest gains recorded in this period by a variety of piecemeal measures, such as closing one school, pairing a few others, and busing a small number of pupils. These hesitant actions, usually inspired by Health, Education, and Welfare Department pressures or threats of court action, lowered the segregation indices during this period considerably less than the decisive court orders in the first group. Note, for example, the minor drops in such cities as Dallas and New Orleans.

The largest group of cities in table 1, however, are those whose segregation indices remained essentially constant or even increased over the 5-year span. Significantly, the largest of the Border and Northern urban districts with vast numbers of black students are conspicuous in this third group—New York, Los Angeles, Chicago, Philadelphia, Detroit, Cleveland, Cincinnati, and Baltimore. A number of the cities included, such as Boston, Detroit, and Minneapolis, are now operating their schools under Federal court orders and their indices will have declined sharply. Yet, obviously there is much further school desegregation to be accomplished within these vast school districts which together account for roughly a third of all black Americans.

But the attention to the largest cities often obscures the "mopping up" that remains to be done in the smaller urban districts of the North with limited black enrollments and no need whatsoever for metropolitan remedies. The Nation is dotted with these cities from Portland, Maine, to Eugene, Oregon, and which cumulated constitute a significant portion of the North's school segregation. These cities have tended to act as if the racial desegregation of the public schools was strictly a Southern and big city process that is irrelevant to them.

Consider the schools of Des Moines, Iowa. Only 10 percent of the district's 42,000 pupils

are black. Yet this small percentage is highly concentrated in five elementary schools and one junior high which range from about 52 percent to 80 percent black. Indeed, two of these five elementary schools were just recently built adjacent to the city's tiny black community. Efforts to improve this situation have been modest. The two new predominantly-black schools were designated "magnet" schools and intended to attract whites to them. And a voluntary transfer plan was instituted in 1973. But these limited remedies have failed as they have tended to fail elsewhere. By June of 1974, only 17 white students (1 in every 2,200) and 308 blacks (7.9 percent) were utilizing the transfer plan and furthering racial mix. The Des Moines school district has now asked "a representative committee of citizens to study the problem of school segregation, identify solution strategies, interpret these as recommendations to the Board of Education and the community, and monitor program installation and program outcomes."

There are many such situations requiring attention today. The solutions are relatively simple and do not require metropolitan participation. In Des Moines, for instance, the strategic transportation of less than 2,000 pupils (5 percent of the district) entirely within the central city could fully eliminate racially identifiable schools. *Milliken* should not deter intradistrict desegregation suits in the largest cities from New York to Los Angeles, nor should focus upon the largest metropolitan centers deter action in the many areas such as Des Moines.

III. From Desegregation to Integration

Defenders of racial segregation today often claim that integrationists held prior to 1954 that school desegregation would always be a dramatic success in terms of increased achievement and improved interracial attitudes (Armor, 1972). But actually the original integrationist assertion was not that all desegregation would be effective, rather

the assertion was simply that racial segregation of the public schools in the American context was intrinsically inferior (Pettigrew *et al.*, 1973). Desegregation is a necessary but not sufficient condition for equal educational opportunity across the races. A sharp distinction must be made between more *desegregation*—involving simply the mixture of the races—and *integration*—involving positive intergroup contact with cross-racial acceptance. Now that there is widespread school desegregation in many areas, an important question for education becomes. How do we achieve integration out of desegregation? *Miliken* limits the ideal solution for some metropolitan centers, but it should not delay efforts at making interracial schools more effective. Toward this end, eight conditions that appear to maximize the probability that true integration will evolve in a school can be tentatively advanced on the basis of laboratory and classroom research, social psychological theory, and observation.³³

(1) *There must be equal racial access to the school's resources.* This critical condition means far more than just equal group access to the library and other physical facilities. More important, it refers to equal access to the school's sources of social status as well. It is a compelling fact that the two most frequently voiced complaints in desegregated schools revolve around membership in the cheerleading squad and the student government—both sources of social status.

(2) *Classroom—not just school—desegregation is essential if integration is to develop.* Many so-called “desegregated” schools today are essentially internally segregated. This internal segregation is achieved in many not-so-subtle ways, ability grouping and curriculum separation being prime examples. However it is managed, segregation by classroom does not and cannot provide the benefits that generally attend integration.

(3) *Strict ability grouping should be avoided.* The principal means of separating majority and minority pupils within schools is

by rigid ability grouping across various subjects. Such grouping is often based on achievement and IQ tests standardized only on majority samples. And ability grouping is increasing in American schools, even penetrating down into the primary grades. Some grouping by subject is, of course, necessary; Algebra 2 must follow Algebra 1. Rather it is the across-the-board classification of students into “dull,” “average,” and “bright” that not only tends to segregate by race and social class but through labeling sets the aspirations of both teachers and students in concrete and produces self-fulfilling prophecies of achievement. Told they are dumb and treated as if dumb, all but the most rebellious and self-confident pupils become, in fact, dumb.

Thus school systems, such as those of Sacramento, California, and Goldsboro, North Carolina, that maintained classrooms of heterogeneous ability through more open classrooms and team teaching have tended to demonstrate the most encouraging achievement effects of desegregation. By contrast, systems such as Riverside, California, which increased its use of ability grouping with the onset of desegregation, have tended to show the most disappointing results (Pettigrew *et al.*, 1973).

(4) *School services and remedial training must be maintained or increased with the onset of desegregation.* Typically there is no reduction in local funds but an overall decrease due to narrowly conceived Federal guidelines for Title I monies under the 1965 Elementary and Secondary Education Act. Actually the act does not expressly forbid Title I funds for children from low-income families from following the children on the bus to the desegregated school, for so-called compensatory education and desegregation are most effective when they are combined rather than treated as opposite alternatives (U.S. Commission on Civil Rights, 1967).

(5) *Desegregation should be initiated in the early grades.* Racial isolation is a cumulative process. Its effects over time on children of both races make subsequent integration increasingly more difficult. Separation leads them to grow apart in interests and values.

³³The following section is drawn in part from chapter 15 of the author's forthcoming volume, *Racial Discrimination in the United States* (Pettigrew, 1976).

Coleman (1966) showed that black children who had begun their interracial schooling in the first five grades evinced higher achievement test scores (Coleman *et al.*, 1966; p. 332). And specific studies in Hartford, Connecticut, Ann Arbor, Michigan, Newark-Verona, New Jersey, Bridgeport-Westport, Connecticut, and Riverside all show the best achievement gains for those who begin desegregation in kindergarten and the first grade (Pettigrew *et al.*, 1973). The Coleman data also indicate that the most positive attitudes toward having interracial classes and blacks as close friends are found among white children who begin their interracial education in the earliest grades (Coleman *et al.*, 1966; p. 333).

Following the assassination of Dr. Martin Luther King, Jr., in April 1968, a series of interracial confrontations and conflicts erupted in many biracial high schools. Some observers immediately interpreted this strife as evidence that desegregation "cannot work," that it "only leads to trouble." Yet a diametrically opposite explanation is more plausible. This interracial conflict typically involved black and white students who in the earlier grades had attended largely uniraical schools. The hostile students, then, were unfortunately living what they had been taught; that is, their first 8 years of schooling taught them that segregation was the legitimate American norm and did not prepare them for harmonious interracial contact in high school. It was not desegregation that "failed." Rather it was racial segregation in the formative years that had "succeeded," as it has throughout our nation's history, to develop distrust and conflict between Americans of different skin colors.

(6) *The need for interracial staffs is critical.* Another correlate of the high school strife following Dr. King's murder underlines the importance of black teachers and administrators in the public schools. One study has shown that high school disruptions during 1968-1970 occurred far less often when the black staff percentage was equal to or greater than the black student percentage (Bailey, 1970). To be sure, there are more positive reasons for the development of thoroughly interracial staffs than the prevention of conflict. Genuine integration among students may be impossible to achieve unless the staff furnishes an affir-

mative model of the process. Black students report a greater sense of inclusion and involvement when blacks as well as whites are in authority. In addition, black and white teachers learn the subtleties of the process from each other under optimal intergroup contact conditions—interdependently working toward common goals as equals under authority sanction (Allport, 1954; Chapter 16).

There is growing evidence, too, that the role of the principal is decisive in generating an integrated climate within a school. This fact suggests that it is important not just to have an interracial mix of teachers but a mix of administrators as well.

(7) *Substantial, rather than token, minority percentages are necessary.* Tokenism is psychologically difficult for black children. Without the numbers to constitute a critical mass, black students can come to think of themselves as an unwanted appendage, and white students can overlook the black presence and even perceive it as a temporary situation. But once the minority percentage reaches about 20 percent to 25 percent, blacks become a significant part of the school to stay. They are now numerous enough to be filtered throughout the entire school structure, on the newspaper staff and in the honor society as well as in the glee club and on athletic teams. Substantial minority representation, of course, does not guarantee intergroup harmony, but it is clearly a prerequisite for integration. Not surprisingly, Jencks and Brown (1972) find in a reanalysis of Coleman Report data that schools with 25 percent to 50 percent black enrollment seem to teach their black pupils more than those with 1 percent to 25 percent black enrollment. Tokenism, then, appears not only to exact a heavy psychological cost from black children but may hold fewer academic benefits for them in addition.

(8) *Finally, race and social class must not be confounded in the interracial school.* When the white children of a biracial school are overwhelmingly from affluent, middle-class families and the black children are overwhelmingly from poor, working-class families, the opportunities to develop integration are severely limited. Such confounding of race and class heightens the probability for

conflict. Much of this conflict may be generated by value differences between the classes, but in race-conscious America such class conflict is typically viewed as race conflict. To meet this eighth condition for the development of integration, the inclusion of working-class white pupils and middle-class black pupils is essential. The crucial group in shortest supply are the middle-class blacks, though their absolute numbers have expanded about 14 times since 1940. The middle-class black child, then, should be seen as an invaluable resource for lowering the correlation within biracial schools between race and class.

IV. Demographic and Housing Trends

The fundamental racial trend in population and housing is well-known. It can be capsuled by saying that the central cities are getting rapidly blacker as suburbs continue to expand with whites. But within this wide brush stroke are a number of detailed trends and phenomena that are relevant for the post-*Mil-liken* era in civil rights.

Black Americans have in 30 years transformed from a rural to an urban people; four-fifths were rural in 1940 and four-fifths were urban by 1970. Blacks, in fact, are now more urban than whites (81 percent to 72 percent in 1970). This growth has taken place largely in the Nation's largest central cities at precisely the time these cities were undergoing massive suburbanization of their white populations. The overuse and misuse of the "white flight" notion overlooks that what is odd about the American post-World War II residential patterns was not development of the suburbs by whites but the intense system of discrimination that prevented blacks from following them to the suburbs. Other industrial nations have witnessed comparable rates of suburban growth in their metropolitan areas since World War II without racial motivation being involved.

Some observers, such as ex-President Richard Nixon, would minimize the role of blatant discrimination in excluding blacks from the suburbs and emphasize economics. But this is an insufficient explanation. On economic grounds alone, many metropolitan

areas would have almost the same proportion of their metropolitan blacks in the suburbs as of their whites. Thus, the 1970 U.S. census (1972) provides the following illustrations: in metropolitan Chicago, 54 percent of the whites live in the suburbs compared with only 8 percent of the blacks though 46 percent of the area's blacks would be expected to do so on economic grounds alone; in metropolitan Detroit, the comparable figures are 73 percent, 12 percent, and 67 percent; in metropolitan Washington, D.C., 91 percent, 20 percent, and 90 percent; in metropolitan Minneapolis, 58 percent, 6 percent, and 49 percent; and in metropolitan Baltimore, 58 percent, 5 percent, and 51 percent. These data suggest that black America's economic gains in recent years combine with the considerable range of housing in the suburbs to constitute a substantial potential for a black demand for suburban housing. Such a conclusion is supported by an abundance of survey data that indicate black willingness to reside in racially mixed neighborhoods (Pettigrew, 1973).

This suburban potential in the future may not, however, be met with interracial residential developments. Proportionately, the tiny black population in the suburbs grew faster during the 1960's than the white population in the suburbs. But much of this growth took the form of either "mini-ghettos" (e.g., Pontiac, Michigan) or the spillover of expanding central city ghettos into the "suburbs" (e.g., East Cleveland, Ohio). Salt-and-pepper residential patterns in the suburbs are not as prevalent as commonly thought. Nonetheless, even these mini-ghetto developments are usually easier to service with interracial schools than the massive black communities of central cities. And there was some significant rise during the 1960's in black suburban populations in such metropolitan areas as Washington, D.C., Los Angeles, and New York City—though only 20 percent, 11 percent, and 17 percent, respectively, of even these area's blacks resided outside the central city by 1970.

The past prevention of the natural growth of a black suburban population has more severe consequences for public school desegregation than the total population figures suggest. This is true for three

reasons. First, white families with school-aged children in metropolitan areas reside in the suburbs more than white families in general. Now only about a third of such families live in central cities, contrasted with over four-fifths of metropolitan black families. Second, racial differentials in fertility cause black communities to be markedly younger than white ones. Moreover, presently declining black fertility ratios will not alter this racial age difference substantially for some years. Third, private and parochial schools remove large numbers of mostly middle-class whites from urban public school systems. In Philadelphia, around 60 percent of all school-aged whites attend Roman Catholic schools; in St. Louis and Boston around 40 percent do so. And since only about 6 percent of black Americans are Roman Catholic, blacks are grossly underrepresented in parochial schools. Private schools are less of a tradition in the South, though their enrollments have now grown to roughly 5 percent of the region's school population.

The housing separation of the races is intense within as well as across central city boundaries. Taeuber and Taeuber (1965) showed that by 1960 the housing segregation index for the country's central cities had reached an astounding 86.2; that is, six-sevenths of all the racial segregation possible in fact existed, with 86 percent of all blacks required to move from largely-black to largely-white blocks before a random racial pattern would result. No other residential segregation pattern between two major segments of American society approaches this figure. For example, social class indices and white ethnic indices of housing segregation are generally only half as large. Racism, then, in the form of malplanned government programs and blatant real estate discrimination (Pettigrew, 1975), provides a uniquely intense example of residential separation.

Nor is this *apartheid* arrangement subsidizing substantially (Sorenson, Taeuber, and Hollingsworth, 1974). During the 1950's and 1960's, very modest reductions in housing segregation did occur for the Nation's central cities as a whole. Yet the median 1970 index for 34 Southern cities was still 91; for 12 Border cities, 87; for 53 Northern cities, 81;

for 10 Western cities, 81. In many of our largest central cities, the degree of racial segregation in housing remains almost as extensive as it can possibly get. Dallas has a 1970 index of 96; Chicago and Houston, 93, Los Angeles, 91, and St. Louis and Cleveland, 90. In fact, there is little variation across major cities. The least segregated include San Francisco (75), New York (77), Washington, D.C. (79), and Minneapolis (80).

The significance of these housing segregation data for school segregation is gauged by the correlation between them across central cities. Farley (1974) finds this relationship much closer in the North than the South, in part because there is more Northern variance on both indices. The 1970 correlation between the housing and school segregation indices across 64 Northern urban districts is 0.53 and across 37 Southern urban districts is only 0.27. Several interesting points arise from this analysis. For one thing, both relationships are somewhat reduced by a few medium-sized cities that effectively desegregated their schools despite high levels of housing separation (e.g., Berkeley, Providence, Harrisburg, Pasadena, Asheville, and Charlotte). For another, both correlations reveal that the connection between housing and school segregation is not as close as popularly believed. Once squared, the coefficients of 0.53 and 0.27 indicate that only 29 percent of the North's urban school segregation and only 7 percent of the South's is accounted for by residential segregation.

This demographic perspective prepares us now to tackle the riddle advanced by Justice Potter Stewart in his important, if perplexing, concurring opinion.

V. Social Science and Justice Stewart's "Metropolitan Criteria"

Justice Stewart, in joining the four Nixon appointments to the high bench to form a majority in *Milliken v. Bradley*, left a loophole open for metropolitan remedies in the future that has received considerable legal attention and discussion recently.

This is not to say, however, that an inter-district remedy of the sort approved by the

Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines***; by transfer of school units between districts***, or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.

Stewart also pointedly emphasizes that he detected no findings made in the district court "concerning the activities of school officials in districts outside the city of Detroit***" or "that the differing racial composition between schools in the city and in the outlying suburbs was caused by official activity of any sort."

The interpretation of these "metropolitan criteria" set down by the crucial "swing" Justice is complicated by a number of considerations. One must remember that the two metropolitan cases to reach the Supreme Court, Richmond, Virginia, as well as Detroit, did contain considerable material along several of these lines of evidence. For example, the record of the Richmond case, in which Justice Stewart apparently also rejected a metropolitan remedy, was replete with evidence concerning naked discrimination against blacks seeking housing in the two involved counties (Henrico and Chesterfield). The Richmond case also demonstrated discriminatory activities in the past by school officials in these outlying counties. Stewart might have considered this proffered evidence to be insufficient proof; but we have no way of judging the standards of proof he is requiring for his "criteria."

Recall, too, the extreme degree of housing segregation by race that typifies the Detroit metropolitan area. Only 12 percent of the area's blacks live in the suburbs, and they constitute only 4 percent of the suburban population. Yet even this small segment is concentrated in three communities—Highland Park, Inkster, and Pontiac. Many of Detroit's suburban communities are nationally infamous for their near-total exclusion of their black fellow citizens. Hence, Dearborn and Dearborn Heights are listed in the 1970 census as

having just *two* black families each when 7,487 would have been expected on the basis of family income; Allen Park (1,490 expected), Lincoln Park (2,224 expected), and South Gate (1,279 expected) had only *one* black family each; and at least nine additional Detroit suburbs in 1970 had four or fewer black families.

The role of social science in meeting Stewart's "criteria" is made harder by a particularly puzzling footnote inserted by the Justice. Directing his remarks to his "Brother Marshall," he writes:

It is this essential fact of a predominantly Negro school population in Detroit—caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears—that accounts for the "growing core of Negro schools," a "core" that has grown to include virtually the entire city.

There are many aspects of human societies whose causes are "unknown and perhaps unknowable." But the tight, unremitting containment of urban blacks over the past half-century within the bowels of American cities is not one of them. In fact, most social scientists who specialize in American race relations would agree, I believe, that housing segregation is one of the better understood processes in our realm of study. So well is it understood that mathematical models that usefully simulate the process and its consequences for educational, employment, and income inequities have been widely developed (Pettigrew, 1973, 1975). Apart from what this startling statement reveals about Justice Stewart's knowledge of the relevant social science evidence, it is also self-contradictory. Having declared the preponderance of black pupils in the Detroit city schools to be "caused by unknown and unknowable factors," Stewart proceeds nevertheless to provide an illustrative list of what his lay theory leads him to view as important—"in-migration, birth rates, economic changes, or cumulative acts of private racial fears." One could cynically read this bizarre footnote to mean that the Justice much prefers his own private social "theory" to solid social science evidence.

On a broader level, three interpretations have been advanced to explain Justice

Stewart's position. None of these three are mutually exclusive; all of them may be correct. The importance of metropolitanism to the viability of American democracy and its dependency upon gaining majority support on the Supreme Court make it worthwhile, then, to discuss briefly these three interpretations.

First, it is maintained that the metropolitan cases reached the high court at the wrong time and under the worst possible political climate. Justices, goes this reasoning, are human, too; they are politically sensitive, read the newspapers, and remember who appointed them. They realize the post-civil-rights era reaction is in full swing, that Presidents now openly flaunt racist beliefs while Congress busily passes antibusing riders on educational funding bills. They may also even fear the possibility of antibusing amendments to the Constitution. In such a climate, it is argued, legal concerns fade in the wake of political realities. Justice White, in his blunt dissent, forcefully advanced this explanation for the majority's ruling:

Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret. I dissent.

Second, many observers believe that the Detroit case and its proposed remedy were simply so massive in scale as to scare even those who might otherwise look favorably upon metropolitan solutions. One of Justice Stewart's key summary sentences appears to support this view: "The Courts were in error for the simple reason that the remedy they thought necessary, was not commensurate with the constitutional violation found."

There are, however, reasons for believing that this interpretation is too simple. The Supreme Court could have remanded the case back to the district court for further hearings on a limited metropolitan scheme. Indeed, it could have—at Stewart's insistence as swingman—chosen from a wide range of intermediate steps as opposed to outright rejection.

There is also the Richmond case to consider. There the scale was only about an eighth of Detroit's: 105,000 students attend public school in the contested three-district area. Moreover, about 75,000 of these students were being bused prior to the case, and metropolitanization would have reduced this number to about 65,000 while vastly extending school desegregation. This is a critical point that separates the metropolitan thrust from simply more busing, and we shall shortly return to it. In any event, according to the "massive scale" interpretation of Stewart's *Milliken* opinion, Richmond, Virginia, should have been an ideal case for the Justice to have accepted some form of metropolitanism. But he apparently did not in the 4-4 deadlock with Justice Powell not sitting.

Finally, there is the interpretation that Justice Stewart was acting on his own social "theory."⁴ If the "real" factors are "unknown and perhaps unknowable," as Stewart indicated, then it follows that one "theory" is as tenable as another. Consequently, goes this argument, Stewart felt free to act on his personal social "theory" of how urban race relations operate now in the United States. And this "theory" may well be influenced by much of the current pseudoscience that appeases white American consciences during this post-Reconstruction-like period. (Wattenberg's *The Real Majority* is an excellent example of this genre.) This "theory," borrowing from revealing parts of Stewart's opinion, may consist of the following chain of contentions:

A. Most, if not all, of the racial separation between central city and suburbs has been brought about by "natural causes" largely beyond the reach of the law. Blacks have had heavy in-migration into the central cities where the opportunities for the poorly educated have been concentrated; and their numbers swelled rapidly, too, from high birth rates. Whites have naturally sought better and more expensive housing in the suburbs; and their rising economic prosperity allowed them to do so in far greater proportion than blacks.

⁴This interpretation has been most persuasively advanced by William Taylor, now of Catholic University and former staff director of the U.S. Commission on Civil Rights. The following paragraph benefited from a discussion with Taylor, but he is not responsible for my handling of the idea. A full statement from Taylor will shortly appear in print.

B. Prejudice and discrimination have been involved in this process, to be sure, but they are largely manifested in "cumulative acts of private racial fears." Again, such acts may largely be beyond the reach of the law.

C. The racial desegregation of the public schools is important to provide within established district lines on constitutional grounds. But the special problems raised by an overwhelmingly black school district within central cities are not so severe as to justify drastic remedies. After all, black Americans have made considerable progress as a group in the past two decades, and promise to continue to do so without metropolitanism. Indeed, over time their movement to the suburbs will eradicate the geographical disparity without litigation.

D. Metropolitan remedies are drastic and extreme. They will invariably lead to massive increases in busing and administrative structure—both changes likely to stir up further an already aroused white America.

In short, Justice Stewart's concurring opinion in *Milliken* seems to be undergirded by a social framework that views residential segregation across municipal lines as natural, the school problems created by this housing pattern as not too serious, and the social changes necessitated by metropolitan solutions as too extreme.

It is the contention of this paper, however, that virtually every link in this social "theory" can be challenged by social science research as either flatly incorrect or at best exaggerated. To the extent that this "theory" does, in fact, lie behind Justice Stewart's reasoning, social science contributions in future metropolitan litigation should center on the counter-evidence. Consider once again each central contention of the "theory."

A. Residential separation is one of the least "natural" processes to have developed in American race relations since slavery. The social science research literature on the subject has firmly documented that governmental decisions, particularly those of the Federal Government itself, have shaped and determined much of the pattern we see today (Pettigrew, 1975). Indeed, ever since the first National Housing Act in 1935 each major initiative in housing by the Federal Govern-

ment, furthered racial discrimination—especially between central city and suburb. Public housing, VA and FHA mortgages, urban renewal, 221D-3 and later 235 and 236 housing, model cities (with its original metropolitan stipulations carefully removed by Congress), even Federal highway construction—each in its own way furthered the process in a most unnatural way. Abrams put in bluntly:

***the federal government, during the New Deal period, not only sanctioned racial discrimination in housing but vigorously exhorted it. From 1935 to 1950, discrimination against Negroes was a condition of federal assistance. More than 11 million homes were built during this period, and this federal policy did more to entrench housing bias in American neighborhoods than any court could undo by a ruling. It established a federally sponsored mores for discrimination in the suburban communities in which 80 percent of all new housing is being built and fixed the social and racial patterns in thousands of new neighborhoods. (Abrams, 1966, p. 517.)

State and local governments readily exploited these biased Federal programs and distorted them further as instruments for creating housing *apartheid*. Lewi (1969) has provided a brilliant analysis of how this was done with over \$5 million in Federal funds in Gadsden, Alabama. Real estate dealers, licensed by the States, completed the process by open advocacy of racial segregation, an advocacy that continues throughout the country to this day.

The final part of contention "A" in the "theory" concerning "economic changes" has already been dealt with. We have noted that economics plays only a minor role in accounting for racial segregation in housing.

B. The role of active prejudice and discrimination has also been carefully documented by social scientists; and these findings strongly suggest that this role is by no means simply "cumulative acts of private racial fears" that are likely to be beyond the arms of the law. Rather they are quite likely to fall clearly within the terms of largely unenforced antidiscrimination legislation now on the lawbooks. For example, Johnson, Porter, and Mateljan (1971) conducted a rigorous experiment to test the degree of discrimination in

apartment rentals against both black and Chicano couples in Los Angeles. They found a statistically significant pattern of discrimination which involved not only the availability of apartments but the sizes of rents and extra fees as well. Work done in Gadsden and Los Angeles would not be convincing in a Seattle case, of course. But these studies by Lewi and Johnson *et al.* offer models of the kind of research that can easily be done in any area where litigation is being planned.

C. There is growing evidence in social science that the Supreme Court's 1954 judgment concerning *de jure* public school segregation—"separate facilities are inherently unequal"—applies with equal force in contemporary American society for schools segregated by race by virtue of the antimetropolitan character of our school district lines. Moreover, black progress over recent decades is by no means uniform across the group. Wattenberg not only exaggerates black progress in *The Real Majority*, but he virtually ignores the growing polarization within black America between the haves and the have-nots (Pettigrew, 1975). The blacks with skills and access to equal educational opportunities are, in fact, living proof of the gains of the civil rights movement, and they are increasingly moving ahead in terms of income, education, and employment. But a large segment, perhaps a majority, of black Americans have not significantly benefited from the gains of recent decades. And it is this "other black America," largely out of view of whites—especially whites on the Supreme Court—who constitute the immediate need for sharp structural changes in American race relations. There is still a serious race relations problem in the United States, and particularly in the cores of our major central cities. And it is a problem that is growing worse. We have already noted how housing segregation is not improving at any significant rate (at the 1960 to 1970 rate, racial desegregation in housing would effectively take hold in about four to five centuries).

D. Metropolitan remedies, if well planned, need not be extreme and drastic. In fact, they have the potential of actually decreasing the "cost" of the racial desegregation process. Medium-sized areas such as Richmond, Vir-

ginia, we have noted, can often *reduce* busing with metropolitanism. This is a point that deserves emphasis because it is neither obvious nor has it so far been advanced forcefully by metropolitan advocates. It will not be true for all metropolitan areas. Yet, by eliminating the artificial restraint of district boundaries, metropolitan approaches often make possible new and efficient means of transportation planning that result in less busing for the same degree of desegregation. The demographic basis of this important phenomenon lies in large black communities' having reached the central city's boundaries; this places blacks near large concentrations of suburban whites, since there is generally a gradient of ever-decreasing density of population as one moves out from the urban core.

In addition, any concerns Justice Stewart may have about the possible Kafka-like enormity of metropolitan administrative arrangements can also be eased by careful planning. In the Richmond case, for example, six or seven subdistricts with approximately equal racial proportions were proposed in place of the existing three districts. The new metropolitan structure would have resulted in *smaller* districts; metropolitan remedies need not translate into bigness and the threat of Kafka. But this suggests that future cases in Federal courts that seek metropolitan school desegregation should pay more attention to demonstrating the feasibility and viability of this approach.

VI. Conclusions

This sociological view of the post-*Milliken* era in American race relations has led to a number of conclusions concerning future efforts and directions. In summary fashion, they may be listed as follows:

(1) There is much still to be accomplished within the *Alexander v. Holmes* framework. Some of the very largest cities in the United States—such as Los Angeles, Chicago, and Cincinnati—maintain public schools that are virtually as segregated as they ever were and also have enough whites to develop considerable desegregation without metropolitanism. Easy to overlook, too, are a vast number of smaller cities, such as Des Moines, that have

relatively small black communities but tight elementary school segregation nevertheless. For the Des Moines type locality, ideal solutions are readily available with a minimum of transportation and within central city boundaries.

(2) Desegregation is a necessary means to an end, but integrated schools are the final goal. There is much to be done, both by educators and lawyers, in ensuring that those schools that have been desegregated have every opportunity of evolving into integrated institutions. Toward that end, eight structural conditions of schools that seem to further integration were cited, including equal access to resources, the avoidance of rigid ability grouping and token minority percentages, initiation of the process in the early grades, racially mixed staffs, and socioeconomic as well as racial mixing.

(3) Within the broad trend toward black core cities and white suburbs, there are a number of demographic phenomena which must be kept in mind in viewing the post *Miliken* era. First, *apartheid* across city boundaries is more a function of blatant discrimination against blacks moving to the suburbs than of so-called "white flight." Second, economic differences between blacks and whites play only a minor role in this exclusion of blacks from the suburbs. Third, much of the tiny black population in the suburbs is found in either mini ghettos or contiguous extensions of core city ghettos rather than in salt-and-pepper patterns. Fourth, the consequences for the public schools of the racial separation across city lines are actually more severe than the gross population figures indicate. This is true for three reasons. White families with school-aged children reside in the suburbs even more than whites in general; blacks have a higher birth rate and thus form a young population with disproportionately large numbers of school-aged children, and private and parochial schools in some areas remove large numbers of middle-class white pupils from the public school population.

Fifth, residential separation by race is intense within as well as across central city boundaries. Thanks to discriminatory real estate practices and governmental programs,

six-sevenths of all of the possible housing segregation by race in America's central cities now exists. And this black-white separation in housing is roughly twice that of ethnicity and social class. Sixth, this extreme degree of residential *apartheid* is subsiding so slowly that it would require at the 1960 to 1970 rate of change about four to five centuries to eliminate it. Finally, the relationship across central cities between housing and school segregation is not as close as many believe, and it could be even less with the adoption of metropolitan approaches. Using dissimilarity indexes, only 29 percent of the urban North's and 7 percent of the urban South's school segregation could be accounted for by indices of residential segregation.

(4) This demographic perspective, together with direct research evidence of racial discrimination in housing through State action, may constitute an important contribution of social science in later efforts to meet Justice Potter Stewart's "criteria" for metropolitan remedies. But there are complications to understanding Stewart's crucial, "swing" position. Some of what he calls for was, in fact, furnished in the Detroit and Richmond cases which he apparently rejected. And suburban Detroit affords a nationally infamous illustration of the blatant exclusion of black residents. Moreover, Stewart's footnote that describes the factors behind residential segregation by race as "unknown and perhaps unknowable" is particularly puzzling. Three interpretations are possible. The current political climate is not conducive to new remedial initiatives, the scope of the Detroit remedy appeared too enormous, and Justice Stewart may have acted on the basis of his own questionable social "theory." In the latter two instances, social science evidence that goes well beyond that presented in the Detroit and Richmond cases could be of help in later attempts to persuade Justice Stewart to join his four prometropolitan colleagues.

In summary, then, this paper has presented the sociological case for two types of future desegregation action. On the one hand, it is argued that further intradistrict efforts are still badly needed. Under the *Alexander v. Holmes* framework, urban breakthroughs are still necessary, both among the largest of cen-

tral cities and among smaller, Northern cities with small black communities. In addition, strenuous effort is required to transform merely desegregated schools into truly integrated ones. On the other hand, Justice Stewart's invitation to test the limits of *Mulliken v. Bradley* must be accepted. The demographic situation of today's race relations points dramatically to the conclusion that America will soon regress back to an earlier stage in civil rights without metropolitan solutions. Hopefully, social science will be able to contribute to this vital endeavor.

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CHAIRMAN FLEMMING. We would like to have a 10-minute summary of your main issues.

DR. PETTIGREW. Thank you. I appreciate the invitation. I don't remember being at a meeting where I knew half the people in the room.

I started off my paper by giving what I think to be eight major ways white America has resisted school desegregation. I don't believe there was a conspiracy to figure this up. The country shows its ingenuity by muddling through with continued resistance.

I think *Milliken* represents an eighth and in some ways the ultimate last ditch. Looked at in this perspective, I argue the degree of school desegregation we do have 20 years after *Brown* is remarkable, considering the barriers placed in its way.

I would disagree with my legal colleagues earlier who say *Milliken* was not a step back but not a step forward. Legally, that may well be true. In a social science view, it is certainly not true. Not to go forward in this direction (I agree with Joe Feagin) is a step back. We will see the figures in school desegregation decrease if we do not have a form of metropolitan remedy. I will not give up on that. But I tried also to argue in my paper there is a great deal to be accomplished within the *Alexander v. Holmes* framework.

Some of the largest cities in the United States maintain public schools virtually as segregated as ever. They have enough whites to develop complete desegregation without use of the suburbs. Look at Des Moines, Iowa. They have a small black community. Ten percent of the school system is black. Yet they have tight segregation.

One of our firmest research findings is that elementary school desegregation has the most effect. That is the level where you can get the most effective desegregation in cities like Des Moines with little trouble and little busing. You can have an ideal desegregation plan. We should not leave out the Des Moines of America.

I argued within *Alexander v. Holmes* that there is a lot to be done at those schools that are formally desegregated, but not integrated. I would like to make a sharp distinction between those two terms. We have a way to go in most desegregation of the schools to make them integrated. I think, in both social science and the law, there are a lot of improvements that have to be made to make effective integration come about.

There are eight structural conditions of schools that seem to further integration—that is, positive interaction by race in the classroom beyond the simple racial mix. These conditions include equal access to resources, physical as well as social status, the avoidance of token minority percentages, the initiation of the process in the early grades; racially mixed staffs, and socioeconomic as well as racial mixing. This final factor we may not get through the courts, but we should still press to have it.

Having said that, I have tried to specify in my paper a number of phenomena which must be kept in mind from the demographic standpoint. First, *apartheid* across city boundaries is

more a function of blatant discrimination against blacks moving into suburbs than of so-called "white flight." Second, economic differences between blacks and whites play only a minor role in the exclusion of blacks from the suburbs. Three, much of the tiny black population in the suburbs is found in either mini-ghettos or contiguous extensions of the core city rather than in salt and-pepper patterns.

Fourth, the consequences for the schools of the racial separation across city lines are actually more severe than the gross population figures indicate. This is true for three reasons. White families with school-aged children reside in the suburbs even more than whites in general. Blacks have a higher birth rate. Although their rate is coming down rapidly, it is still higher than that of whites. Finally, private and public schools remove large numbers of white and middle-class children from the population of the schools. Roughly 60 percent of the school-aged white children in Philadelphia attend parochial schools, 40 percent in St. Louis, and 40 percent in Boston. You cannot forget this parochial effect.

Fifth, the residential separation by race is intense within as well as across city boundaries. Thanks to discriminatory real estate practices and government programs, six-sevenths of all possible housing segregation by race we could have in America's central cities now exists. This black-white separation is roughly twice that that you find for ethnics within white ethnic groups and twice that you find between social classes. There is, in short, nothing to compare with the extreme degree of black-white separation in housing.

Sixth, this degree of residential *apartheid* is subsiding so slowly it would require at the 1960 to 1970 rate of change (if that rate were to continue uninterrupted) four to five centuries to be eliminated.

Finally, the relationship across central cities between housing and school segregation is not as close as many believe. It could be even less with the adoption of metropolitan approaches. Using the dissimilarity index, only 29 percent of the urban North's and 7 percent of the urban South's could be accounted for by indices of residential segregation. That is within central cities. These figures would go up if you include metropolitan areas.

This demographic perspective in housing, together with direct research evidence of racial discrimination in housing through State action, I think may constitute an important contribution of social science in later efforts to meet Justice Potter Stewart's criteria for metropolitan remedies. But there are complications as several speakers have indicated to understand Stewart's swing, or "flywheel," position. Some of what he calls for *was* in fact furnished in the Richmond cases, which he apparently also rejected.

I was deeply involved in the Richmond case. So, my judgment may be biased. It seemed to me, however, that we made a good case of State involvement in housing segregation in Chester field and Henrico Counties. What is he looking for there? Suburban Detroit affords a nationally infamous illustration for generations of the blatant exclusion of blacks in residential areas. Consider Dearborn, Michigan. It has long been the classic exclusion of black people from suburban living.

Stewart's footnote describes factors behind residential segregation by race as "unknown and perhaps unknowable." That is particularly puzzling to a sociologist. There are a lot of things "unknown and perhaps unknowable," but segregation by race in our cities is surely not one of them.

Three interpretations are possible of Stewart's position. They have been given before more eloquently by speakers before me. First, the current political climate is not conducive to new remedial initiatives, and, second, the scope of the Detroit remedy appeared too enormous. I can not give significant weight to this latter. Richmond is one-eighth the size of Detroit. It is my hometown, and it was put on earth by God for metropolitan education. It was not enormous. I

believe it met all of Burger's objections on administrative grounds. The third interpretation, Bill Taylor has specified. Justice Stewart may have acted on the basis of a questionable social theory. I go farther and speculate that he read *The Real Majority* and made the gross mistake of thinking that was science.

Social science evidence can go well beyond that provided in the Detroit and Richmond cases in an attempt to persuade Stewart to join his metropolitan colleagues. In case someone gets the wrong idea from Nabrit, there are quite a number of cases in the works now that will put *Milliken* to some test. I hope social science can be a more positive contributor to those cases and those like them that will come soon to test *Milliken*. Let me give a few quick examples beyond what I have in my paper.

I agree with Dr. Gittell there is not necessarily a conflict between community control and metropolitan remedies for community education. It depends on how you define "community." If you define it as group homogeneity, there is a conflict. I would not define it that way.

But I disagree with the thrust of her paper, which seems to say metropolitan remedies are likely to involve consolidation. They do not in my mind. There was no such suggestion in the Richmond case. I believe that you can go the other way. I believe you can have smaller districts than we now have under metropolitan remedies. That means more local control, etc. In Richmond, we would go from three to six or seven districts, each roughly 35 percent black. Now, you have a 75 percent black central city with 9 percent black county systems. The new seven districts would have been easier to have been locally controlled. We did demonstrate that.

It is also my opinion that the Richmond case would have reduced busing. I wish to speak against what I believe to have become conventional wisdom which is incorrect. That is how busing—more of it—and metropolitan remedies are one and the same. They are not. Distortions have been brought about by the media. About 290,000 would be bused in Detroit, 210,000 are bused now. You have to subtract this figure to learn the case involved about 80,000 more busing. Under the metropolitan plan we suggested in Richmond, I believe something in the order of 65,000 would have been bused for a reduction of 10,000 from the present 75,000.

For many American cities, metropolitanism means more efficient planning. You take away the artificial limitation of that central city line. There are many white schools on the border of the counties a few blocks from central city schools that are overwhelmingly black. So, you don't require any busing for them. You simply walk to schools in paired school arrangements. I think that has been overlooked. I believe you cannot be antimetropolitan and antibusing without, in fact, being a segregationist. In Richmond, that smokes you out. And it did there. That is the kind of insights that I believe in the future social science could contribute. I hope Professor Karl Taeuber is here and can elaborate on them.

In summary, on one hand I argued intradistrict efforts are badly needed under the *Alexander v. Holmes* framework. Urban breakthroughs are still necessary in the largest central cities of the North and West and among small Northern cities with small black communities.

In addition, strenuous effort is needed to transform merely desegregated schools into truly integrated ones. Justice Stewart's invitation, which may be a siren sounding, to test the limits of *Milliken* must be accepted. In spite of pessimism, I think we have to move ahead.

I disagree with the paper by the economist that, if the public is against it, we cannot move in this direction. I believe if that had been the test we would still have slavery. You cannot let the public opinion polls govern your strategy at some point. I believe the criticalness of the problem means that we cannot take a poll. The history of our race relations points to the conclusion that America will regress back in civil rights without a metropolitan solution.

In this attack on *Milliken*, I hope social science will be able to contribute positively to the endeavor.

CHAIRMAN FLEMMING. Thank you very much. The first reactor is Oscar Cohen, inter-group relations consultant, Anti-Defamation League of B'nai B'rith.

MR. COHEN. Thank you. I am glad Dr. Pettigrew referred to the difference between desegregation and integration. It is an important question. If we are concerned only about desegregation, then the *Milliken* results must present a grim forecast. But the prognosis is even worse if we agree that integration is the ultimate goal.

Surely, a metropolitan system is desirable, not only with regard to education, but in relation to housing, social services, transit, taxation, and other matters which I do not feel are unconnected with the *Milliken* decision.

My concern, however, is not primarily desegregation. It is the academic success of the child. There can be unequal education in a desegregated school as in a segregated school unless integration is achieved. How many schools are really integrated is open to question.

I would suggest that we are not paying enough attention to the question of truly integrating the minority child in the so-called desegregated schools. I agree that we have made progress, remarkable progress in desegregation. Integration is another matter. But my principal concern and what I think should be the concern of this Commission, from which I hope *Milliken* will not deter us, is the academic achievement of the child.

I think we had better take a rather good look at what metropolitanism may mean.

There are people who are simply racist and are not going to have their children in schools with minority children. There are those who have other reasons for moving or removing children from public schools, which I shall outline in a moment.

In the Detroit area, I understand that to carry out the proposed plan some suburban schools would become segregated. They would have more than 30 percent black children—and this would be a remarkable switch. If the *Milliken* decision had been favorable, where would the segregationists and others who object to having [minority] children in their schools go? Will there be a move to the suburbs or other parts of the country?

Metropolitanism may not be the panacea that is claimed by some. I note industries moving from cities and from suburbs to areas where the labor force percentages cause them no problem with affirmative action. I am not referring to affirmative action generally, but that kind of affirmative action which industry feels causes harassment by the illegal imposition of quotas. I think we should have a realistic look at the possible consequences of massive moves from the central city, although I am ardently in favor of metropolitanism. Incidentally, if metropolitanism causes erosion of community control, there will be no tears shed in this corner.

I have indicated that families flee central cities for various causes. Obviously, one is racism. I need not describe it.

I speak not only as one who has traveled throughout the country to observe schools but who has lived in and whose children went to schools in the central city where they were a small minority. Parents are horrified and upset as a result of lifestyles and behavior of some students. They are horrified at some kinds of language they hear that some of the children express in class. If it were not for obscenity restrictions, I might cite a few examples.

When young people are beaten up in schools, robbed, and threatened—white kids and minority kids—many of those black and white kids are out of the school fast. When handguns are sold in bathrooms, that flight is greatly encouraged. Again, I am not only talking about white flight. When behavior of children renders learning almost impossible, parents are going to try to find places where they can learn.

It is my contention that, while we spend a great deal of time trying to achieve the goals of metropolitanism, we have to take heroic measures to affect the schools where children are failing. Without such achievement metropolitanism will fail.

In this context, it is said that teachers should be accountable. But teachers alone are not to blame for academic failure and violence in the schools. Nevertheless, the educational achievements in our cities can be improved. I believe there has to be a thorough retraining of educators teaching minorities and the poor.

I do not mean the usual kind of retraining consisting of the familiar courses and seminars. Rather, I suggest a complete retraining led by those who have actually accomplished success in the classrooms and in the schools. Moreover, I do not believe actual success can be achieved without parental cooperation. This must be part of any retraining process and, if improvement of academic performance is expected, methods of meaningful parental involvement must be found. Frankly, if there was not enough money for both bus drivers and buses and parent liaison personnel, I would have difficulty making the choice.

I intended to add a reference to the community. But there are so many different communities in the same school areas speaking with different voices and power drives that I find it difficult to place a community or whatever we call the community into this perspective.

I would suggest that teachers and administrators should require certification to work in schools in which there are substantial numbers of minorities. They would require special study and experience. This would merit higher pay. I would send the teachers who cannot be so certified to the schools with middle-class children.

I do not believe that the American Federation of Teachers is unmindful of the problem or unconcerned with the academic success of the children and should be consulted. We have had a number of successes with experimental programs in various schools. One of the shortcomings of foundation grants and Government contracts is that they are given to schools for a period of a year or two. Then, they are dropped. The benefits are not replicated.

We need a permanent institutionalization of the successful techniques. It would take money and lots of it. All throughout the country, there are oases of success in classrooms of minority children. We should utilize the techniques and the people who have achieved this success.

CHAIRMAN FLEMMING. I don't like to interrupt, but the 7 minutes has gone by and a little more. If you could wind up, we will get into a more informal discussion.

MR. COHEN. I was going to go into teachers' colleges, but I will conclude by thanking you for your courtesy. I want to repeat that, while doing everything we can to achieve integration, we must not be deterred from our principal objective.

CHAIRMAN FLEMMING. Thank you very much. We are happy to have with us Mr. Warren C. Fortson, attorney for the Atlanta, Georgia, school board, substituting for Dr. Benjamin Mays. Would you please give us your comments on Dr. Pettigrew's paper?

MR. FORTSON. Thank you. Let me give you Dr. Mays' personal regrets. He found that at 80 you don't bounce back from an operation as rapidly as he thought he would. It was a personal disappointment to me that Dr. Mays is not here. I have worked with Dr. Mays for nearly 4 years. To work with Dr. Mays is to be in the shadow of greatness. I think Dr. Mays is a living example of the tragedy of segregation in the South. Many, many young white children in the South never had the opportunity to hear and learn of Dr. Benjamin Mays up until just a few short years ago.

I read with considerable interest Dr. Pettigrew's paper. I confess to Dr. Pettigrew and you all that I did not know until short notice that I was going to come here. I read it just before I went to sleep last night. I was struck by one thing.

I want to say this to you because I am going to talk to you, in response to the paper, primarily about the Atlanta school system. We have a lot of publicity as to how great that was. We have only 15 percent white children in the Atlanta school system now. It is not hard to draw up something to make it look good with just 15 percent white children in our system.

We have also a *Milliken* case. We have a metropolitan case in Atlanta pending. In our case, it is very interesting. There are some of the factors involved in this case referred to in some of the concurring opinions of Stewart and other opinions in the *Milliken* case.

I personally used to be on a small Georgia school board. I served for about 5 years. I was legal counsel to a smaller county school board. I have been legal counsel for the Atlanta school system which is the largest in the State. Historically in the State of Georgia, we have contracted between school systems for the education of children.

In the Americus, Georgia, school system, it pretty much became a college prep system. We contracted and took in all of the students who wanted to go on to higher education. White students, it was at that time. For Sumter County, Georgia, they took most who wanted to go to trade schools. Jimmy Carter, our Governor, was a product of that system and also the U.S. Naval Academy. The fact is, we have many, many different contracts such as that and contracts between different systems. That makes our position in Atlanta a rather unique one.

The courts have put a stay on that case. The title is *Armour v. Nix*. The court put a stay on that case. They have now lifted the stay and allowed discovery to proceed, giving the plaintiffs 90 days to point out where the case differs from the *Milliken* case. It proves to be an interesting history.

In reading Dr. Pettigrew's paper, a point of interest is he seems to be approaching with specific questions raised by *Milliken* which he lists on page 5. The thought that comes to me is, from my experience, what if *Milliken* had been decided in just the reverse?

One of the problems some members of the school board have had with the metropolitan concept is that the city of Atlanta, which is really a quite small system in comparison to what is known as metropolitan Atlanta, has less than one-half million people in the city.

In metropolitan Atlanta we have one million and a half, you put the compass point at five points. That is a geographical center of metropolitan Atlanta in Atlanta. You draw the circle a little bit bigger. Some want to draw it for nine counties. Some want five. Pick it up and draw the circle a little bigger, and you take in the first band of predominantly white schoolhouses sitting around there. With a place like Atlanta continuing to grow and the out-migration is not just for racial reasons but also for developmental reasons.

I have watched beautiful neighborhoods, solid white, completely obliterated and commercial development go up in its place. Those families did not leave because of black children coming in but because there was no place else for them to go.

I have two items raised by Dr. Pettigrew which are most important. In the South, blacks and whites grew up together. We have a pattern of interrelationship in our history that we can draw on. I don't want to sound paternalistic. It is reality. The Northern places don't have that to draw on.

You all have rough sledding ahead of you. What we have done in the South is simply to change reference points. I grew up in a rural area. I went swimming and hunting with black children. I played with black children. With all deference to problems about differences in lifestyles, our lifestyles were the same. We went to the movie house together. They could not come and sit downstairs with me, but I could go upstairs with them. When I went up there with them, that was quite a treat.

I have a black law partner. He was pretty much educated up here in the Northeast. He came in complaining to me. We represent the school board, county. We teamed up. You have a black one and a white one. He complains about having to correct his children at home because of some of the lingo they were bringing home from school from this teacher.

"Prentis, the problem with you is you were educated up in the Northeast. That teacher is talking just like I talk." What I am saying is, they are real. They are real in Atlanta, Georgia.

I am not making light. Some of the problems of lifestyle and violence are some things I think we are afraid to talk openly about. I happen not to have been a Johnny Come Lately in Southern desegregation or integration. I was outspoken when it was not popular to be outspoken. You were called a nigger lover if you were outspoken in the South on racial matters. Now, you are a racist if you say anything that in any way may reflect that black folks ought to take a good close look at some of the problems arising in integrated situations, particularly in bigger places like Atlanta—the shaking down of kids for money, the knives and guns that are a problem. To what extent it goes on I am not real sure. We have made some studies in the Atlanta system.

CHAIRMAN FLEMMING. I don't like to interrupt. We are beyond the 7-minute time limit.

MR. FORTSON. As a result of those studies, we have found there are actually far fewer reported instances than one would think from what we hear.

COMMISSIONER FREEMAN. Dr. Pettigrew, in reference to your eight points of the design (which you indicate that you did not want to call a design) aimed at cutting back on the *Brown* decision, I would ask you this. Would you reexamine it? I have concern that actions which hampered or slowed what progress we have made were not accidental. This whole process is necessarily a part of our domestic policy. I read your points and, as I read them, I came out with a feeling that there probably was a design to slow or avoid desegregation. I will ask my other questions. Do you think metropolitan desegregation would have helped in Boston?

DR. PETTIGREW. On the first one, I agree, Mrs. Freeman. As we are old friends of many years, you are baiting me a little. I have natural paranoid tendencies of my own. But now that you have removed the restraint, yes, I believe a great deal of it was by design. I believe segregationists did not necessarily sit down and work it out, but they knew how to take the resistance that was certain to emerge in the country and fashion it into a pattern and design. I don't see how you can really argue with that.

On the second point, yes. I believe there are actually few cities, except for the ones with very small populations such as Des Moines, that could not benefit from metropolitan remedies. I am not saying consolidation. I believe Boston is one of those, for reasons that are not always as sharp as in other cities. It is not so much that the percentage of black students in the system, which is roughly 38 percent, cannot be accommodated within the city limits. In Boston, it is the difference in quality of schools.

We have two of the best public schools systems in the United States which are imaginative and innovative in Brookline and Newton. They are nearer the black community than many parts of Boston. We have in Boston a tragically bad public school system. It is not just tragically bad for blacks but also for whites. That is some background to some of the upset of some of the parents. There is a distinct feeling in South Boston that the Boston schools have been cheating their kids. Here is action to do something for black kids. Who is doing something for me lately?

I think a metropolitan approach to the problem could have, in fact, built-in incentives for the very white parents screaming obscenities in front of the South Boston High as much as it would do for black children. I have never seen desegregation and integration for just black people. I think it is just as important for white people.

CHAIRMAN FLEMMING. Mr. Ruiz?

COMMISSIONER RUIZ. Dr. Pettigrew, your critique was eloquently stated. Much of the real power constituting state action in California is not by public officials. I mention it because it is far away from the East, because we don't have exactly the same problems. It gives us a point of reference. Because of our local initiative, we have "people power."

We cannot blame our State officials to the extent Detroit has been able to do. Perhaps that is a reason why the up and coming Pasadena case for desegregation where the Federal court held that given "apartheid" there is an affirmative duty to equally educate irrespective of "culpability." Do you think if the concept of *apartheid* segregation by happenstance, either with or without design, is considered the same as de jure segregation, a giant step forward would take place?

DR. PETTIGREW. I am sorry—

COMMISSIONER RUIZ. De jure is when a State official as we know—

DR. PETTIGREW. I don't see the question.

COMMISSIONER RUIZ. Assuming there is a separation or de facto residential or curricular education, without culpability. Could the fact that this existed without culpability require state action as an affirmative state action to do something about cross-metropolitan busing, etc., just from the reason there is a separation?

DR. PETTIGREW. I am not a lawyer. You are. On one point, I thought that was what was in *Baker v. Carr*. I thought Tennessee was not shown to have designed the Nashville lines to discriminate against urban voters. It was their failure to readjust the lines for 60 years that caused the imbalance, that was discriminatory. I thought it was an argument that equally applied in this situation. I take it from *Milliken*, the Court is not prepared to extend that principle yet.

The second part of your question, if I understand it correctly, is a point I have to confess I believe social scientists and lawyers have been in disagreement about for many, many years. That is the distinction between de facto and de jure.

That is a nice legal distinction, but social scientists never understood it. There is nothing we know about in American race relationships that could be called de facto. As I understand what state action is under the 14th amendment, it is an extremely broad thing. We have never studied all the so-called de facto segregation. To the extent we have had the opportunity to do it, we always come up with things which in my eyes are clear de jure segregation.

With my close friends and constitutional lawyers that I have the good fortune to kick around with, I have looked at this over the years. We have literally never seen evidence to support the notion of "de facto."

COMMISSIONER RUIZ. That is the reason you understood perfectly well what Commissioner Freeman was talking about, about the foundation of it all being designed.

DR. PETTIGREW. I think after the mutual link there was clever exploitation.

COMMISSIONER RUIZ. That is not particularly in agreement with what Mr. Fortson had said with respect to lack of design insofar as his jurisdiction had.

MR. FORTSON. I am afraid you misunderstood me. I did not come across with lack of design. I did not intend it that way.

VICE CHAIRMAN HORN. I would ask all three of you this. In order to take advantage of the Court's invitation and to help us draw up proposals as to how to gather the evidence, do you feel it would be useful to have a national longitudinal study which would ascertain the cognitive and noncognitive factors and the effects and results of the education being provided and the change in racial attitudes now occurring in our school system? Such a study should include an examination of the community environment in which those schools operate and a look at the process by which we have achieved, to whatever degree, desegregation leading to integration. Would this be a helpful national project?

DR. PETTIGREW. I don't believe a yes or no is appropriate. In general, social scientists have a bias towards more research. Yes. I am not satisfied by the present research. I think there are many more important questions we have not successfully answered or addressed. If

you are referring to the Rand proposal, I reacted to their proposal. It turned out to be more favorable than the reactions of many others. I would like to see it done. I would like to see some parts of it modified or eliminated, however.

Giving an example of what I mean, what we do not need more of are general effect studies. That is, does busing work or does it not? Does Head Start work or does it not? There is no such thing as Head Start, there are as many Head Starts as there are programs. To ask that global question, I think is idiotic.

The relevant question, which is seldom addressed and what we really need to know, involves process—what programs work and which don't and why. What are the differences between where integration is working and where desegregation is failing? What are the differences between such schools? How might we get a remedy?

It seems the traditional effect studies never accept *Brown*. *Brown* hopefully is here to stay. Taking that, the real question to ask is, how do you make it work? Social science does not address what is justice. That is the legal process. What we can address is how to make it work. We can do that.

I would hope we could do it better than we have done it in the past. My answer is, yes, sir. If you ask me a further question, I will answer even though you did not ask it. What kind of priority would you give this educational research as opposed to other research?

I might give it lower priority. It might be after housing, for instance. Marty Sloane is arguing the control importance of housing. It is the area that has not moved at all. It will be 400 or 500 years before we eliminate residential segregation by race at the present rate. Researchwise, we have the techniques for working on it well. Professor Taueber is the leading person working on that. We know how to do it, but there is a great bit of work to be done.

VICE CHAIRMAN HORN. This is what concerned me and that is why I advocated that a national longitudinal study occur over a minimum of 5 years. We need a good data base from which judgments can be made rather than many, diverse 1- or 2-year studies which are in reality comparing apples and oranges.

DR. PETTIGREW. I could not agree more. The Rand proposal is, I think, an excellent example. It has a good discussion of the need for developing that data bank.

VICE CHAIRMAN HORN. I have one more question. Would you not agree that if we get the data, we should have a random sample of all schools in the United States?

DR. PETTIGREW. I would agree.

VICE CHAIRMAN HORN. Do you have reactions, you other gentlemen?

MR. FORTSON. In answer to your question, it would be yes. It is not necessarily to studies of why it works but why it has not worked. What concerns me the most is this business of drawing circles bigger.

What we proposed to do about 2 1/2 years ago was to bring in as party defendants into the Atlanta desegregation case, which has now apparently been settled, the Planning and Zoning Commission, the housing authorities for the city, and the Real Estate Brokers Association. We had a mass of documented information as to the patterns of racial discrimination among brokers, growing out of hearings they had had. We wanted to bring all of these various agencies and groups that do contribute to the problem. At that time, it was white flight. We found we really were unwilling to operate within that one case.

CHAIRMAN FLEMMING. Mr. Cohen?

MR. COHEN. I set a little trap, and the trap worked. In my statement, I referred to certain lifestyles, etc., in the schools. I did not indicate that they were practiced by blacks or Puer to Ricans or Chicanos or any other group. There are plenty of whites who have the lifestyle to which I referred. I believe there was an assumption there were minority students involved.

With regard to the study, who is going to use it? I have seen studies come and go. Unless studies are going to be actually used in order to achieve specified results, the expenditure is not one I prefer. My preference is for a study of those techniques which achieved integration and academic success which can point the way to how they were accomplished.

VICE CHAIRMAN HORN. My reaction to "who uses the study" is that, if we based the doing of a study on a definite answer to that question, we might never do it. If, for example, we asked Gunnar Myrdal who was going to use *The American Dilemma*, he might never have done it.

MR. COHEN. As professionals, I knew Myrdal was involved in the work. I knew who was going to use it. I knew how it was going to be used. I used it extensively. I think I can answer that question regarding other studies.

VICE CHAIRMAN HORN. As I gather from an earlier example, you feel that in order to overcome the negative white image of the black that the group to bring together in terms of desegregation leading to integration would be the working-class white pupil and the middle-class black pupil. Do you see a combination also going the other way?

DR. PETTIGREW. What I have been saying is that you have to take social class as well as race into consideration. All of America, Oscar, falls into your trap. The "Black Board Jungle" image of the black community is a perceptual reality to most white Americans. You don't want all working-class black kids and all middle-class white kids. You want some of all four.

I am not talking about precise percentages so much as a critical mass of all four. That breaks up the correlation between race and class. The black middle class has increased since World War II. It has increased to about 40 percent of the group. In a city like Boston, it is largely established in the community. They are a very valuable source in breaking up that correlation, as are working-class white students. The metropolitan separation does not just separate on race. If anything, it more viciously separates on class.

I can perceive class mix, then, as another argument for metropolitanism. I made that argument in the Richmond case.

VICE CHAIRMAN HORN. Dr. Cohen, I was most interested that you were going to start in on teachers' colleges. I am pleased to state that at California State University, Long Beach, the faculty has required that prior to graduation all students in the school of education must have a series of multicultural, multiracial, bilingual experiences in working with children. I feel deeply about this. The universities and teachers' colleges have been improperly preparing many of the teachers. I would like to hear your comments on that.

MR. COHEN. For 10 years I have been searching for a teacher training institute which on a system-wide basis is preparing its teachers adequately upon graduation to be able to teach minorities and the poor. I wanted to publish a book on the subject. I have found none so far.

One of the problems is that the teachers at an academic institution are not necessarily related to the master teacher who succeeds in the classroom or the administrator here who has actually had a successful school in the context of this discussion. I believe the student should spend more time in the school classroom rather than the college classroom. Graduating students should be perfectly comfortable in a ghetto school setting or whatever. They would be prepared to meet the situation as any technician would given any problem within his or her discipline.

CHAIRMAN FLEMMING. Thank you. The agenda calls for us to resume at 2:15. Let's plan to start promptly at 2:15.

AFTERNOON SESSION

CHAIRMAN FLEMMING. Let us reconvene. Our next subject matter is the housing implications of *Miliken v. Bradley*. We have learned this morning that there are a great many implications. I am grateful to Martin Sloane, general counsel, National Committee Against Discrimination in Housing, for being willing to develop the fine paper he has prepared.

HOUSING IMPLICATIONS

Milliken v. Bradley And Residential Segregation

**Martin E. Sloane
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Discrimination in Housing**

Any assessment of the significance of the Supreme Court decision in *Milliken v. Bradley*⁹⁵ must begin with the plain fact that plaintiffs lost. In this limited sense, at least, the case represents a setback to the cause of school desegregation. How much more serious a setback *Milliken* represents depends, in large part, on how broadly or narrowly future courts interpret the decision. But in weighing its significance from the perspective of the limited time that has passed since the decision was rendered, it is important to keep in mind the issues that were raised and what the Supreme Court decided.

The concern of the Supreme Court in *Milliken* was with remedy. What plaintiffs were seeking—and what the district court and U.S. court of appeals agreed they were entitled to—was relief for de jure school segregation on a metropolitanwide scale, without having to go through the enormous effort of proving that each of the jurisdictions subject to the order for relief had committed acts that “affected the discrimination found to exist in the schools of Detroit.”⁹⁶

If plaintiffs had prevailed—and they almost did—*Milliken* would have represented a breakthrough of unprecedented proportions, at least measured by the practical standard of results that could be achieved. For *Milliken*, unlike many other important school desegregation decisions of the past, could have sparked massive school desegregation—and on a metropolitanwide scale—in the many metropolitan areas in the country where central city school enrollment is so heavily minority as to make it unlikely that a

lasting remedy to de jure segregation can be achieved within the confines of the central city alone. Further, its impact probably would have been felt mostly in the North and West, where de jure segregation in the form of State and local laws requiring or authorizing school segregation were less frequently maintained than in the Deep South.⁹⁷ But the Supreme Court narrowly rejected plaintiffs' position, reversing both the district court and the U. S. court of appeals in the process.

In a real sense, then, *Milliken* represents not so much a setback, but the breakthrough that did not happen. The case is important more for what was not won than for what was lost.

Where are we after the *Milliken* decision and what are the problems confronting plaintiffs who, after proving unlawful segregation in a central city school system, seek lasting and realistic relief? Relief limited to central city schools alone, as in *Milliken*, is doomed to failure not only in Detroit, but in a large and increasing number of metropolitan areas, of which the Nation's capital is only the most extreme example. These central city school systems are heavily, often predominantly, minority. While desegregation on a central city basis may distribute white and black students equally throughout the city's schools, it also will have the effect, as in Detroit, of

⁹⁵Such school segregation laws were by no means unknown to the North. State statutes authorizing separate-but-equal public schools were on the books in Indiana until 1949, in New Mexico and Wyoming until 1954, and in New York until 1938. In New Jersey, separate schools for black children were maintained well into the 20th century. In Illinois, at least seven counties maintained separate schools for black children as late as 1952 and assigned teachers and principals on a racial basis. In Ohio, well into the 1950's, there were cities which maintained separate schools for black students. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 42-43 (1967).

⁹⁶94 S.Ct. 3112 (1974).

⁹⁷At 3131.

making the entire school system identifiable as a minority system, accelerating white exodus, and ultimately exacerbating the problems of racial isolation.

The solution, of course, lies, as the district court and court of appeals recognized in *Milliken*, in including the predominantly white suburbs in the order for relief. Experience shows that while the distribution of population by race in the Nation's metropolitan areas has changed dramatically over the years, to the point where a substantial number of central cities are already or are fast approaching majority black, the racial composition of the metropolitan areas themselves has changed little in the past 50 years.⁹⁸ What this means is that school desegregation on a metropolitanwide scale gives strong promise of remaining stable, while school desegregation limited to the central city does not.

Moreover, the specter of massive busing under a metropolitanwide school desegregation plan may be more illusory than real. As Justice White pointed out in his dissent in *Milliken*, desegregation limited to the city of Detroit would require massive transportation involving the purchase of 900 school buses, while the metropolitanwide plan would have required only 350 buses.⁹⁹

If the Supreme Court rejected the idea that suburban jurisdictions could be included for purposes of remedy in a court order for desegregation absent any showing that their conduct "affected the discrimination," the question remains, what sort of conduct must they be shown to have engaged in? In short, what is plaintiffs' burden after *Milliken*?

A surface examination of Chief Justice Burger's opinion for the Court would suggest that plaintiffs' burden is to show that State or suburban school officials are directly responsible for the school segregation that exists in the central city or for the concentration of minority schoolchildren in central city schools.

⁹⁸For example, the racial composition of the Washington, D.C., metropolitan area has changed very little since the turn of the century, consistently remaining about 75 percent white and 25 percent black. The distribution of the population by race, however, has changed dramatically so that today the population of the District of Columbia is about 75 percent black, while the surrounding suburbs are generally more than 90 percent white.

⁹⁹At 3133.

This would indeed impose a burden of proof on plaintiffs that is virtually insupportable. If, in a State like Michigan—where it is clear that education is a State, not a local, responsibility—the Court believed that State involvement was not sufficiently direct and rejected the principle of State responsibility through the doctrine of *respondeat superior*, only rarely will plaintiffs be able to show sufficient responsibility by State school officials to satisfy the Court. Further, suburban school officials, who have as little as possible to do with their central city counterparts, can even less frequently be found responsible for the segregation in the central city school system. And while State and suburban officials have a good deal to do with the concentration of minorities in the central city and its schools, it is not school officials who have played the major role.

Thus, the harshness of the burden which the Court seems to place on plaintiffs lies in its narrow focus on the conduct of school officials alone. But a careful examination of the various opinions suggests that the burden on plaintiffs may be considerably less heavy than that suggested by the Chief Justice's opinion and, in fact, is supportable.

For one thing, the Court was sharply divided—4-1-4—and the Chief Justice was not speaking for a majority. The swing Justice, Potter Stewart, made it clear that his inquiry would extend beyond the conduct of school officials alone, to other officials, including those concerned with housing.

Justice Stewart pointed out that "an inter-district remedy of the sort approved by the Court of Appeals would*** be proper, or even necessary in other factual situations."¹⁰⁰ The two kinds of factual situations specified by Justice Stewart as calling for or even requiring an interdistrict remedy were: (1) where State officials had contributed to the separation of the races by drawing or redrawing school district lines, and (2) where there had been purposeful racially discriminatory use of State housing or zoning laws.¹⁰¹

A principal basis for Justice Stewart's concurrence was his rejection of Justice

¹⁰⁰At 3132.

¹⁰¹Id.

Marshall's contention that "Negro children in Detroit had been confined by intentional acts of segregation to a growing core of Negro schools surrounded by a receding ring of white schools."¹⁰² According to Justice Stewart: "This conclusion is simply not substantiated by the record presented in this case."¹⁰³ Justice Stewart went on to say:

No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity*** [emphasis added].¹⁰⁴

Justice Stewart conceded: "It is this essential fact of predominantly Negro school population in Detroit***that accounts for the 'growing core of Negro schools,' a 'core' that has grown to include virtually the entire city."¹⁰⁵ But under his view of the record in *Milliken*, the phenomenon of a predominantly black school population in Detroit was "caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears."¹⁰⁶

The four dissenting Justices would have upheld relief on a metropolitanwide basis even without proof that the high concentration of black people and their children in the city of Detroit was a result of policies and practices of the State and its political subdivisions. The inference is strong that they would, *a fortiori*, support such an order on a showing that the policies and practices of the State and urban jurisdictions were responsible for the exclusion of black people from the suburbs and their resulting concentration in the inner city.

Moreover, a fair reading of Chief Justice Burger's opinion for the Court does not suggest a rejection of Justice Stewart's position. In an important footnote, the Chief Justice noted that the district court has alluded to policies and practices of housing discrimination by government and private parties in producing residential segregation within the

Detroit metropolitan area. He pointed out, however, that the court of appeals had expressly not relied on this factor in affirming the district court. "Accordingly," the Chief Justice said, "in its present posture the case does not present any question concerning possible state housing violations."¹⁰⁷

Thus, at least five of the Justices (Potter Stewart and the four dissenters) would be likely to uphold metropolitanwide relief on a showing that State and suburban officials—housing officials, not just school officials—were responsible for the high concentration of minorities in the central city. And it is possible that all nine Justices might uphold an order for metropolitanwide relief on such a showing. At the least, the remaining four Justices did not reject this position.

If this reading of the various opinions in *Milliken* is correct, then the burden on plaintiffs is not the virtually insupportable one of showing that State or suburban school officials are directly responsible for the school segregation that exists in the central city or for the concentration of minority students in central city schools. Rather, their burden would be to show that the high concentration of minority students in central city schools is caused (to paraphrase Justice Stewart) by "known" and "knowable" factors, that these factors are not limited to the neutral ones suggested by Justice Stewart—"in-migration, birth rates, economic changes or cumulative acts of private racial fears"—but that the State and its suburban political subdivisions bear heavy responsibility for the phenomenon of minority exclusion from the suburbs and their resulting concentration in the central city.

What kind of evidence can be obtained to meet this burden, assuming it is the correct one? There are a variety of governmental policies and practices which historically have contributed substantially to residential segregation in metropolitan areas. The policies and practices described below are typical of those followed by State and local governments. Two caveats. First, it is unlikely that a particular State or suburb will be found to have followed *all* of these policies and prac-

¹⁰² At 3153.

¹⁰³ At 3133, n. 2.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ At 3119, n. 7.

tices. Second, some of the policies and practices are not unlawful in and of themselves. It is likely, however, that some, or even most, of them will be found in virtually every case and can be shown to be major causes of residential segregation.

1. Racial zoning ordinances.

In the early part of the century, many municipalities, particularly in the South, enacted zoning laws which required residential segregation. These zoning laws were declared unconstitutional as early as 1917 in *Buchanan v. Warley*,¹⁰⁸ but many such ordinances were discovered to have remained on the statute books as late as the 1950's. Undoubtedly, such ordinances remain even today and constitute evidence of continuing discriminatory conduct by the municipalities that maintain them. More important, even in those instances where such ordinances have been invalidated, their enactment and maintenance in the past helped establish the segregated residential patterns which have persisted to this day.

2. Racially restrictive covenants.

Following the *Buchanan* decision in 1917 outlawing racial zoning ordinances, a new form of institutionalized housing discrimination became popular—that of racially restrictive covenants. These covenants were private agreements among neighboring property owners aimed at assuring racial homogeneity. Unlike racial zoning ordinances they provided not merely for racial segregation, but for the total exclusion of minorities from particular neighborhoods—in many cases, from entire communities. Also unlike racial zoning ordinances, racially restrictive covenants were not limited largely to one region of the country but were rampant nationwide.

Their use became widespread during the 1920's and became especially popular following establishment of the Federal Housing Administration (FHA) in 1934. During the period of great suburban expansion after the end of the Second World War, FHA, which was perhaps the single most important factor responsible for the suburban boom, was also the strongest advocate of minority exclusion from the suburbs.¹⁰⁹ Although these covenants

were private agreements, they were given the status of law through enforcement by State and Federal courts. In 1948, the Supreme Court, in *Shelley v. Kramer*¹¹⁰ ruled that their judicial enforcement by State courts violated the equal protection clause of the 14th amendment.¹¹¹

FHA continued to advocate these covenants for nearly 2 years following this landmark Supreme Court decision. In February 1950, FHA changed its position so that it would refuse to insure mortgages on property carrying such covenants filed of record thereafter. This new policy, however, did not apply to covenants filed earlier. With respect to these, FHA routinely continued to insure mortgages.

Racially restrictive covenants are one of the most concrete factors responsible for the exclusion of minorities from the suburbs, many of which could not have been developed without assistance from FHA, the strongest advocate of these covenants. The fact that State and Federal courts stood ready until 1948 to enforce them in the same way they enforced other "covenants running with the land" placed the power of the State and the Federal governments behind what otherwise would have been private acts of discrimination. Enforcement of racially restrictive covenants is perhaps the greatest and most widespread example of governmental responsibility for establishing and perpetuating all-white suburbs. Moreover, in many cases they remain on deeds, are read and taken seriously as binding obligations by purchasers.¹¹²

3. Use of public improvements to exclude or displace minorities.

There have been a number of reported instances in which suburban communities, confronted with the prospect of housing in which minorities would live, have suddenly found that they needed the land for some urgent public purpose. Thus, in 1961, the virtually all-

¹⁰⁸245 U.S. 60 (1917).

¹⁰⁹For a discussion of FHA policy and practice on housing discrimination during its early years, see 4 U.S. Commission on Civil Rights, *Housing* Ch. 2 (1961).

¹¹⁰334 U.S. 1 (1948).

¹¹¹In a companion case, *Hurd v. Hodge*, 334 U.S. 24 (1948), the Supreme Court ruled the enforcement of such covenants by Federal courts violated an 1866 civil rights law and was against public policy.

¹¹²In *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972), a U.S. court of appeals held that the mere recording of racially restrictive covenants by local officials was a violation of Title VIII of the Civil Rights Act of 1968. This suggests that for local officials not to expunge such covenants from existing deeds constitutes continuing discriminatory conduct.

white Chicago suburb of Deerfield, Illinois, condemned land on which integrated housing was to be built for purposes of providing a park. In the late 1950's, Creve Coeur, Missouri, a white suburb of St. Louis, successfully condemned land on which a black family was constructing a house. Again, the reason for the condemnation was to provide a playground and park.

In some suburbs, minority enclaves exist, often dating from the time that the suburbs were rural areas.¹¹³ In a number of cases, these black enclaves have been selected as sites for a variety of public improvement projects. Frequently, these projects have been funded under Federal programs, such as urban renewal. The minority families are displaced, often with no provision for their relocation.¹¹⁴ In other cases, suburban communities have sought to satisfy their relocation responsibilities by use of public housing in the central city. As the Commission on Civil Rights found in its January 1970 hearing in St. Louis, Missouri, the suburb of Olivette planned an urban renewal project in 1961 which involved displacement of families, all of whom were to be black. Relocation for these black families was to be in low-rent public housing in the city of St. Louis.¹¹⁵

4. Exclusion of minorities by excluding subsidized housing.

Although the great majority of lower-income people in the United States are white, minorities are disproportionately over-represented among the poor. Subsidized housing programs, particularly public housing, are viewed as programs that serve minorities.¹¹⁶ Through action and inaction, suburban jurisdictions have sought to exclude subsidized housing, with the purpose or effect of excluding minorities as well. There are a variety of ways in which they have accomplished this.

¹¹³ For example, in Montgomery County, Maryland, such black enclaves as Scotland and Kengar date back to pre-civil war times.

¹¹⁴ See, e.g., *Norfolk Core v. Norfolk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *English v. Town of Huntington*, 448 F.2d 419 (2d Cir. 1971).

¹¹⁵ *Hearing before the U.S. Commission on Civil Rights, St. Louis, Missouri, January 14-17, 1970, 564.*

¹¹⁶ This perception, at least regarding public housing, the oldest of federally-subsidized programs, has some basis in fact. In Cleveland, Ohio, for example, the waiting list for family public housing is 87 percent black. The local public housing authority in Cleveland, the Cuyahoga Metropolitan Housing Authority (CMHA), has jurisdiction that extends throughout the Cleveland metropolitan area.

(a) *Failure to provide public housing.* The low-rent public housing program, like most other Federal programs of financial assistance, is not mandatory. State and local governments participate in the program on a voluntary basis. If they choose to participate, they must take certain steps required by Federal law. Chief among these are the enactment of enabling legislation by the State and the establishment of local public housing authorities by the municipalities involved. Every State has enacted the requisite enabling legislation. Many municipalities, however, particularly those in the suburbs, have failed to establish local public housing authorities and thereby have excluded public housing and the minority families who would live in them. In some cases, State enabling legislation provides that a local public housing authority may build public housing in an adjoining jurisdiction if such jurisdictions have not established a local public housing authority. In the suburbs of Chicago, Illinois, some suburban jurisdictions have established local public housing authorities, which effectively prevent the Chicago Housing Authority from operating there, and then have kept them inactive. No court decisions have been rendered on the legality of this conduct.

(b) *Failure to sign cooperation agreements to permit construction of public housing.* In some States, notably Ohio, State enabling legislation permits central city public housing authorities to build public housing in the suburbs as well as in the central city. Federal law, however, requires that the municipalities in which the public housing is to be built must sign a cooperation agreement, agreeing, among other things, to a tax exemption for the project and the provision of ordinary municipal services. Thus, the suburbs may exclude public housing by merely failing or refusing to sign the requisite cooperation agreement. In short, by doing nothing they may keep out public housing and the minority families who would live in it. This practice of exclusion by inaction has been challenged unsuccessfully in the Cleveland, Ohio, area where the family waiting list for CMHA, a public housing authority having metropolitan-wide jurisdiction, was 87 percent black.¹¹⁷ The

¹¹⁷ *Mahaley v. CMHA*, 500 F.2d 1087 (6th Cir. 1974). See also *Jaimes v. Toledo Metropolitan Housing Authority*, CA C-74-68

Sixth Circuit held, among other things, that in the absence of any evidence of past racial discrimination by the suburbs, they were entitled under Federal law to decide for themselves whether to enter into cooperation agreements for public housing.

(c) *Site selection and tenant assignment.* For the first 25 years of operation of the low-rent public housing program, Federal officials permitted local housing authorities to run the program on a racially segregated basis. Most communities took advantage of this option and, in fact, built public housing projects that were occupied exclusively by black or white tenants. The principal ways in which they carried out the policy of segregated occupancy were by maintenance of racially separate waiting lists. Following the Supreme Court's decision in *Brown v. Board of Education*¹¹⁸ lower Federal courts uniformly ruled that enforced segregation in public housing was unconstitutional.¹¹⁹

Despite these rulings, the practice persisted throughout the country well into the 1960's. Of particular importance is the fact that this practice helped establish and harden patterns of residential segregation. Further, it is important that the parties involved all are governmental entities—cities, local public housing authorities, and the Federal public housing administration.¹²⁰

(d) *Initiatives and referenda.* Another way in which suburbs have sought to exclude subsidized housing is by subjecting proposals for such housing to a vote of the electorate. In *James v. Valtierra*¹²¹ the Supreme Court of the United States held that a California constitutional provision requiring a referendum vote on public housing did not violate the U.S. Constitution, absent a showing that the

(N.D. Ohio, filed Feb. 15, 1974), where lower income minority potential residents of public housing brought an action against the local housing authority for failure to request cooperation agreements from the suburbs of Toledo.

¹¹⁸347 U.S. 483 (1954).

¹¹⁹See, e.g., *Detroit Housing Commission v. Lewis*, 226 F.2d 180 (6th Cir. 1955); *Heyward v. Public Housing Administration*, 238 F.2d 689 (5th Cir. 1956); *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 997 (N.D. Ill. 1969).

¹²⁰Public housing has not been historically a program much utilized by the suburbs. To the extent public housing has operated in metropolitan areas it has been largely a central city program. Therefore, it is unlikely that segregation in public housing by the suburbs will often be a major factor in the confinement of minority families and their children to the central city.

¹²¹402 U.S. 137 (1971).

requirement was "aimed at a racial minority." A case now pending challenges a similar referendum requirement adopted by the city of Parma, Ohio, a suburb of Cleveland.¹²² The major difference between this case and *Valtierra* is that the complaint here charges the municipality with a history of racial discrimination.

(e) *Use of discretionary authority to exclude subsidized housing.* The construction of any housing in a community—unsubsidized as well as subsidized—frequently depends on certain discretionary decisions by local officials. Among these decisions are those pertaining to applications for rezoning, for an increase in the permitted density, permission to hook up with water and sewer lines, and applications for building permits. In many instances, suburban communities have exercised their discretionary authority in a manner to prevent the construction of subsidized housing in which minorities would live. These exercises of discretionary authority have been challenged in court as racially discriminatory, in many cases successfully.¹²³

The key elements in the successful cases have included: a past history of racial discrimination on the part of the defendant municipality; a finding that the effect of the conduct of the municipality fell with disproportionate severity on racial minorities; that the justification for the conduct was flimsy; and that the municipalities treated differently proposals for housing that would serve whites.

(f) *Maintenance of zoning laws that exclude lower-income housing.* Many suburbs maintain zoning laws that exclude lower-income housing and the minority families that would live in it. These zoning laws accomplish that result in one of two general ways: by prohibiting or inhibiting construction of certain types of housing which would facilitate residence by lower-income families, and by imposing requirements that necessarily in-

¹²²*Cornelius v. City of Parma, United States v. City of Parma*, 374 F. Supp. 730 (N.D. Ohio 1974), appeal pending.

¹²³See e.g., *Dailey v. City of Lawton, Oklahoma*, 425 F.2d 1037 (10th Cir. 1970) (denial of rezoning application, *Kennedy Park Homes Association v. City of Lackawanna, New York*, 436 F.2d 108 (2nd Cir. 1970), cert. denied, 401 U.S. 1010 (1971) (withholding of a building permit), *Skilken v. City of Toledo, No. C 74 202* (N.D. Ohio August 28, 1974) (denial of platting and refusal to rezone).

crease the cost of housing that may be built to an amount that only the affluent can afford:

Among the restrictions or prohibitions that are typically imposed through exclusionary zoning laws are the following: (a) absolute prohibition against any multifamily housing or projects; (b) where multifamily projects are permitted, restrictions on the maximum number of bedrooms (e.g., an absolute prohibition against units with three or more bedrooms or a percentage ratio by which all units in a multifamily development may not exceed one or two bedrooms); (c) the imposition of a percentage ratio by which all multifamily units may not exceed the total number of single-family residential units within a community, (d) regulations that add to the cost of multifamily housing (such as requirements that electrical and utility lines be underground, that each apartment have central air conditioning and garbage disposals, and that swimming pools and tennis courts be provided); (e) absolute prohibition against mobile homes; (f) excessive zoning for commercial and industrial use; and, (g) requirements that add to the cost of single-family housing (such as minimum lot size requirements, minimum interior floor size requirements, and minimum frontage requirements).

These zoning laws have been challenged successfully in State court in a number of States.¹²⁴ In those States where successful challenges have been brought, the decisions have been based on economic, rather than racial discrimination. The courts have found that these exclusionary zoning laws have exceeded the zoning authority of the suburbs provided in State enabling legislation and have failed to satisfy the standard of promoting the general welfare.

5. Failure to take steps to encourage minority residents.

In addition to conduct by the suburbs—through action and inaction—that has tended to exclude minorities, suburbs have often failed to seize opportunities that would

¹²⁴See, e.g., *National Land and Investment Company v. Kohn*, 215 A.2d 597 (Pa. 1965) (4 acre minimum lot size); *Melino v. Borough of Glassboro*, 281 A.2d 401 (N.J. 1971) (restrictions on apartment construction); *Bristol v. City of Woodhaven*, 192 N.W.2d 332 (Mich. App. 1971), (exclusion of mobile homes).

alter their all-white image and encourage minorities to reside there. For example, the suburb of Parma, Ohio, a municipality of more than 100,000 people, of whom only 50 are black, has consistently rejected proposals for the mildest form of fair housing resolutions, thus reinforcing the perception of blacks in the Cleveland area that they are not welcome in Parma. By the same token proposals for subsidized housing in which minorities would reside have been rejected in such suburbs as Black Jack, Missouri, Evanston, Illinois, and Delray Beach, Florida, in an atmosphere of opposition to minority entry.

In short, in many suburbs where a choice had to be made between a course of conduct that would encourage minority entry or discourage it, the latter course has consistently been taken. Although, in many cases, no single action rises to the level of the illegality, the course of conduct is an important part of a mosaic in which suburban jurisdictions have successfully sought to maintain minority exclusion.

6. Discrimination by the private housing and home finance industry.

The key elements of the private housing and home finance industry—builders, real estate brokers, and mortgage lending institutions—have all traditionally operated on the basis of a restrictive housing market in which the suburbs have been designated as havens for whites. Although they are ostensibly private, nongovernmental entities, all three are closely tied and dependent on government. Mortgage lending institutions are chartered and closely regulated by Federal or State agencies. Builders have depended heavily on FHA and VA assistance in constructing suburban housing developments and have successfully relied on suburban governments for the necessary zoning changes, building permits, water and sewer lines, and the like to construct their housing. Real estate brokers must secure a license from the State in order to transact business. In some cases, as in Michigan, the State real estate licensing agency traditionally included in its code of ethics provisions to the effect that brokers should maintain racially homogeneous neighborhoods. Earlier this year, it was disclosed that the Florida Real Estate Licensing Commission, in

its handbook for brokers, still lauded the concept of residential segregation.

Although there is considerable question whether governmental involvement in the discriminatory practices of the private housing and home finance industry is sufficient for a finding of "state action," government at all levels has been guilty of some degree of affirmative encouragement of private housing discrimination and, at the least, passively permitted this practice to go on when it could easily have been stopped. Further, it may be immaterial that the residential segregation results largely from private discrimination. Just as local school boards may not build exclusionary attendance areas on private racial discrimination,¹²⁵ so it may be that the State may not maintain school district boundary lines that build upon the segregated housing market. Beyond this, private housing discrimination must be seen as a part of an entire pattern of minority exclusion from the suburbs and confinement to the central city—a pattern in which government and private industry have been linked closely.

*

If the broader view of Justice Stewart that a showing of government responsibility for residential segregation in metropolitan areas is sufficient to warrant an order for relief that would encompass the suburbs as well as the central city, several questions still remain to be answered.

First, how important a factor must governmental conduct be in establishing and perpetuating residential segregation? If plaintiffs' burden is to demonstrate that the suburbs are *entirely* responsible, the burden again may be insupportable. Justice Stewart, however, indicates that the burden may be less onerous. At one point in his concurring opinion he suggests that the test is whether segregation was "imposed, fostered, or encouraged by the state or its political subdivisions."¹²⁶ At another point, he suggests the test of whether the segregated residential patterns were "in any significant measure caused by governmental activity."¹²⁷ Further,

Chief Justice Burger indicates that the test is whether the conduct of the suburbs "*affected* the discrimination found to exist in the schools of Detroit" [emphasis added].¹²⁸

Under these tests, admittedly imprecise, plaintiffs' burden is something less than a demonstration of total governmental responsibility, but something more than a showing of trivial or insubstantial impact. A precise definition will have to be determined on a case-by-case basis.

Second, to what extent must each and every element of the governmental conduct, which admittedly caused or fostered the residential segregation be unlawful in itself? For example, the mere failure of suburban jurisdictions to provide public housing in which lower-income minorities could live, whether through failure to establish a local public housing authority or refusal to sign cooperation agreements to permit other local public housing authorities to build, has not been held unlawful.¹²⁹ Yet, such conduct clearly has the effect, if not the purpose, of maintaining minority exclusion. By the same token, it is doubtful whether State or suburban involvement in discrimination by the private housing and home financial industry, through licensing of brokers or the mere rezoning of land for use by a discriminatory builder, is sufficient to constitute "state action" for purposes of a violation of the equal protection clause of the 14th amendment.

In my view, the threshold problem for plaintiffs is not that of proving that all of the conduct of the State or suburbs is unlawful, but the more basic one of demonstrating to the Court that the residential segregation that exists in metropolitan areas is not caused, in Justice Stewart's words, "by unknown and perhaps unknowable factors,"¹³⁰ that the bland assumption that residential segregation is the result of neutral, impersonal factors beyond the control of government is totally wrong, and that government at all levels is heavily, and even decisively, implicated as a major causal factor. Thus, the principal burden on plaintiffs is that of educating the Court to the realities of the causes of residential segregation.

¹²⁵ See *Brewer v. School Board of City of Norfolk, Virginia*, 397 F.2d 37 (4th Cir. 1968).

¹²⁶ At 3133.

¹²⁷ *Id.*, n. 2.

¹²⁸ At 3131.

¹²⁹ See *Mahaley v. CMAA, supra*.

¹³⁰ At 3133, n. 2.

Further, the swing Justice, Potter Stewart, does not specify that the conduct must be unlawful. For Justice Stewart, it is enough if the State or its subdivisions "imposed, fostered, or encouraged" segregation¹³¹ or caused it "in any significant measure."¹³² This language falls short of suggesting a requirement that each and every aspect of the suburbs' conduct must be unlawful.¹³³ In addition, while some individual acts of commission or omission may not be unlawful when viewed in isolation, they may well be seen as part of a pattern of unlawful, racially discriminatory conduct when considered in the context of all other acts of the suburbs.

Thus, I have some confidence—or at least hope—that the burden on plaintiffs is not to show that each and every act of commission or omission by State or suburban governments must be in itself unlawful; but, rather, that the totality of their conduct constitutes a major cause of the residential segregation.

Third, must plaintiffs demonstrate as a condition to securing metropolitanwide relief that each of the jurisdictions they seek to include in the school desegregation plan has maintained policies and practices that have caused residential segregation? If so, plaintiffs' burden may again be virtually insupportable, at least in those metropolitan areas where a large number of jurisdictions are involved.¹³⁴ The effort of investigation to obtain evidence of complicity by a large number of suburbs may well tax the limited resources of typical plaintiffs and their attorneys beyond their capacity. Further, it is possible that even the most exhaustive investigation would fail to

disclose sufficient evidence by the one or two suburbs that are the key to effective desegregation. Here too, the answer is uncertain, though the Court does suggest that blameless suburbs should not be included in the order for relief.

It must be borne in mind, however, that in *Milliken*, the Court was dealing with a metropolitan school desegregation plan that involved 53 suburban jurisdictions plus the city of Detroit. The Court stressed the logistical, fiscal, and other complexities that would be involved in a plan of that magnitude.¹³⁵ Mr. Justice Stewart also stressed "the difficulty of a judicially supervised restructuring of local administration of schools."¹³⁶ Thus, it is likely that one of the considerations that went into the Court's ruling that in the absence of proof of State or suburban responsibility for the segregation found to exist in Detroit the suburbs could not be included in the order for relief was the Court's fear that affirmance would lead to an administrative and political nightmare.

What this suggests is that it would be, at the least, unwise to confront the Supreme Court immediately with another case involving a desegregation plan applying to a large number of suburban jurisdictions—certainly without solid evidence that each of them, individually and collectively, constituted a causal factor in the segregation. By the same token, a case involving a metropolitanwide plan for relief that applies to only one or two suburban jurisdictions would offer two important advantages. First, it would make it easier to prove responsibility of the included suburbs for residential segregation (if that is, in fact, required). Second, it would ease the Court's concern over the administrative and political problems that a metropolitanwide desegregation plan would entail and begin the process of demonstrating to the Court that its fears are baseless.

¹³¹ At 3133.

¹³² *Id.*, n. 2.

¹³³ Chief Justice Burger does indicate that there must be a constitutional violation, but this in the context of a focus limited to the conduct of school officials alone. *Id.* at 3127. As noted earlier, if the Court's attention can be directed to the fact that the State's maintenance of school district lines is imposed on a pattern of segregated housing, this may be sufficient to satisfy the Chief Justice's standard.

¹³⁴ In Detroit there are 86 school districts that make up the metropolitan area and 53 suburban school districts were to be included in the metropolitanwide desegregation plan.

¹³⁵ At 3136.

¹³⁶ At 3122.

CHAIRMAN FLEMMING. At this time I will recognize Mr. Sloane. I ask him to brief us on his paper. Harold Fleming and Dr. Tauber will react.

MR. SLOANE. We have heard several warnings this morning about listening to the call of the siren. Experience shows you should be careful about sirens, especially when their song is sung in footnotes. That is what we have here. Heavy reliance on the concurring opinion of Justice Stewart. I suppose we all try to be optimistic. Being in civil rights, you have to be optimistic. But I find his textual comments on proof of segregation somewhat incomprehensible.

State housing laws, I don't know what he has in mind. Literally, it does not make too much sense in that States delegate authority to municipalities. In a footnote, Justice Stewart makes a statement about "unknown and perhaps unknowable" factors. Then, in the same footnote, he ticks off the causes of residential segregation. All are neutral, impersonal factors beyond the control of States and localities. As I recall, Justice Stewart is the author of a fine opinion in *Jones v. Mayer* which held, on the basis of an 1866 civil rights law enacted under the 13th amendment, that all housing discrimination is barred. I find it difficult to understand how the author of that opinion could come to the assertion that the causes of residential discrimination are unknown and unknowable. In the same footnote, however, he refers to other factors and we seize upon these as reason for optimism.

Justice Stewart said no record has been made showing that the racial composition of the Detroit school population or that residential patterns within Detroit were caused by government activity. That is fine. If we can take him at face value, our burden is to show that residential patterns within Detroit and the surrounding areas were in fact in significant measure caused by governmental activity.

If the Chief Justice's opinion is taken literally, the burden placed on plaintiffs in the school decision is unsupportable. Justice Stewart, taken at face value, makes the burden supportable.

Well, what do we have in the way of experience on the extent to which State and suburban governments can be found to have been a causal factor "in any significant measure" for the residential segregation that exists in metropolitan areas—the absence of minorities in the suburbs? Their confinement to the central city and the resulting heavy minority enrollment which makes desegregation extremely unlikely within the confines of the central city?

In my paper, I have gone through as many different kinds of practices in which suburban governments have been heavily involved that I can think of. While these are fairly typical in terms of my experience, you are not going to find every one of these policies and practices in operation in every suburb or every metropolitan area.

Secondly—and this may cause difficulty when I get to questions later—not all of these practices have been found to be illegal by courts. There is a third caveat I did not mention. Some of these practices are unique to particular parts of the country and some of them vary in their relative importance in terms of being a causal factor of residential segregation.

The first practice is an example of the two last caveats.

They are found largely in the South and Border States. And they are a central city phenomenon. These are racial zoning ordinances, which were quite prevalent at the beginning of the century. In 1917, these zoning laws were held unconstitutional. They keep turning up, however.

In *Buchanan v. Warley*, the Supreme Court held that ordinances requiring racial segregation were unconstitutional. I suspect we can still find these on the municipal books. In any case, they were a factor in establishing the patterns of residential segregation largely in the cities of the South and of Border States. Once those patterns were established, they tended to be perpetuated. This is one big difference between schools and housing.

In schools, at the end of the academic year you say "everybody out" and you start over next year. You don't do that in housing. You don't say, "everybody out in the street. Get your furniture." Once the residential pattern is established, it tends to perpetuate itself.

The second is racially restrictive covenants. These exist on a national scale. They have been a profound factor in the establishment of all-white suburbs. These covenants, which are private agreements between neighboring landowners, exclude people by race or national origin. They became popular during the period of great suburban expansion. They were spread mostly by the Federal Housing Administration, which began in 1934. Their enforceability was ruled unconstitutional by the Supreme Court in 1948, but they are still on the books. Individual homeowners purchase houses. They examine the deed and the covenants they are supposed to obey. They see its restrictive covenants still there. A lot of people take their promises very seriously. A good many of them don't know this particular covenant has no force of law.

This is a very important factor that can be found easily and could make very good evidence of governmental responsibility. While they were private agreements, they gained force because the State and Federal courts were quite willing to enforce them as a covenant of the land.

The third is difficult to ferret out—public improvement programs that either keep out minorities when they want to get in or displace them when they are already there. For example, in the face of a proposal for development of a racially integrated project, suddenly the municipalities find there is a crying need for a public improvement. The park is the usual one. They condemn the land and keep out racial minorities. The other side of that is the example where racial minorities already live there, generally as a historical fluke going back to pre-Civil War days. Suddenly, there is a need for urban renewal. Out go the minorities.

In St. Louis, the relocation resource for urban renewal in one suburb was public housing in the central city. This will take digging. You may not find it in every municipality, but it is quite prevalent. This is the subject of a good deal of fair housing litigation over the last 5 years.

Next are the practices of municipalities which keep out subsidized housing and, therefore, keep out racial minorities. It is the perception of a good many suburban municipalities that subsidized housing means minority housing. To a large extent, that is not true. To some extent, however, it is. There are a variety of ways the suburbs have excluded minorities by excluding subsidized housing. One way is not to establish a public housing authority. The nature of the public housing program is that it is voluntary. The Federal Government offers the benefits, but they do not have to be accepted. If no public housing authority is established no blacks come in.

In Chicago, under Illinois State law, neighboring public housing authorities can operate in an area which does not have a public housing authority. Municipalities establish a public housing authority which builds no public housing authority. That is enough. The neighborhood public housing authority cannot operate there.

In addition, there is a requirement under Federal law that the locality in which public housing is to be built must sign an agreement or authorizing resolution. One way to keep out public housing is to ignore a request to sign a cooperation agreement or refuse to sign it. This was

challenged in *Mahaley v. CMHA*. The challenge was successful in the lower court. This would have been the kind of major breakthrough in housing that *Milliken* promised to be in public education. You had largely black public housing waiting-lists. There was a need for public housing in the area. Therefore, the lower court held that the refusal was racially discriminatory. The case was reversed. The breakthrough did not happen. This practice is not necessarily illegal under existing law.

Long-standing causes of racial segregation. Until 1962, it was common practice for local authorities with Federal acquiescence to select sites and assign tenants on an overt racially discriminatory basis. It is not done overtly anymore. The pattern, however, developed over a period of 25 to 30 years and now perpetuates itself.

Another one used is initiatives and referenda to keep out subsidized housing. The *Valtierra* case challenged the constitutionality of a State referendum requirement for public housing. Unfortunately, that challenge was defeated in the Supreme Court. The Supreme Court's opinion seems to indicate fairly strongly that economic discrimination does not rise to the 14th amendment violation.

We at NCDH are involved in a lawsuit involving similar issues. The case has been going on for several years. The defendant city is almost all white. There are over 100,000 people there, of whom only about 50 are black. This is *Cornelius v. City of Parma*. This is an example of what I meant when I said subsidized housing is perceived as black housing. In this case, there was a proposal for subsidized housing. The good people of Parma immediately thought black. They passed two ordinances, the first requiring a referendum vote for subsidized housing. The second one placed an absolute limit on the height of residential structures—a height much lower than you need for subsidized housing. We hope that we have a case that is a winner. We have, or at least allege, the element that *Valtierra* did not have—racial discrimination.

The referendum in *Valtierra* was not aimed at a racial minority. The record did not show it. We claim that in Parma it is aimed at a racial minority. We are still in court, having successfully withstood procedural motions to dismiss.

Another way in which localities keep out subsidized housing is through their authority to deny building permits and hookups for water and sewer. That authority is used, in effect, to say no.

Finally, there is the broader area of zoning laws under authority that States have delegated to localities. In many localities, zoning laws exclude by imposing cost-increasing requirements, or by prohibiting housing that lower-income people can live in. Some of these have been challenged successfully in the State courts. If you challenge these laws, you don't have to show racial discrimination. It is enough to show they discriminate against lower-income people.

The failure of municipalities to encourage minorities. We have had experience where a number of occasions arise where there are choices the city can take—a choice between taking the step that will encourage minorities to come in or discouraging their entry. The choice is made. The city takes the choice of keeping minorities out.

Finally, the major factor of discrimination by private industry. The connection between private industry and suburban governments often is a tenuous one. In Michigan what you had was the State real estate licensing board adopting a policy similar to that of the National Association of Realtors in favor of racial homogeneity. I don't know if there are too many States where you can find that, although a similar policy was found in Florida recently.

These, in brief, are the kinds of causes of residential segregation which involve government. Some are not illegal under court decisions. The weight of these, however, adds up to a pattern of governmental involvement that might satisfy Stewart's standard of government's being the cause in any significant measure.

There are several questions that remain that I am not in a position to answer right now. The answer depends on subsequent cases. First, how important a factor must government activity be in causing racial segregation? Stewart uses two terms. One, government in any significant measure caused it, and, second, the residential segregation was imposed, fostered, or encouraged by the State or political subdivisions. It is vague language, but language that lawyers are familiar with. It certainly suggests something less than total government responsibility and something more than a trival cause. Subsequent cases will help to define how much responsibility there must be.

CHAIRMAN FLEMMING. Could you identify those other questions?

MR. SLOANE. Not all of these practices have been found to be unlawful under existing law. Must every one of these acts be unlawful?

The third is, if you are dealing with a number of jurisdictions, as in Detroit, must you show that each of these jurisdictions is in some way responsible for the residential segregation that goes on?

CHAIRMAN FLEMMING. Thank you. I am happy to recognize another Fleming—Harold Fleming, president of the Potomac Institute. He will react for 7 minutes to this fine paper.

MR. FLEMING. Mr. Chairman, may I say that any confusion that arises between the two of us is to my benefit.

I have a concern about Martin's fine paper. If there are any local jurisdictions that have not perfected the techniques of keeping out racial minorities, he has given them a how-to-do-it method. He has given us a masterly analysis.

It may be like dreaming the impossible dream, but our assignment is to make known the unknowable factor, to make it clear not only to Justice Stewart but to a great many other people in this country, so that they will understand the basic causes of racial segregation.

We have heard in this presentation and several of the others a number of facts and circumstances that fly in the face of popular assumptions about segregation and desegregation. These facts are an impressive refutation of the conventional wisdom. The trouble is that almost nobody believes them. Not only Justice Stewart and some of his colleagues, but many people who are opinion makers in this country, and who have a considerable influence in the shaping of policy in the political life in this country, simply do not believe that there is no such thing as purely de facto segregation—that segregation in housing and in schools is at bottom absolutely attributable to conditions created or abetted by governmental action.

Those of us who have worked in this field long enough are convinced of this. But we have not succeeded in convincing even the well-educated, public-minded people in this country who are going to have to be convinced, in my opinion, before we can get beyond the position taken by the Supreme Court in *Milliken*.

I don't think you have to convert the whole American public or even a majority of it to achieve this result. But I do think well read, well-informed, articulate people must come to see the realities as most of us here see them, and as they have been described here this morning, before we can hope to see the Court take a position different from the one the majority took in *Milliken*.

This is important to all of us. This Commission has done yeoman's work, particularly in the field of school desegregation. It has not yet addressed itself in a major way to the complex way in which residential patterns in this country are shaped, and to the complex and intricate interplay of forces that leads us into a more and more segregated pattern. I hope the Commission, in addition to such reports as may issue from this conference, will plan and embark on a major program of factfinding and public and official education in this area.

I want to take my stand with those up here who profess to be optimistic. I would remind you that it was not so long ago, when I was in the South with the Southern Regional Council, that what became the first successful voting rights legislation was introduced in Congress. Its sponsors faced a problem—how to present persuasive evidence that there was, in fact, widespread voter discrimination. This was back in the fifties when the evidence to most of us seemed quite obvious. But it was seriously and persistently argued on the floor of the Senate that there was no convincing evidence that discrimination existed. We had to assemble and communicate much public information to convince people that voting rights needed governmental protection.

Those were simpler days. The evils were bigger and more satisfyingly identifiable. Yet, I think we may be at a similar stage now with respect to the interrelationship of segregation in housing and education. We are faced with the old problem of self-interest operating on the wrong side.

The trouble with the antibusing position is the assumption that we can have it both ways. President Ford and his predecessor have expressed themselves as opposed to busing on the grounds that it is artificial and that the natural way of achieving desegregated schools is through open housing choices.

President Ford has not yet made clear his position on housing policies, but former President Nixon did. He opposed the use of Federal leverage to achieve an economic and racial mix in suburban housing because to do so would intrude on the autonomy of local jurisdictions.

I would suggest that one cannot reasonably argue both ways. If desegregated schools may only be achieved through residential patterns, then the power and authority of this country had better be put behind housing desegregation. If that is not going to happen, let us as Americans learn to live with busing as the penalty for being unwilling to desegregate our communities.

If we can get self-interest turned around so that it benefits a community to desegregate housing, or to join with neighboring jurisdictions in achieving a balanced educational program, then we can get somewhere in this field.

I welcome the closer linkage of these two issues, of housing and education. The people primarily concerned with educational integration have tended to steer away from the housing issue as being less popular and less likely of solution than educational desegregation. But we are now coming to see the two tasks as being really one. They have to be approached together. Integrated housing choices and integrated schools ultimately must go together. Until and unless we can achieve that, schools must be desegregated in such a fashion as to prevent residential barriers from permanently separating children on racial lines.

CHAIRMAN FLEMMING. Thank you very much. I am happy to recognize Professor Taeuber, professor of sociology at the University of Wisconsin.

DR. TAEUBER. In the written version of the paper, Mr. Sloane started with the statement that the plaintiffs lost their case in Detroit. I would like to side with the optimistic speakers today and emphasize that the original case, which was a city case, was won handily. We have demonstrated clearly that Northern school segregation is a product of illegal, unconstitutional action by State agencies.

Another impression that fosters pessimism is the view that all of our central cities are becoming predominantly black. This was a major issue in the Atlanta case that has been referred to several times today. It is true that Atlanta, Washington, D.C., and a number of other cities are becoming very heavily black in residential proportions and more in their school proportions. But keep in mind that a population group which is a small minority in the total U.S. population cannot become a majority in all of the central cities. The Nation has a very large number of central cities and large numbers of white families live there now and must continue to do so for many years to come.

School desegregation policies and actions must confront a wide variety of school districts and demographic settings. We should not try to lump them all together. We in this room perhaps all know that racial discrimination underlies our segregated residential patterns and our highly segregated school systems. One of our problems today is whether we can prove what we all know.

Before the conference, reactors were sent all the papers and were admonished to resist the base impulse to comment on papers other than the one assigned. Mr. Pettigrew has ably reported on some of the demographic background and on some of my published work on residential segregation, and I shall resist the base impulse to travel over the ground again. Rather I will follow a trail that Mr. Sloane has marked for us.

Mr. Sloane emphasized that in recent years there is much more subtlety and concealment about discriminatory practices. Many of the major institutions and actors in the real estate industry are attempting to avoid actions that, with current laws and rulings, are now well known to be illegal, while others are simply editing their language and their minutes and better concealing their motives.

Let's go back to the period of restrictive covenants, to the time when Federal housing guidelines said openly that racial mixture was bad. Suppose we use this earlier period, together with the succeeding period of less openness but of no affirmative action to change past practices or to overcome their segregative effects.

Many governmental and private agencies had no thought that they should be responsible for racial discrimination that resulted from their actions. Suppose we can prove all of this more easily for the not-so-long ago past than for the present? Can we then demonstrate that the past does leave a heritage on the present? Can we document that current segregated patterns were established during that period when these kinds of discriminatory actions were more open? As a demographer more comfortable with numbers than with verbal documents, I put together a few pieces of data for illustration. FHA and VA insurance provide a first example.

I went back to the 1950 census and found there were then about 2.4 million housing units federally-insured under those two programs. The 1960 census showed 14 million mortgaged owner-occupied housing units in the country, nearly 6 million of which were insured by FHA or VA.

Forty-six percent—nearly half—of the mortgage debt in the Nation was insured under those programs. This was in the period when the kinds of evidence that Mr. Sloane was referring to can be developed more easily than now.

- Consider the 1960 data for blacks (and other "nonwhites") in single-family, owner-occupied housing. Blacks held 5.4 percent of all mortgages. Let's overlook what this says about lack of access to the homeowner housing market. Instead, note that, of the more desirable mortgages, blacks held only 3.7 percent of the VA-insured and only 2.5 percent of the FHA-insured. The black share of the FHA mortgage market was half as great as their share of the conventional mortgages. This was a period when the conventional mortgage market has been shown to be highly discriminatory against blacks.

The 6 million units insured under these programs constitute quite a large share by anybody's standards. Certainly there was "significant" governmental involvement. These federally insured units constituted in 1960 one-eighth of all of the housing, in the country, one-fifth of the owner-occupied housing and about two-fifths of all of the mortgaged housing.

These insurance programs were utilized throughout the Nation, in the cities as well as the suburbs. In Detroit, 48 percent of mortgages were covered by these two programs, in Atlanta, 51 percent; and in Boston, 29 percent.

Let's go to the issue of the heritage of the past. The 1970 Census of Housing has two highly pertinent questions. First, "what year was the structure built?" Every household was asked to report this. Of all central city housing, 34 percent of the units were built in the forties or fifties. Forty-eight percent were built before 1940. More than three-fourths of the housing was built before 1960. Many of us have the impression that suburbanization is a new phenomenon, yet 28 percent of the housing was built before 1940 and two-thirds before 1960. These figures are roughly true for the housing occupied by blacks also.

We have a perception that the United States population consists of people who have no roots. The Census Bureau reports that one-fifth of the people move every single year. What we fail to perceive is that most families display a high degree of residential stability during much of the life cycle. A second question in the 1970 Census of Housing is, "What year did you move into this housing unit?" For central city residents, 14 percent reported they moved in before 1950, and altogether one-third (including renters) had moved in before 1960.

In the suburbs, it was 19 percent in the fifties and 12 percent before 1950. Nearly a third had moved into their units prior to 1960 and a substantial proportion prior to 1950. These data show that the heritage of the past is not simply an abstraction. Many of the people who made a residential choice in the 1930's, 1940's, or 1950's are still living in the same house.

Mr. Orfield said that, if we leave things alone, it does not mean they will get better or worse, but they will change. Demographically our society is always in a state of flux. Today the urban black population is growing predominantly through natural increase, not migration. The children of those who moved to the cities in the forties and fifties are now forming their own households and seeking housing. These people are responding in many ways quite differently from their parents and grandparents. They have a different background and a different sense of the way things should be.

Any large scale migration pattern must come to an end, and the black rural-to-urban and South-to-North pattern has about run its course. The last few years we have had a marked change in movement out of the rural areas. We have a change in patterns of interregional migration. Metropolitan growth has slowed down tremendously. From 1970 to 1974 there was net out-migration from metropolitan areas. The counties peripheral to metropolitan counties were growing faster than the metropolitan counties and faster than the more remote counties of the Nation.

The locations of housing, schools, and jobs are intricately tied together. These locations are changing with forces both knowable and unknowable, forces within our control and some outside of our control.

The version Mr. Taylor presented of the causes of our current racial division is, I believe, held by many people, regardless of whether it is an accurate description of the views of particular members of the Supreme Court. In essence, it is a widespread perception among the Nation's leaders.

As Mr. Pettigrew emphasized, most of these social trends are among those topics about which social science *does* have knowledge. I believe that further progress on school desegregation depends on more than the course of litigation. The Commission and scholars must work with renewed vigor on their task of educating the public about this reality.

CHAIRMAN FLEMMING: Thank you very much. Commissioner Ruiz, do you have a question?

COMMISSIONER RUIZ: I would like to preface my question directly to Martin Sloane with a statement of background to focus better upon the question which I am going to interpose. I have been intrigued by the evolutionary process which may be taking place. As you know, I am a California Chicano, Mexican American.

I was born in East Los Angeles, baptized in the old plaza church where my mother and father were married adjacent to Olvera Street, which was the birthplace of the City of the Angels. I was there before the white Anglo or the black arrived in great numbers and watched the pueblo grow into a megalopolis.

I have observed the demise of the Chinese exclusionary act in my State. I have experienced the enactment and repeal of laws that prohibited Japanese from owning real estate. I have observed segregation of Mexican American schoolchildren based upon a law in California that they had Indian blood, and I was instrumental in working for the repeal of that law in my State.

California never practiced de jure, legally State-imposed segregation against the black American.

I was practicing law when restrictive racial covenants and real property contracts were formulated against Jews, Orientals, Indians, Mexican Americans, and blacks. When the restrictive covenant laws were repealed, it made me get rid of my law library on matters of restrictive State covenants because the laws became irrelevant in respect to that.

Now we come to *Milliken v. Bradley*. I have listened to various definitions of learned persons as to the *Milliken* implications. In those instances where the experts have seemingly agreed upon definition, there is a dispute as to the application of what has been defined.

The rules set down by *Milliken* appear to be plain and intelligible. The major premise adopted by all nine Justices of the Supreme Court is a tricky one however—a premise on which all reasonable men will continue to have different opinions. That premise is called “official state action.” If we define “state action” as limited to the official acts of the Governor, the State legislature, the State board of education, and local school boards, I think we are going to stay and remain on dead center.

I will say this. The raw power of what constitutes “state action” in my lexicon is *local customs and not State officials*. It is more discernible in my State where we have the “referendum,” where much of the “state action” comes from communities and not the officials of the government, the State legislature, the State board of education, or local school boards.

Mr. Sloane, do you feel it is necessary for “state action” to limit involvement to State officials and heads of State systems of education? What do our court decisions relate on whether official State conduct is necessary as a condition to the exercise of equitable remedies in the field in which you have expertise?

MR. SLOANE. The State acts in a variety of ways. The 14th amendment is addressed to the State. The State is responsible for the actions of its own creations, including its political subdivisions. On initiatives and referenda, again the State acts in various ways, such as passage of statutes by legislation, adoption of ordinances by city councils, actions of the Governor or mayor. It can act also through the people. But courts are somewhat reluctant to enjoin the holding of a referendum.

Everyone here 50 years ago would have been straining mightily to support initiatives and referenda. Courts are reluctant to enjoin the holding of a referendum unless it is clear the results would be unconstitutional. The courts have had no trouble entertaining lawsuits challenging initiatives or referenda already held. The case of *Reitman v. Mulkey* involved proposition 14 adopted through an initiative measure in California. It would have embodied in the State constitution the right to racial discrimination in housing. It was ruled unconstitutional by the U.S. Supreme Court.

COMMISSIONER RUIZ. Let us suppose the city council says, we have passed a law seeking desegregation. You will admit that that is “state action”?

MR. SLOANE. Yes.

COMMISSIONER RUIZ. Supposing on a referendum the people of the community overrule State action? That is my inquiry. Is that still “state action”?

MR. SLOANE. Yes. The State and its political subdivision can act in a number of ways, including through voting of the electorate.

CHAIRMAN FLEMMING. Mrs. Freeman?

COMMISSIONER FREEMAN. You have cited several possible practices and policies for local government. My concern is the extent to which, over the years, our system of jurisprudence has placed the burden for remedial action on the victim. We blame the victim and we put the burden on the victim.

I would like to hear your comment on the extent to which the State, in the exercise of its power under the so-called concept of New Federalism, has a duty to come in the beginning when local communities are undertaking or have indicated they are going to undertake a project, to what extent they might take the initiative as a part of the duty of the government. Would you comment on that? Is there a theory that we should develop?

MR. SLOANE. I can comment in the limited context of fair housing litigation. I mentioned this new area of litigation that has developed over the last 5 years involving challenges to exclusionary land use practices. This did not develop by accident. It is a direct result of events that occurred in 1968. What happened in 1968 was we suddenly had a sweeping Federal fair housing law, a sweeping Supreme Court decision, *Jones v. Mayers*, which barred racial discrimination in all housing. Most important, we had the 1968 Housing and Urban Development Act, which established massive new programs of subsidized housing which could operate freely throughout the metropolitan area. Suburban jurisdictions no longer had the veto power over subsidized housing that they previously had.

What had been lurking in the background—exclusionary land use—rose to the fore as a prominent obstacle to achieving open access of housing to minorities. In litigation challenging these exclusionary land use practices, a number of which I have mentioned, in every case I know of, as an essential part of the prayer for relief is a request for an order requiring the municipality to undertake an affirmative program of comprehensive relief.

The way you get that is by showing they have done something wrong in the past. It is now conventional legal wisdom that the obligation of a municipality found guilty of unlawful conduct is not just to stop what it is doing, but to correct the effects of its past discrimination. Absent a showing that the State or locality has done something wrong in the past for which it must atone, there is no affirmative obligation on the State or its political subdivisions. If they have not been shown to have done anything wrong, their obligation is merely to maintain a neutral posture.

Now, that may suggest more than it means. All you have to do is look at any governmental body, whether Federal, State, or local, and you will find they then have been guilty of discriminatory conduct. The Federal Government, after years of actually advocating racial discrimination in housing, maintained a posture of neutrality from 1950 until 1962. If builders and developers who sought FHA help wanted to discriminate, that was okay. If they wanted to practice fair housing, that was okay.

Now, FHA had been a formidable factor influencing policies and practices of housing discrimination and establishing patterns of residential segregation. Therefore, its obligation is more than to maintain a policy of neutrality.

In short, you have to show the governmental body has done something or caused a residential pattern.

COMMISSIONER FREEMAN. I am disturbed that governmental bodies all too often treat their responsibilities differently in matters involving race. Usually, government accepts its duty and nobody has to ask them about it with respect to matters involving the general population. In the field of race relations, we shift the burden and have to force attention to the issues. What is it that we can do to eliminate this double standard?

MR. SLOANE. You are right, Mrs. Freeman. I think, however, that the answer must come from somebody other than a lawyer involved primarily in litigation. The answer lies in the kind of political pressures necessary to force government agencies—Federal agencies in particular—to get off the dime, not wait for complaints, but to come in and undertake massive compliance efforts.

If you want to take them into court, my feeling is that prospects for success are not terribly good. Agencies have wide discretion in civil rights enforcement. The courts are not likely to interfere, absent some showing that the agency or governmental body has done something in the past for which they should be required to atone.

CHAIRMAN FLEMMING. Mr. Horn?

VICE CHAIRMAN HORN. When Mr. Sloane was assistant staff director, we learned that his work was of high quality. Thus, I will not ask him many questions. First, however, I would like to staff to secure and place at this point in the hearing a copy of the FHA policy in the thirties which has been referred to as encouraging some of this discrimination. When I asked the staff to find this some years ago, it took an awful long time to pin the matter down.

[Two publications of the Federal Housing Administration (FHA) called for discriminatory practices:

FHA Underwriting Manual (with revision to June 1, 1935), section 310, stated: "Important among adverse influences besides those mentioned above are the following: Infiltration of inharmonious racial or nationality groups."

FHA Underwriting Manual (with revisions to February 1, 1938), section 951, stated: "If the children of people living in such an area are compelled to attend schools with a majority or a considerable number of pupils representing a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist."]

Second, I would like to ask Mr. Sloane his estimate or judgment as to how much of the movement towards the suburbs has been actually "racially caused." Was the movement the result of an individual personal decision or because of a conscious government policy? Do you have any government estimates of what we are talking about? I am including all the suburbs of America. We have a demographer in the group. He may have a feel for this. People were in the suburbs before blacks were in many of the cities.

DR. TAEUBER. That is a question that statistics don't answer. I would go in the light you gave. Boston was suburbanizing around 1800. The suburban trend is not only in the U.S., but it is worldwide.

If you take away race as a motivating factor, how much would be left? Well, most of it would be left because most of our social trends, individual decisions are overdetermined. There are far more causes than there need to be. If you ask people why they move, they say better schools. If you show they had better schools, maybe they would say something else. There are many, many reasons—space, living styles, cost, Federal subsidies to homeowners that don't go to renters, and that sort of thing.

As you take a universe, there are a lot of cities where there is no real black population. I am from Madison. The entire county is being filled up with people. One can't show often specific white flight from race. There are neighborhoods where there is a very rapid turnover. One can say there are racial factors in that particular move at that particular time. It entails racial complications. I don't see race as a principal cause.

MR. FLEMING. I obviously cannot answer that question, but I can raise another. It seems that the two sides of the coin are white flight and black stagnation. To what extent are racial factors keeping blacks out of the suburbs? I guess that you are asking the converse of that:

What makes whites flee to the suburbs? For our purpose, both questions are equally relevant. If blacks were in the suburbs, too, in some reasonable proportion, would the question of white flight really arise?

MR. SLOANE. I would ask the question the other way around. My own feeling is that the reasons for suburbanization cannot be determined statistically, they vary. While racism is undoubtedly a factor, it is hardly the only factor. I would not list it all that high.

It is a result—perhaps here, Justice Stewart's phrase is apt—of unknown or unknowable causes. The problem is not so much that the suburbs are being populated, but that not everybody is free to go. I did a cursory study some years ago, looking at metropolitan areas over a period starting in 1900.

In a good many, the racial composition of the metropolitan area has not changed by more than 1 or 2 percentage points over a period of 70 years. Washington, D.C., comes to mind where the population of the metropolitan area has been roughly 75 percent white to 25 percent black throughout this period. What has changed dramatically, in no other place as much as in Washington, is the distribution of the population by race. In 1900, the Maryland and Northern Virginia suburbs and the District all had roughly 75 percent white population and 25 percent black. Now, it is completely turned around. The Maryland suburb of Montgomery County is 95 percent white to 5 percent black. Some of the Virginia suburbs are the same.

But the movement towards the suburbs is caused by factors that don't have to do with race. The problem is not how do we stop this movement, but how do we let all people have access to living in the suburbs if they so choose. I don't choose to live there, but I can see where some people would want to.

VICE CHAIRMAN HORN. You mentioned quite correctly the psychological influence of restrictive covenants even though they might have been legally overruled for a generation. I recall buying a home in Northwest Washington in 1963 and insisting that a disclaimer be put on the deed because it still carried those restrictive covenants. There was great shock when I asked that this be done. I happened to have been a Republican. Apparently, the only other person who had done it at that time was the son of a Democratic Attorney General. What can be done by the way of class action suits, a law, etc., to wipe out that invidious type of language from the records kept in the courthouses of America?

MR. SLOANE. For many years, that was a troublesome question. We have something going now. The Supreme Court, in 1948, ruled that the covenants were unenforceable. The Court also declined to rule whether they were void. In fact, the covenant later was used successfully as a defense in an action against a cemetery owner.

There was a recent decision by the U.S. court of appeals, *Mayers v. Ridgley*, which held on the basis of Title VIII that for the recorder of deeds of the District of Columbia to record these racially restrictive covenants was a violation of Title VIII. It is a fairly prestigious court. I have some confidence that similar cases around the country would have the same result. That is one way of getting rid of them.

VICE CHAIRMAN HORN. I thought my colleague Ruiz was leading towards a broader base. Let me give you an analogy in the National Collegiate Athletic Association in order to set rules for the conduct of athletes. When a student athlete commits an infraction of the rules which could mean a loss in eligibility, the NCAA has a committee on infractions which makes findings. The NCAA, as an association, has not directly punished the transgressor. That is the obligation of the member institution, if it wishes to remain in good standing. Since the NCAA is headquartered in Kansas City, various cases have gone to the Federal courts. The question has been. Was there sufficient State action involved in the acts of this national association which consists of both private and government colleges and universities to invoke the 14th amendment to assure the protection of an individual's rights under that amendment?

Without phrasing my question precisely, what I am getting at is. Do you see an extension of State action under the 14th amendment beyond the official acts Commissioner Ruiz mentioned of the Governor, legislature, and public bodies, beyond the electorate which is obviously functioning as an agent of the State? If it were all State agencies, you would have a clear case. When you get into the mixed area of private and public groups in an association, you get Federal judges making different decisions.

MR. SLOANE. There are some cases where even though the entity is involved not in strict terms government, if it performs a governmental function, it would be held to the same standards. One case involved a privately-owned company town which discriminated against Jehovah's Witnesses in a home. Although it was privately owned, it functioned as a municipality and its conduct was held unconstitutional.

Another line is possible antitrust violations. There is a case in Pennsylvania that I think is fairly solid where the board of realtors denied access to the multiple listing service and denied membership to a local group of fair housers. The Pennsylvania Supreme Court held that they must offer access to the multiple listing service on the basis of antitrust violations. They were a monopoly. They controlled all the listings in the area. They could not deny access to others.

Those occur to me as possible legal avenues.

VICE CHAIRMAN HORN. If you had a neighborhood group, as Mrs. Freeman has said, the fact the State did not act when it had a positive duty to act, one could argue that comes in under State acts and a lack of affirmative action.

Could you do the same with citizens' associations that don't have the functions of government? Perhaps the opportunity for attitudes, etc., and stretch it that far, so citizens by not positively acting in terms of fair housing and furthering the constitutional right can be enveloped under a broad inclusive concept of state action?

MR. SLOANE. We don't have to rely entirely on the Constitution. We have a nice Federal law. A lot of States, including your own, have a State fair housing law. These laws affect private groups whether acting as a government or not. You don't have to rely entirely on the 14th amendment. The Federal laws reach most discrimination.

CHAIRMAN FLEMMING. Thank you all very, very much. I will turn now to the economic implications. Our next speaker is Walter Williams, professor of economics at Temple University.

ECONOMIC IMPLICATIONS

Minority Education:

Some Economic Questions

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Investments in human capital are a critical determinant of individual lifetime earnings.¹³⁷ Various studies have shown that differences in formal education received by Negroes explain an important part of the black-white earnings differential.¹³⁸ Racial discrimination in labor markets has been documented as having a significant effect on income earning opportunities of minorities. Less widely documented are certain market entry restrictions such as licensing and price-fixing laws which weigh heavily on Negro earning potential:

This paper will attempt to draw together the above factors along with issues involving independent political jurisdictions in order to focus on the delivery of education to residents of inner-city areas. Unchallenged implicit and explicit assumptions and propositions about minority education which have acquired axiomatic status will be examined. It is hoped that the discussion will help crystalize questions and issues that currently are too vague to permit effective contemporary social policy to improve overall welfare of minorities.

An initial point of departure might be to ask questions concerning the goal of education policy concerning blacks. In this regard, at least two separable questions emerge: (1) Should blacks be educated where whites are educated and (2) Should blacks receive educational opportunities similar to whites?¹³⁹ The

¹³⁷ Activities engaged in which augment future earnings constitute investment in human capital. Formal and informal education and on-the-job training are three chief methods of augmenting human capital.

¹³⁸ Investigators disagree on the magnitude of income differences related to educational differences. See Giora Hanock, "An Economics Analysis of Earnings and Schooling," *Journal of Human Resources* (Summer, 1967); W. Lee Hansen, "Total and Private Rates of Return on Investment in Schooling," *Journal of Political Economy*, (April, 1963).

¹³⁹ The Supreme Court and popular discussion consider it axiomatic that (1) implies (2) and vice versa, viz., "[I]n the field of

question boils down to, does school integration necessarily guarantee equal educational opportunities for blacks and do equal educational opportunities for blacks necessarily require integration?

Evidence which tends to support the argument that integrated schooling is not a sufficient condition for improvements in Negro education comes when education is considered as a multiplicative function of background variables and formal education.¹⁴⁰ That is, parents' education, income, and a host of other variables reflect real differences in the quantity and quality of investments made in the home. These investments made in the home raise the absorptive capacity for children to use investments, such as formal education, made outside of the home.¹⁴¹ ¹⁴² There is also evidence that integration is not a necessary condition for black academic excellence. For example, as far back as 1899 Dunbar, an all-black high school in Washington, D.C., ranked highest in citywide academic tests given in both black and white schools. Dunbar's graduates included Benjamin O. Davis (the first black general), William Hastie (the first black Federal judge), Robert C. Weaver (the first black U.S. cabinet officer),

public education***separate educational facilities are inherently unequal." *Brown v. Board of Education* (1954).

¹⁴⁰ When we postulate that a relationship is multiplicative as opposed to additive, we mean something like the following: (Education is a function of household education times formal (school) education, i.e., $E = H_x F_x$). E is critically dependent on both H_x and F_x . If H_x happens to be zero, no matter what is done to F_x the left hand term is always zero. On the other hand if the relationship is additive: $E = (H_x + F_x)$, then even if H_x is zero E can be increased by raising F_x .

¹⁴¹ Such household investments may include: nutritious diet, adequate sleep and rest periods, adequate space, music lessons, correct grammar spoken, cultural excursions, assistance with homework, scholastic models and encouragement, *ad infinitum*.

¹⁴² James S. Coleman, "Equal Schools or Equal Students," *Public Interest* (Summer, 1966), pp. 70-75.

Charles Drew (discoverer of blood plasma), and Edward W. Brooke (the first black U.S. Senator since Reconstruction).¹⁴³

This suggests that school integration is not unambiguously shown to be either a sufficient or a necessary condition for excellence in black education and further assuming that racial integration per se is not a direct goal of public education policy, attention will now be focused on what may be considered as "gut" issues pertaining to black education.¹⁴⁴

The fact of the business is that there is a high degree of correlation between low family income, race, and poor quality education.¹⁴⁵ Accepting this reality, along with increasing public resistance to busing and interdistrict school desegregation, forces us to renew our focus on ways to increase the capacity of central cities to deliver higher quality education to their residents, an increasing percentage of which are minorities.

The reduced capacity of central cities to deliver high quality education in part is due to the high concentration of poverty in central cities relative to their surrounding suburbs. The high concentration of poverty in central cities can be in part explained by the growth process of urban areas. Urban areas tend to have the oldest houses and hence the cheapest houses. Also urban central areas tend to have, with their relatively efficient transportation system, the easiest access to jobs. All of this means that poor people will be attracted to an urban central area because it has relatively cheaper housing and more jobs than any other one area.

As more and more poor people take up residence in an area there is the observed tendency for city tax revenues to decrease relative to the demand for city services. That is, the city finds that an increasing percentage of its citizens are contributing a smaller amount to the city coffer while demanding more and more of city services. Therefore, if the city is

¹⁴³Aside from integration not being a necessary condition for black academic excellence at least in the case of Dunbar, neither was elaborate physical facilities and large amounts of financial support. See Thomas Sowell, "Black Excellence—The Case of Dunbar High School," *The Public Interest* (Spring, 1974).

¹⁴⁴Other black schools with excellent academic records include New Orleans schools such as McDonagh 35, St. Augustine, and Xavier Prep.

¹⁴⁵Later discussion will focus on policy measures with respect to education that will weaken this correlation.

to finance an equal level of services from a smaller per capita tax base (assuming that they receive no outside compensating aid), they have to tax themselves at a higher rate than do their suburban neighbors.

This response of cities to dwindling resources tends to exacerbate its problems. Namely, increasing taxes sets up forces to make matters worse in the next period. Industries, trades, and higher-income individuals find that they are able to improve their lot by moving to other political jurisdictions where the tax rate is lower and government services are higher. Thus, selective migration by those who contribute to the fiscal surplus speeds the erosion of the central city tax base.¹⁴⁶ Further erosion of the tax base automatically sets up forces for further migration and continued erosion of the tax base. Older cities with their large concentrations of impoverished ethnic minorities are under great pressure to spend more and more resources toward income redistribution.¹⁴⁷ Thus they are faced with a painful dilemma: the more they spend on the poor, the more they set up fiscal pressures which may drive out the non-poor, therefore undermining the tax base which provides services for those who remain in the city.¹⁴⁸ If they attempt to protect the tax base by policies that are less distributive, they may fail in their fight against poverty.

The problems that cities face are to a major extent compounded by the presence of independent political jurisdictions. In other words, these political jurisdictions offer people the opportunity to opt out, as it were, of the city "club" and join the suburban club where it is more probable that those who do not pay for local public services are effectively excluded from enjoying the use of those services. Aside from the mere presence of other political jurisdictions, city fiscal problems are exacerbated by public policy at the Federal and

¹⁴⁶A fiscal surplus is realized when the value of an individual's tax contribution is *greater* than the value of the public service that he uses. A fiscal deficit occurs when the individual's tax contribution is *less* than the value of services used.

¹⁴⁷A significant portion of income redistribution occurs at the Federal and State levels, however, cities redistribute income through contributions to public assistance, hospitals, and clinics, etc.

¹⁴⁸It would be too strong a statement to say that taxes alone cause migration, the whole geographical amenity set is individually evaluated.

State level which subsidizes and reinforces movement to suburban communities.

In the housing area, United States tax law favors homeowners by not taxing homeowners on the imputed net rental value of their homes, it allows them to deduct against their other income interest payments and local property taxes. Such a tax saving is greater in the higher marginal tax bracket, i.e., richer homeowners benefit more than poorer homeowners. Another public policy biased in favor of higher-income people is the Federal intervention in the mortgage market. This happens through the Federal Housing Administration's (FHA) program of mortgage guarantee. The effect of the FHA program has been that of reducing downpayments and the monthly payments required for new owner-occupied housing. The program has been administered in such a way so as to encourage homeownership in the newer suburban areas, which has had a net effect of hastening the flight from the cities.

Highway construction programs have had massive locational and growth effects. Highway construction has lowered the cost of traveling between the central city and its environs. Therefore, public subsidies for highways and intercity rapid transportation favor those who live long distances from the center. The distance to work for the nonwhite, low-income commuter tends to be much shorter than that for the white, high-income commuter.¹⁴⁹ Therefore, rapid transit systems such as San Francisco's BART and the proposed Metro system in Washington, D.C., have the net effect of redistributing income in favor of the rich and stimulating suburban migration. It is interesting to note, as an aside at this juncture, that while the above public policies of subsidies which benefit suburban residents have no explicit racial intent, the effect is to foster and hasten homogeneous grouping by race and income class.¹⁵⁰

Along with the decentralization of the metropolitan population has gone job decentralization. (See tables 1 and 2.) In Northern and Eastern sections of the United States between 1948 and 1967 the percentage change in employment in the central city was (-) 8.3

¹⁴⁹Martin Wohl, "Users of the Urban Transportation Services and Their Income Circumstances," *Traffic Quarterly* (January 1970), pp. 21-43.

while that in the suburbs was 112.5. In the South and West the corresponding percentage changes were 65.9 and 200.¹⁵¹ These data, along with data showing population shifts, demonstrate that the outward movement of jobs encourages and is encouraged by the simultaneous outward movement of the population. The suburban relocation of businesses, aside from population shifts, has been induced by other factors such as lower land rents, lower taxes, and, perhaps just as important, lower suburban crime rates.¹⁵²

Though job opportunities and higher quality public goods exist in the suburbs, the poor are effectively denied access to these opportunities. This comes about, to a large extent, through policies that fall under the rubric of "exclusionary zoning." Poor people can be kept out of the suburbs by provisions in local zoning, requiring, for example, that to construct a single dwelling the house must be, say, 50 feet from the street and 50 feet from the adjacent property. This has the effect of requiring a larger parcel of land which costs more than smaller parcels. Some communities have local ordinances banning the construction of multiple unit dwellings. Others have ordinances specifying the minimum square footage for a single dwelling. All of these ordinances, singly or in combination, have the effect of excluding poor households from suburban communities.

A number of motives may explain exclusionary practices. An important motive is the desire to exclude those who contribute to the fiscal deficit; i.e., those who do not pay their own way in terms of taxes. This motivation is very strong, since local governments bear a significant share of their public services. Another motive for exclusionary zoning is the desire to maintain certain community attributes such as open spaces, low-rise buildings, etc. Though, today, zoning policy

¹⁵⁰I, personally, am always amazed at civil rights organizations and court obliviousness to and support of these kind of policies and others which foster racial inequality.

¹⁵¹See, U.S. Bureau of the Census, *Census of Business*, 1948 and 1967; *Census of Population*, 1970; *Census of Manufactures*, 1947 and 1967.

¹⁵²See, Small Business Administration, *Crime Against Small Business Report*, transmitted to the Select Committee on Small Business, U.S. Senate (Washington, D.C., Government Printing Office, 1969).

TABLE 1
 DECENTRALIZED EMPLOYMENT AND POPULATION
 WITHIN SELECTED METROPOLITAN AREAS

<i>Six Largest SMSA's in North and East</i>	<i>Employment (000)</i>		<i>Percentage Change</i>
	<i>1948</i>	<i>1967</i>	<i>1948-1967</i>
Manufacturing			
Central Cities	2,386	2,019	- 15.4
Outside Central Cities	879	1,642	86.8
Retail			
Central Cities	1,066	908	- 14.8
Outside Central Cities	358	801	112.4
Wholesale			
Central Cities	640	599	- 6.4
Outside Central Cities	66	243	247.6
Selected Services			
Central Cities	508	692	36.6
Outside Central Cities	88	271	207.6
Total Four Industries			
Central Cities	4,600	4,218	- 8.3
Outside Central Cities	1,392	2,957	112.5
Population			
	<i>(1950)</i>	<i>(1970)</i>	<i>(1950-1970)</i>
Central Cities	17,038,000	16,119,000	- 5.4
Outside Central Cities	8,306,000	17,064,000	105.4

Sources: U.S. Bureau of the Census, *Census of Manufacturers* 1947, 1967; *Census of Business*, 1948, 1967; *Census of Population*, 1950, 1970.

does not have an explicit racial exclusionary intent, it has a racial effect to the extent that race is highly correlated with income.¹⁵³ This, incidentally, makes public policy quite difficult. It raises important constitutional questions regarding free association among individuals to group together and tax them-

selves for the purposes of providing public goods with certain attributes.

People's preferences for public goods as well as private goods differ. However, the overall ramifications of these differences in taste are not the same. For private goods, it pays the individual to enter the market to exchange with people whose tastes differ from his own. This allows him to realize a greater level of satisfaction. However, in the case of publicly produced goods, it pays him

¹⁵³These policies are "racial" only to the extent that minorities, as a percentage of their population, are more highly represented among the poor. On the other hand, nearly all of the suburban poor are white, suggesting the presence of explicit racial discrimination in housing.

TABLE 2

DECENTRALIZED EMPLOYMENT AND POPULATION
WITHIN SELECTED METROPOLITAN AREAS

<i>Six Largest SMSA's in South and West</i>	<i>Employment (000)</i>		<i>Percentage Change</i>
	<i>1948</i>	<i>1967</i>	<i>1948-1967</i>
Manufacturing			
Central Cities	400	765	91.6
Outside Central Cities	294	923	214.9
Retail			
Central Cities	352	458	30.0
Outside Central Cities	160	376	134.6
Wholesale			
Central Cities	198	253	28.0
Outside Central Cities	38	128	242.1
Selected Services			
Central Cities	130	314	141.9
Outside Central Cities	36	154	325.8
Total, Four Industries			
Central Cities	1,079	1,790	65.9
Outside Central Cities	528	1,582	199.6
Population			
	<i>(1950)</i>	<i>(1970)</i>	<i>(1950-1970)</i>
Central Cities	4,973,000	7,358,000	48.2
Outside Central Cities	4,092,000	9,167,000	124.0

Sources: U.S. Bureau of the Census, *Census of Manufacturers* 1947, 1967; *Census of Business*, 1948, 1967; *Census of Population*, 1950, 1970.

to associate only with persons whose tastes are similar to his own. This is true because with public goods there is a collective sharing of the burden and if he associates with people with similar tastes it is less likely that budget and expenditure decisions will be offensive to his or his associates' interests.

Thus, it becomes economically efficient for people with similar effective demands for public goods to group (reside) together. The

presence of independent political jurisdictions facilitates the coresidency of people with taste similarities. In effect, the choice of community becomes a method for the registering of tastes for public goods, i.e., households "vote on their feet" for public goods.¹⁴ Therefore, the presence of different local political jurisdictions allows households to

¹⁴See Charles M. Tiebout, "A Pure Theory in Local Expenditures," *Journal of Political Economy* (October, 1956).

achieve budgetary optima for the consumption of public goods. For example, the presence of communities placing different budgetary allocations for schools allows those who do not place a high value on school services—e.g., senior citizens, businesses—a larger measure of choice. Thus, the presence of multiple local authorities makes it easier to resolve conflicting preferences for public goods.

Thus far in our discussion, we have highlighted some of the issues relevant to the relationship between the central city and its suburbs. What is shown is that there is a significant interrelationship between central cities and their suburban communities. This boils down to the fact that in their policy decisions urban areas must take into full account the policy decisions and reactions of suburban communities. Therefore, *any urban policy which seeks to increase the provision of any publicly financed service must have as its immediate objective function the creation of a fiscal surplus.*¹⁵⁵ This means that people who contribute to the generation of a fiscal surplus must be kept within the city. If people who contribute to the fiscal surplus are observed migrating to suburban communities, the urban fiscal strategy has failed.

In other words, rational fiscal strategy (tax-sharing schemes and public service distribution schemes) require that consideration be given to suburban migration of high-income citizens and thereby recognize a trade-off between wealth redistribution and tax base to carry out that redistribution. These fiscal strategy considerations are quite independent of who (high-, middle-, or low-income, black or white) makes up the dominant political coalition. Rational fiscal strategy pertains to the city's solvency; it has nothing to do with ethics concerning "justice" or "equity." For example, consider a city's fiscal strategy having *equity* as its objective; say, equal distribution of public goods. If, in the attempt to achieve its equity objectives, the city manages to induce its high-income residents and businesses to migrate to the suburbs, thereby eroding the fiscal base of the city, what can be said about the goal? Quite possibly with

most high-income residents gone, the city is financially able to provide a lower level of public services, but on the other hand it can boast that its citizens receive equal shares of public goods.¹⁵⁶

Optimizing fiscal strategy may require the presence of certain inequities. These inequities may be necessary in the tax-sharing policy, e.g., violation of the "ability-to-pay" principle. Or the inequities may involve differential distribution of public goods. In other words, optimizing fiscal strategy may not permit the development of norms which apply to all neighborhoods. Such fiscal strategy which preserves the fiscal base of the city by unequal treatment of unequals *may* benefit low-income groups who initially *seem* to be harmed. For example, it may be good fiscal strategy to provide higher quality schools, better lighted streets, and higher property rights protection in high-income areas.

Another potential fiscal strategy which deserves attention involves methods which increase the cost for individuals to set up independent political jurisdictions. This strategy requires that the city fully take into consideration its monopolistic powers in the provision of certain publicly produced goods. If those who consider setting up independent jurisdictions are made aware of the costs of making purchase arrangements with the city, they may reconsider. This strategy has direct implications for city pricing of water, sewer line connections, extended police and fire services to suburban communities.

Other strategies to increase the fiscal solvency of the city involve appropriate exclusion measures such as user charges for cultural amenities such as museums, symphonies, parks, and theaters. These measures should be taken so that suburbanites who are not residents cannot benefit from city services without contributing to the city's tax base.

To summarize what we have said so far, rational or effective fiscal strategy for urban areas requires explicit recognition of the presence of suburbs. This means that the political coalition that formulates city policy should take into account the trade-offs

¹⁵⁶Therefore, the city officers are faced with the age-old question of whether an unequal share of something is better or worse than an equal share of considerably less.

¹⁵⁵See note 146.

between various policy objectives. That is, to assist its low-income minority population it must fully understand the behavioral characteristics of its higher-income nonminority population. When formulating policies to improve the delivery of services to the poor, the city leaders must ask what will be the effect of this policy on the nonpoor population which contributes to the fiscal surplus; i.e., how many nonpoor people will find it beneficial to migrate? Will the tax base that they take with them be replaced through Federal or State grants? Leaders must ask: Will this policy to aid the poor be effective? The answer requires evaluation of both short term and long term effects.

What is seen, by some, as a disadvantage of independent political jurisdictions is the unequal consumption of certain public goods in the metropolitanwide area. The *Milliken v. Bradley* case is one such case in point. The proposed solution was to reduce educational inequalities between jurisdictions by reducing the autonomy of the jurisdictions surrounding Detroit; i.e., through interdistrict busing. The point to be considered in the following paragraphs is whether busing is the most effective remedy for educational inequality.

Let us begin the discussion by comparing the choices between public and private goods for the low-income resident of our urban areas. By virtue of the fact that a person is poor means that he will be forced to consume a lower quality of some goods. But with private goods he will have a relatively large choice spectrum. For example, if low quality cars are sold in his neighborhood, he has the option of going to another store in perhaps some other neighborhood and purchase higher quality cars. He may pay a higher price which will require him to do without other goods, but the point is that he has this freedom to tailor his budget. On the other hand, suppose the same individual wanted higher quality cars. He may pay a higher price which will require him to do without other goods, but the point is that he has this freedom to tailor his budget. On the other hand, suppose the same individual wanted higher quality education for his children. Given the present education system, he would have to move to another community which would entail his

having to purchase a \$30,000 or \$40,000 house which in all probability may be well outside of his financial capabilities. In other words, he has little or no effective choice of schools. He has to send his child to the school in the locality in which he resides.¹⁵⁷

To understand how low-income families may be given more effective choice in the consumption of education requires at least a brief discussion of some of the issues surrounding its delivery. There are a number of legitimate justifications for public subsidies to primary and secondary education; primary among these are that the benefits of education extend beyond those actually receiving the education and that a child's future income potential should be independent of his current wealth. However, a clear distinction must always be made between public or collective financing of education and public production of education. The one does not necessarily imply the other. They are two separable issues as can be seen in the following example. Cities may provide municipal buildings through taxes levied on their citizens, but seldom do cities actually build the buildings. They generally leave the construction to the private sector. In other words, they publicly finance the building but allow the actual construction to be done by private firms.

This distinction between public financing and public production is crucial to the understanding of education issues because popular public opinion always, unquestioningly, associates public financing of education with public operation of education or production. Hardly ever are questions asked concerning the comparative efficiency of a publicly financed but privately operated education system.

The public school systems in most inner-city areas have been objects of chronic complaint for many years. Given the nature of the service that they produce, it is inevitable that they be under attack. Minority youngsters leave the system with what constitutes a fraudulent education.¹⁵⁸ The typical city

¹⁵⁷ If low-income minorities were forced to consume private goods only from stores in their neighborhoods they would be much worse off. Social observers should ask themselves: Why is it that in poor neighborhoods one observes some high quality cars, some high quality clothing, some high quality food consumption, etc., but no high quality schools?

¹⁵⁸ This serves to exacerbate already complex social problems; e.g., does a graduate fail to get hired because of incompetency or ra

response is to put more resources in the form of physical plants and teachers into the system—yet the disparities remain and perhaps get worse.¹⁵⁵

The effective solution to the education problem in urban areas is one that gives parents greater control over the education of their child. The control should be of such a nature that the individual parent, at relatively low cost, can penalize incompetent educators. In other words, an effective system for education would permit a parent, who saw that his child was not being educated properly, the choice of placing his child in another school.

Such a method has been proposed but never widely considered.¹⁶⁰ This system, in its purest form, would have the State issue to parents education vouchers sufficient to cover education costs.¹⁶¹ States and localities would no longer operate schools. Private enterprise would take over the operation of schools. Parents would then be permitted to send their children to any of the private schools.¹⁶² It is natural to expect that some private schools will provide higher quality education than others and charge more than the State voucher allotment. This, of course, means that high-income people will tend to consume a higher quality education than lower-income people. But some poor people would stand a better chance of getting higher quality education. For example, a Negro living in the inner city can, if he decides to sacrifice, consume the same kind of car or suit that a rich suburbanite consumes. But he cannot as easily under the present system provide the same kind of education for his child that the high-income suburbanite child consumes. Under the proposed voucher system he has the option of foregoing other things and adding to the voucher.

cial discrimination? This is a difficult question to answer given the nature of public education received by minorities.

¹⁵⁵One might note that public schools in middle- and high-income areas do the "job" and ask, why can't inner-city public schools do the same job? It seems to me that public schools in the inner city are increasingly being asked to take on the function of parents, which lies beyond their productive capacity.

¹⁶⁰Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), pp. 85-107.

¹⁶¹The vouchers could not be redeemed for items other than tuition.

¹⁶²Note that with the food stamp program, as opposed to the old government surplus food programs, poor people have more choice over the kinds of food received and the kinds of stores to shop. i.e., they are better able to achieve budget optima.

Another feature of the voucher system is that, motivated by profit incentives, school administrators would be more concerned with pleasing parents (clients) because they would be effectively penalized if they did not. Teachers in such a system would be paid according to merit. Those that could not attain the level of competence required by the particular private school would be fired.¹⁶³

Another feature of a privately-run school is that the school manager could, without first consulting a remote central authority, tailor education programs to suit differences in learning abilities between children. He would, also, have control as to what type students and what type problems his school could most adequately cope with. For example, it has been reported that in many schools in many classes up to 60 or 70 percent of classroom time is spent on discipline. However, the percentage of children causing the disciplinary problems is relatively small. Due to the fact that administrators cannot expel the problem students (short of some extremely bizarre occurrence), less education is received by the nonproblem-students.

Another feature of the voucher system is that it addresses itself to and simplifies certain legal issues that have plagued the courts. California's *Serrano v. Priest* raised issues concerning equity matters pertaining to variations in per pupil education expenditures. A statewide voucher system providing equal voucher amounts per pupil would seem to be a simple remedy towards the correction of inequalities. In sum, a voucher system would take the control of education out of the hands of administrators and teachers and put effective control over education in the hands of the client; i.e., parents.¹⁶⁴

Quite simply, a good deal of problems faced by minorities are explained by the fact of

¹⁶³The problem with teacher salaries now is not that they are not high enough but that they are too uniform and rigid. That is, incompetent teachers are overpaid and competent teachers are underpaid. This brings up the point why teacher's unions would resist this kind of proposal—specially talented persons are always a minority.

¹⁶⁴Positions taken against a voucher system, that have come to the attention of the writer, essentially boil down to the assertion that parents do not know what is in the best interest of their children or parents should not have the effective choice as implied in a voucher system. Dissenters usually argue that only educators know what is best for educators. Would not this latter position also justify the election of Jesse James as town sheriff?

poverty. Poverty, itself, is in the main caused by individuals either having nothing to sell that is highly valued by the market or having something to sell but not having access to the market. The first is generally solved by increasing the amount of human capital embodied in the individual through formal and informal education. The second is solved by improving individual access to the market through the removal of artificial market barriers. The latter, free market entry, as a measure to promote racial equality and equality of opportunity, has been largely ignored by both the courts and civil rights organizations.

Licensing and franchising laws represent one kind of artificial market restriction. The law prohibits individuals from plying a trade unless they are first given permission from a State authority which is usually controlled by incumbents in the trade. Licensing laws effectively allow incumbents to legislate out of the market their potential competitors (it is a form of collusion against potential sellers). Requiring a license to practice a trade generally permits the use of personal attributes such as race, sex, or national origin to play a greater role as entry criteria.

That licensing has a racial effect can be easily seen if we compare, say, taxicab owners as a percentage of black population in Washington, D.C., versus, say, Los Angeles or Chicago or New York. In Los Angeles there are no black-owned cab companies. That city has granted Yellow Cab Company an exclusive franchise which permits no other cabs to operate within the city limits. New York permits other cab companies to operate in the city limits; however, a "medallion" or permit, which has been known to cost a high as \$30,000, is first required per vehicle. In Chicago and Baltimore a similar permit costs in the neighborhood of \$14,000 to \$18,000. Compare these figures with entry costs in Washington, D.C., of approximately \$500, plus an automobile. The taxicab business is a financially lucrative business requiring a relatively low skill and education level. A number of other economic activities potentially available to minorities are thus circumscribed by certification or licensing requirements, e.g., cosmetology, beer or whiskey distribution, etc.

Another market entry restriction having a deleterious effect on minorities is laws that govern the conditions under which a person may sell his labor. Foremost among these laws is the minimum wage law. The minimum wage law has effects that are especially harmful to minorities. First, it reduces the opportunity for persons, especially minority youth, to gain meaningful education; i.e., on-the-job education. Minimum wage laws create this effect by making it unprofitable for employers to hire people whose output is not worth the minimum wage. For example, if the prospective job candidate's output is only \$1.50 the employer can pay that amount to start and thereafter increase wages as productivity increases. The minimum wage law in effect says that, if one's output is not worth \$2.00 per hour, he is not worthy of a job.

The minimum wage law contributes to racial discrimination in hiring. That is, if an employer knows that he must pay \$2.00 an hour no matter who he hires, he is more likely to indulge his racial preferences.¹⁶⁵ To attack the minimum wage law normally brings raised eyebrows because most think of it as a moral or ethical prerequisite to employment. The effect, hence, is largely ignored and its intent is praised. However, even the intent of the minimum wage law can be questioned. Consider that some suppose that low-skill labor is a substitute for high-skill labor. For example, an object could be made either by hiring one high-skilled worker or three low-skilled workers. If the daily wage is \$13.00 a day per low-skilled and \$37.00 a day for a high-skilled worker, the firm seeking to minimize costs (maximize profits) will hire the high-skilled worker, since labor costs are \$37.00 compared to \$39.00. The high-skilled worker may improve his wealth by lobbying for a minimum wage in the trade. Of course his stated motivation will be that of "fighting worker exploitation," providing a "living wage," etc.

¹⁶⁵ Black teenage labor force participation in 1940 exceeded that of white. In 1960 a 75 cents an hour minimum wage was established, black teenage labor force participation dropped, and black teenage unemployment rose to 20 percent higher than white. In 1940 black teenage unemployment ran around 8 percent in good times; now, it runs around 24 percent. See, Finis Welch, "Minimum Wage Legislation in the United States," *Economic Inquiry* (September, 1974).

Suppose his lobbying brings the legislation of a \$20.00 a day legal minimum. The high-skilled worker can now demand \$59.00 a day and still retain his job, wherein that would not have been possible before the enactment of the law.

This example becomes more than a pedantic device when one asks, who are the major lobbyists for increases in the legal minimum? The answer turns out to be labor unions. Then the question becomes: Why are labor unions so interested in increasing the minimum wage, particularly in view of the fact that most, if not all, of their members earn wages far in excess of the proposed minimum? Are labor unions, who have had a long history of discrimination against blacks and other minorities, somehow now concerned with their well-being?¹⁶⁶ It is doubtful.

It seems as though a primary emphasis of legal and civil rights policy should be that of guaranteeing free access to markets through the removal of artificial barriers.¹⁶⁷ Such removal would contribute significantly to the solution and amelioration of some problems that plague minorities.

This paper has taken the position that minorities suffer worst when resource allocation occurs through the political process. This follows almost axiomatically when one considers that in a majoritarian democracy political decisions reflect the preferences and perceived interests of the majority and not necessarily the minority. Successful political coalitions can be made between the Negro minority and the white majority on issues that are either insignificant or on issues where whites and nonwhites hold similar viewpoints. For example, Negroes could expect large-scale Northern white support (popular and legislative) against the more flagrant disenfranchisement in the South, such as public accommodation, voting rights,

¹⁶⁶ Further evidence of the effect of setting minimum wages comes when one looks at the case of labor unions in South Africa. South Africa has job reservation laws in the building industry. However, recently builders have been ignoring these laws and hiring blacks. Blacks are paid 39 cents an hour, while that paid to whites is \$1.91 an hour. White workers seeing their jobs threatened have proposed an equal pay for equal work law which would require that blacks be paid the same wage as whites. See Charles Mohr, "Rightist South Africa Unions Assail Racial Job Curb," *New York Times*, November 28, 1972.

¹⁶⁷ Note that some minimum wage anyone is unemployable

lynching, etc. These legislative acts have long been a part of the Northerner's way of life.

On the other hand, I do not feel that popular national support on issues such as interdistrict school integration, open occupancy housing, and forced neighborhood integration is forthcoming. This is because the majority do not perceive these measures as being in their best interests. The Negro, now, must look to the marketplace to improve his relative standing in society. Several characteristics of the marketplace that contrast significantly with the polling place have wide implications for minorities. (1) In the marketplace power is more evenly distributed (a dollar is a dollar). (2) Costs and benefits are an individual affair; people can offset certain costs through compensating variations. (3) Individual preferences for race are paid for by the person having such preferences. By contrast in the national polling arena an individual cannot affect behavior unless he first influences the majority. In the political arena, one cannot register the intensity of his preferences, since he has only one vote to cast (if he wants more of a private good, he can register the intensity of his preferences by offering more dollars).

Future strategy for minorities should constitute measures that remove artificial barriers to market entry. These measures in their simplest form would require strict adherence to the U.S. Constitution and Bill of Rights or maybe an amendment to the Constitution such as: "All States and all individuals or groups of individuals shall be prohibited from interfering with all voluntary exchange between two or more consenting individuals."

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CHAIRMAN FLEMMING. Professor Williams, would you please summarize the principal points in your paper, and then we will turn to the reactors.

DR. WILLIAMS. I will be very brief on my points. On the issue of minority education, I always ask myself, what are the implicit goals having to do with public policy and minority education? I think we have to seriously ask, is our objective integration so everything looks nice, or is our objective high quality education for minorities?

It strikes me that the one does not necessarily imply the other. The integration does not necessarily imply high-quality education for minorities. Segregation does not necessarily imply low-quality education for minorities.

There is evidence that I will briefly comment on that blacks at other times in our history and currently have made great strides in education in essentially all black institutions. Dunbar High School was one such institution before the *Brown v. Board of Education* decision, and after that the quality of education at Dunbar went down dramatically. There are several schools in New Orleans that have great track records on minority education. It seems that it is possible to have high-quality education in all-black schools.

Notions that make me think that integration will not necessarily imply high-quality education come when you ask what the production function for education looks like. If you think there is a multiplicative relationship among variables, one realizes, for example, that education is a function of household education times formal education. If household education is zero, you can raise formal education without having an impact on total education of the individual. The evidence that I see—and I am not an expert on education—suggests that integration is not a sufficient condition for high-quality education for blacks. I think, since we have that kind of evidence, we are forced to ask the question whether the cost of attaining school integration is worth it in terms of payoffs. I think we need to ask ourselves instead, how can inner-city areas increase their capacity to deliver high-quality education? What forces us to ask this? What is the optimal fiscal strategy for inner-city areas in terms of getting the resources to produce high-quality education?

I prepared quite a bit of material on fiscal strategy, but I think I am going to summarize it. We have to create a fiscal surplus. That is, we have to devise ways of keeping high-income people in the city rather than forcing them to flee to the suburbs.

There are several ways to force people to flee to the suburbs. One way is to pursue a policy of "equity." That means cities are faced with the dilemma as they try to engage in more and more redistribution of income. They set up the circumstances for high-income people to leave the city. As high-income people leave the city, it lessens the city's capacity to engage in income redistribution. So, a city manager is faced with a very difficult dilemma that forces him to recognize in his policies the presence of independent political jurisdictions.

There are several policies that I mentioned in the paper that city managers can do in order to keep high-income people in the city. One might be perhaps to ignore certain kinds of equity norms and try to not to pursue global equity norms. For example, in Washington when I lived here, many people complained about the building of the Kennedy Center. They said that the Kennedy Center was for high-income whites.

We want to provide high-income people with the kinds of things to keep them in the city if we can benefit from their contribution to the tax base. Another way that the city can improve its resources to deliver high-quality education is engage in monopoly prices or resources. Many cities supply water and electricity to suburban areas. They can exploit their monopoly position by perhaps charging higher prices.

I want to really talk about the position of the minority person in the marketplace versus the polling. That forces us to look at education policy, namely, in the way that we produce education.

What we would like to throw out to this audience is a suggestion that was made by Milton Friedman at the University of Chicago. He suggests that one way of dealing with the education problems of minorities is to have a voucher system. That is, let the State divide up per capita expenditure on education and let the State give parents a voucher, and we get rid of public production in schools. The benefit of a voucher system is it would put power in the hands of the parents instead of in the hands of the school officials.

Parents would have choice. It would also deal with the problem of unequal financing of schools. For example, in the State of Michigan, if vouchers were given to each parent, nobody could say minorities are given unequal educational financing by the State.

Finally, in the paper, I point out near the end quite simply the problems of minorities have to deal with, namely, the problems of poverty. What is the cause of poverty? Poverty is perhaps caused by two things. A person may have nothing to sell. Another reason is he may have something to sell, but he is not allowed to sell it. A classical example of the latter cause of poverty is certain kinds of restrictions placed on market entry.

For example, if we look at Washington, we will see a lot of black-owned cab companies. Look at Los Angeles. You don't see any. In Chicago, you see a few. In Baltimore, you see a few. Somehow in Washington, there are a number of black-owned cab companies. You might ask, are blacks more ambitious in Washington than elsewhere? The answer would have to be no, then why? For example, in Los Angeles, Yellow Cab has an exclusive franchise to operate in the city. In New York, one has to have a \$29,000 medallion to own a cab. In Baltimore, \$14,000, etc. In Washington, it turns out all you need is \$250 and a car.

It seems that the Civil Rights Commission, people who are concerned with the problems of minorities, might be concerned with these kinds of issues where the State or government has acted or people have been able to use the government in such a way as to maximize their own wealth. One can always improve his wealth position if he can exclude his competitors.

Another example of violations of peoples' constitutional rights is the minimum wage law. I think that the minimum wage law is the most antiblack law on the books in the United States. I would need a chalk and blackboard to go through that completely. Let's try guilt by association. In South Africa, they have job reservation laws in the construction industry. Recently in South Africa, there has been a building boom. Many of the contractors ignored this law and are hiring blacks. The wage blacks are getting is 39 cents an hour; whites are getting \$1.91. The labor union, which is white, is upset by this competition. They have lobbied for an equal pay for equal work law. If they get wages of blacks up to \$1.91 an hour, it would pay the employer to discriminate against blacks. The ultimate effect of minimum wage would be to lower the cost of employers' indulging their racial preferences.

Another effect is in 1941 the black teenage labor force participation rate was greater than that of whites. With each increase in the minimum wage law, the labor force participation rate of blacks went down. The effect of the minimum wage law has been to deny black teenagers market entry. That means they have been denied meaningful education, such as on-the-job training.

One thing I would like to say is that, even though the stated intention of the minimum wage is not to discriminate against minorities, its effect is to foster discrimination. As far as I am concerned, I don't care about good intentions, I care about effect.

I would like to say this. A major focus of the civil rights effort of minorities should be to take the decisionmaking out of the political arena. When decisions are made in the political arena, they are made by majority rule. I suspect majorities will have their interest at heart. Minorities will always get injured the most almost by definition. In terms of the whole education bit, I would ask you to make the following kind of empirical test. When you walk around the ghettos in Washington, North Philadelphia, and New York, ask yourself the following question: How come I see more nice cars in the ghetto, some nice houses, and some people are consuming some nice food, but no nice schools?

The answer has to do with the following. How are cars and clothing distributed, and how are schools distributed? Schools are distributed by the political mechanism, and cars and clothing are distributed by the market mechanism. Whenever the minority enters the majority game, he is apt to lose.

CHAIRMAN FLEMMING. Thank you very much, Professor Williams.

I will now recognize as the first reactor Jeralyn Lyle, assistant professor of economics at American University.

DR. LYLE. Thank you, Dr. Flemming. I am no longer with American University. I am now with the Inter-American Development Bank. I have to say to you, my comments represent my personal scholarly reactions to Professor Williams' paper and do not represent any position of the Inter-American Development Bank.

CHAIRMAN FLEMMING. That will be duly noted in the record.

DR. LYLE. I have three basic reactions to your paper, which I find well written. I am very surprised about your being enamoured of the market mechanism and our principle of harmony of interest in pursuit of one's own voluntary way of exchange.

We do such things as try a voucher system for education in the United States or eliminate the minimum wage. I would like to focus on this particular idea as a solution to minority economic inequality, maybe in an effort to refute your position. I will point out to you, as you said at the end of your statement, when one is in the minority, and is not trading with the same comparative advantage that the other person trades with, we don't expect to be successful in the market we trade in.

In education, I think it may well be a voucher system could accomplish a lot of objectives relating to education, but none of the education that has to do with minority people's special concerns.

I think the paper could be greatly strengthened by further treatment of whether there is a relationship between viewing education purely as a consumer good, which is what the voucher system would do, and generating some sort of equal quality of education among the various consumers of it in this particular economy. I see no relationship at all. I think a voucher system has some strengths, none of them having any relationship whatever that I can see to racial equality and quality of education.

One of the results that might be very troublesome for us in this country would be a tendency to make education more commercial than it has already become—that is, to play into

what has been a great tendency for business schools and law schools to turn out people who are not so much scholars or who really have not learned a particular cultural and intellectual tradition but packaged for what employers in society seem to want. I am concerned with a voucher system as to what it would do with curriculum more than equalizing inequalities.

The argument that we can strengthen minority equality objectives by eliminating the minimum wage I find astounding. There are about 50 million citizens of this economy who are economically active, who work full-time year round, but who are earning less than \$4,000 per year per family. That is, there are large numbers of working poor people. A whole lot of those people are minority persons.

To eliminate the minimum wage may enable people to get off unemployment and get on a working income. I would rather be on unemployment and have it extended to make the same thing I can get in low wage employment. I think the elimination of that would add to the ranks of the working poor. It would not do anything to change income distribution between the races.

So, those are my two reactions to the whole idea of making the system more marketable or interesting. A lot of the laws we have that are especially economic laws were written to mitigate the viciousness of the market, where people who start out in a weak bargaining position end up in a weaker position. The minimum wage is certainly one of those laws.

My next reaction to the paper is that it is interesting to worry about problems of what we can do to change characteristics of individual entrants into the labor force, such as creating more equality in education.

I find the tone of the paper is based on a misperception about the structure of the American economy. The structure of the economy is such that a great deal of changing of economic equality rests in getting leverage over the multinational corporation employers, who are the engine of economic growth in the United States and, in fact, in the industrial world. I think a major concern now and the next several decades is a displacement in the domestic labor force as multinationals move their operations from this country to elsewhere and back. We have problems that will affect the employability and income and earning power of minority laborers more than any other group in this particular displacement process that is going on. They will be the first hurt and the worst hurt in this process.

Thirdly, I think the paper overemphasizes the microeconomic framework for analysis and overlooks the most compelling macroeconomic concerns of our day. The first compelling concern is the phenomenon of the international corporation as a major source of jobs and economic security. Second is the overwhelming problem of global inflation. I think that to eliminate the minimum wage, which does all of those things which provide an income floor to workers who are often kept out of the most promising positions, is very, very dangerous, especially in a period such as the one we are entering into. I would like to hear you talk about the macroeconomic implications of your particular suggestions. Thank you.

CHAIRMAN FLEMMING. Thank you.

[Dr. Mabel Smythe, vice president of the Phelps-Stokes Fund, was unable, as scheduled, to attend the conference as a reactor. She submitted the following commentary:]

In reacting to Professor Williams' thought-provoking paper, I should like, at the risk of some repetition, to focus the analysis on one aspect of *Milliken v. Bradley*. Its impact toward isolation of the central city from its suburbs and reinforcement of the image of that city as an impoverished minority community, with a future of declining employment and capital, as contrasted with that of the suburbs as predominantly white, middle-class areas of growing employment, rising land values, and increasing economic activity in general.

Milliken offers precedent for emphasis on discrete arbitrary barriers in a situation which is clearly a continuum, with the fringes of the center blurring into the nearer suburbs without

sharp demarcation. The *Milliken* emphasis on boundaries fosters artificially rigid separation, accelerating the process of capital drain, job flight, and industrial removal to the suburbs. The sociopsychological separation of the two populations reduces the ability of economic institutions, government, and schools to provide adequate contact and experience with a variety of industrial and commercial opportunities, it reduces the likelihood of attracting new industry and encourages persons with higher levels of skills and abilities to move over the line into the suburbs, leaving behind a pool of unskilled and semiskilled with less opportunity to associate with those whose skills are more saleable.

The fact that opportunities for higher wage employment will be perceived as greater in the suburbs can be expected to exert strong pressures on skilled, educated, ambitious workers—minority as well as white—to leave the central cities behind, thus accentuating the economic class division between city and suburb. *It is this separation by economic class—this division into haves and havenots—which poses the greatest threat of economic stagnation for our cities.* Economic class isolation can be expected to:

1. Depress the rate of growth or even foster a decline in the value of commercial properties in the center city.
2. Erode further—at an accelerated rate—the tax base to support essential city services, without which the maintenance of even declining industrial and commercial operations will be impossible. Thus the remaining economic institutions, middle-class residents, and landowners will increasingly bear a heavier share of a budget saddled with a growing proportion of underemployed, unemployed, and otherwise dependent people, unable to develop a viable economy within the fiscal restraints imposed by the barrier between city and suburb.
3. Reduce the attractiveness of the city as the locus of a diverse pool of employable people with a wide range of skills, abilities, and background experience.
4. Increase the proportion of persons who, while working in the city, live outside its center and thus use city services without contributing fully to the cost of those services.
5. Reduce the opportunities of the potential working population of whatever color to develop in the direction of skills readily marketable in modern industry and commerce.
6. Reduce the capacity of human development programs to provide role models, employment experience, training in new careers, and aspirations associated with new industries growing up in the suburbs rather than in the central cities.
7. Increase the distance city dwellers must travel to get to places of employment, thus increasing the competitive disadvantage suffered by city workers seeking suburban jobs.
8. Facilitate the use of middle-class minority (increasingly suburban) populations as beneficiaries of government home loan programs and tax incentives as a demonstration of the “nonracial” basis of their effects. (It is conceivable that this process will accelerate the recognition that *class bias is the culprit to be conquered.*)
9. Spread the area in which the economic rewards for maintaining real estate, controlling crime, and providing adequate public services are difficult to demonstrate, thus discouraging the battle against blight, further reducing the tax base, and accelerating the drain of invested capital from the central city.
10. Erode the economic basis for provision and maintenance of adequate housing and distribution of food, clothing, and other essential goods and services, thus raising the cost of these to a population unable to pay.
11. Tip the scale in favor of economic dependence as the above processes make economic viability increasingly difficult.

The above discouraging picture is deliberately oversimplified, it does not examine counter-tendencies which modify each of the above, for the reason that we are interested in the impact of *Milliken*—and that impact is not on the side of optimism.

Once again, responsible economic judgment must proclaim the invidiousness of the isolation of economically vulnerable people from the mainstream of employment and capital accumulation. We are unforgivably blind if we fail to see that the greatest victims of this kind of isolation will be not those who are forced into economic stagnation and dependency, but our economic society as a whole. Our economic system may well be unable to withstand the socioeconomic time bomb already ticking away in our central cities. We fail to dismantle that bomb at our peril.

CHAIRMAN FLEMMING. We will turn now to Professor Charles Clotfelter, assistant professor of economics at the University of Maryland.

DR. CLOTFELTER. In his paper, Professor Williams suggests three strategies for countering the economic effects of the *Milliken* decision. Let me briefly state what I believe to be the problem posed by the Court's decision and then discuss these strategies.

Some of the most important economic problems faced in U.S. urban areas stem from the extreme degree of racial and economic segregation which characterizes these areas. These problems include unequal access to public services (this includes public schools), the segmentation of the market for housing, and the separation of minority residential areas from the growing job opportunities in the suburbs. Three causes can be cited for this segregation.

First, natural or neutral economic causes such as increases in income and the decentralization of employment have operated through the market to encourage suburbanization. Second, private firms and individuals, including some bankers and realtors, have used their economic power to discourage minorities from buying houses in suburbs. Third, government actions—such as highway construction, income tax subsidies, zoning, FHA practices, and restrictive covenants—have encouraged the suburbanization of white middle-class families.

In addition to these public policies, the fiscal disparities between cities and suburbs brought on by suburbanization tend to produce still more suburbanization, thereby aggravating the original disparities. A special sort of government-produced disparity is created by limiting desegregation efforts to central cities alone. Since whites appear to prefer predominantly white schools, these disparities induce suburbanization, thus increasing the concentration of minority students in city schools.

In *Milliken*, the Supreme Court has dictated that the artificial racial disparities between most city and suburban school systems must remain, further advancing the process of racial separation. So the question is, what can be done, given the prospect of such suburbanization inducing disparities?

Professor Williams' first set of suggestions is aimed at reducing the flow of whites to the suburbs by making more favorable the tax-public service package of middle-class families in the central city, thereby reducing the fiscal disparities between city and suburbs. Short of Federal or State grants, central cities can achieve this only by forcing suburbanites to pay for city benefits they enjoy or by sacrificing equity in the distribution of city public services for the sake of keeping those middle-class taxpayers. The latter possibility raises a difficult question. Is keeping a given number of middle-class families in the central city worth keeping regressive taxes or stopping short of full central city school desegregation?

The second strategy suggested in the paper is, of course, an educational voucher scheme, the subject of increasing discussion and even social experimentation. A principal advantage of a voucher system is that it would foster competition, and presumably efficiency, in education. But, unless voucher payments are heavily weighted pro-poor and adequate guarantees of open enrollment are obtained from participating schools, a voucher program could well result in more racial and economic segregation of schoolchildren than now exists. This is assuming integration is our goal. And if schools were required to admit a certain proportion of minority students, would the extent of ability tracking be limited within these schools?

Professor Williams' third strategy involves broader economic reforms aimed largely at the labor market. Since those reforms really fall outside the purview of this conference, I will not discuss them except to make one point. Like the voucher plan, these reforms embody an appeal to competitive capitalism as the best protection for minorities, a position forcefully argued by Milton Friedman in *Capitalism and Freedom*.

Yet, while it may be quite true that government actions have played a significant role in worsening the plight of minorities, it is not necessarily true that the absence of government will make them better off. For unbridled capitalism is not necessarily the competitive capitalism Friedman describes. One need cite only examples of market power and intimidation which have been used to enforce residential segregation, or the style of white economic domination described in John Dollard's *Caste and Class in a Southern Town*.

In short, coercion is possible without government even though government is impossible without coercion. This point needs to be emphasized when government is singled out as the main target.

Yet, I think the point made by Professor Williams is very important. We ought to search for ways to structure incentives so that private voluntary actions contribute to socially desirable goals. Too often, government actions have pointed incentives in the wrong direction.

CHAIRMAN FLEMMING. Thank you very much.

VICE CHAIRMAN HORN. I would ask Mr. Williams this. Even though revenue sharing is a political process rather than an economic process, it does lead to some degree of decentralization and local decisionmaking. That is what I think advocates of the market process would be hoping to achieve, where people can make their own choice in terms of their self interest rather than the majority self-interest. Do you feel that revenue sharing, as such, is a useful concept that ties in with some of your philosophical views?

DR. WILLIAMS. I think revenue sharing does bring decisions down to a more local level. It is not the Washington people that are making local decisions. I think that it is a move in the right direction.

VICE CHAIRMAN HORN. How well satisfied are you with the economic data now gathered by the Federal Government? Do you feel this material is valuable in determining the intended and unintended consequences of various public policies? Is it sufficient on showing the way these policies affect minorities on matters such as the minimum wage?

DR. WILLIAMS. The minimum wage controversy has been going on for a number of years. One problem is it is hard to get good data. On a theoretical basis, I think economists can say something about minimum wage and its effects. One can ask perhaps the kind of question I asked in my paper. That is, who are the major lobbyists of the minimum wage? It turns out the major lobbyists are labor unions. One may say, why are they lobbyists for increased minimums when their wages exceed the minimum wage? These institutions have had racist policies in our country for a number of years. Why are they now concerned with the minorities? I don't know. how you would answer that kind of question. I would think that they are not concerned.

VICE CHAIRMAN HORN. I wonder if there are particular types of questions, data, and surveys that perhaps we need to have to get at your question rather than to continue simply with what is now collected by the Bureau of Labor Statistics?

DR. WILLIAMS. One has to determine the elasticity of the demand for labor to be able to tell the effects of the minimum wage law — how does labor demand respond to changes in price?

CHAIRMAN FLEMMING. Mrs. Freeman?

COMMISSIONER FREEMAN. I would like to address my question to Dr. Williams' proposal for using educational vouchers. I believe there are two questions. Does the proposal for the educational voucher contemplate that this program would be established by boards of education, at the State and local levels, together with teacher organizations?

DR. WILLIAMS. On the purer and stricter form of the voucher, it does do that. One would get the production of education into private hands. It is hoped that or argued it would increase the efficiency of the production of education.

COMMISSIONER FREEMAN. Does it contemplate that schools will be built by any private builder or department store or something?

DR. WILLIAMS. I would imagine so. That is the way I read it.

COMMISSIONER FREEMAN. It might be administered like food stamps possibly?

DR. WILLIAMS. I guess so. Most poor people perceive themselves as being better off with the food stamps as opposed to what the Government offered from Government surplus. Now with stamps they can travel to different parts of the city and different stores. They have a lot of choice.

COMMISSIONER FREEMAN. I thought of the food stamps. I was trying to figure out your analogy. When I go to the supermarket, it is there. I could not see from your example how one gets a school built.

DR. WILLIAMS. Maybe a lot of people won't agree with me and I imagine Dr. Lyle would not agree, but I look at education as just another good. A good is something that brings one satisfaction.

COMMISSIONER FREEMAN. Are you referring to a good and a product in the same way as you would a quart of milk?

DR. WILLIAMS. Yes.

VICE CHAIRMAN HORN. Milk is ahead right now.

DR. WILLIAMS. The point is the voucher system makes school officials more responsive to parents. Now the only persons that a teacher has to please are her colleagues, the principal, and the board of administration and lastly the students. The quality of education that blacks have now demonstrates that the students come last in terms of the objectives of the school system. Under the voucher system, the parent could effectively fire incompetent teachers.

COMMISSIONER FREEMAN. The reason I was confused is, under the food stamp programs, it is the head of the company that fires the clerk.

DR. WILLIAMS. No. The customer fires the clerk.

COMMISSIONER FREEMAN. In what city? Where?

DR. WILLIAMS. If all customers did not go to Safeway anymore, that store would be out of business. They would be fired. The power is in the buck. If you hold the buck, you hold the power. You might not hold as many bucks as Rockefeller, but they are equal. Rockefeller's buck is the same.

COMMISSIONER FREEMAN. I want to make a point. I think there is a difference.

DR. WILLIAMS. His dollar has a picture of George Washington on it just as my dollar. He has many more.

COMMISSIONER FREEMAN. I have a problem making a link with the voucher and getting an education for that child. Who puts up the structure? Who determines the curriculum?

DR. WILLIAMS. Just like any other private school.

COMMISSIONER FREEMAN. You would eliminate the public school system?

DR. WILLIAMS. I would. In the strictest form, it says eliminate the public schools. When the public finances education, it does not imply that it must be publicly produced. A city may want to build a building for city hall. You don't see the city worker producing it. Even though the city finances it, it hires a contractor. That is the most efficient way of doing this. We have to make clear distinctions between public financing and public production.

COMMISSIONER FREEMAN. Is that not a political decision?

DR. WILLIAMS. Yes.

COMMISSIONER FREEMAN. That is where I misunderstand you. I thought you said you wanted to remove it from a political decision?

DR. WILLIAMS. Public financing is a political decision. We may politically decide whether it is to be publicly produced or not. It can be publicly financed or not publicly financed. It just may be produced privately more efficiently than publicly.

COMMISSIONER FREEMAN. Thank you.

VICE CHAIRMAN HORN. Competition would be put into the public system, they would have to be responsive?

DR. WILLIAMS. Yes. Public officials now, in general, are responsible to their higherups, not parents.

COMMISSIONER FREEMAN. Your assumption is, if it is private, it is going to be responsive?

DR. WILLIAMS. It may be.

VICE CHAIRMAN HORN. Is it not your assumption that competition will give the individual the choice of securing the best deal for his money? If the people want the public schools to start getting responsive to the population, then, they can get the voucher?

DR. WILLIAMS. Yes. If they are getting crappy education, the alternative is to buy a \$40,000 home in the suburbs which may lie outside their ability. With a voucher system, they can bring in this element of competition.

CHAIRMAN FLEMMING. Mr. Ruiz?

COMMISSIONER RUIZ. On the question of economics, I asked the question of Mrs. Gittell whether Chicanos in East Los Angeles preferred to segregate themselves rather than be gobbled up by the surrounding community. She said that she did not know. She thought it was economics. She gave the right answer. In East Los Angeles, you have an ethnic minority that sacrificed political power and autonomy for fear that a newly organized municipal corporation would not allow them to cope with city fiscal problems. It is a defeatist attitude that has plagued Chicanos since 1948. Poor homeowners prepared to continue to live in squalor than to pay more just for living. It is astounding as the elimination of minimum wages to give them their opportunities to continue to live in squalor.

The observation of Jeralyn Lyle of power of multinational corporations and their influence in favor of local corporate bodies to the advantage of poor people elsewhere does not hit home either except in a very indirect way in, East Los Angeles. We have a vicious circle here someplace. There may be a relationship between local minimum wage laws and international corporations. But I think they have to be tied together in the field of international commerce and conflict of laws.

I would like to see a paper written on the subject of international commerce as it affects wages in the United States. I know it is raising havoc in the garment industry in order to accommodate the Japanese market. Jeralyn Lyle, how do international corporations affect wages in the United States?

DR. LYLE. Can I have time to write that?

COMMISSIONER RUIZ. No. You are an economist.

DR. LYLE. If I knew the answer to that, I would write a good book on that.

COMMISSIONER RUIZ. Can you give me a 5-minute answer?

DR. LYLE. I can "guesstimate" it. I have not yet studied it. There are a lot of very good economists in this country and other countries who are studying this question with respect to this next wage floor and the wage floor of other industrial countries because we are aware that the Arabs will own most of the treasury bills, and we are aware that the Japanese will super-
vise in the next 50 years.

What the effect will be I think is to generate some transnational flows of labor. We already see the development of a transnational white-collar group of workers whose main identity is with the company they work for rather than the country that they come from.

The impact on the wage floor is a very special question that I am not willing to say whether it would make it higher or lower. It would depend on whether the economy was in a boom or bust period and the economic relationship to the economy.

I am of the opinion that Ray Vernon at Harvard is right. I have enjoyed his book *Sovereignty At Bay* where he argues that nations like the United States, like Japan cannot pass labor legislation or tax legislation that will have the impact that the legislation is designed to have because of the increasing use by multinationals of transfer pricing and cross-subsidization, making it possible to move capital and labor fairly quickly.

So, I would say that I don't know what the effect would be. One effect, however, and the only one I will predict is Congress cannot control the effect by changing the minimum wage law. I defer to my colleague.

DR. WILLIAMS. I would respond to Miss Lyle this way. When one says that we are going to place a minimum wage of \$2.00 for some activity, what is that saying? That is saying that, if you are not working or if you cannot produce \$2.00 worth of output, you don't deserve to be working; that is, you should be unemployed if you cannot produce \$2.00 worth of output. Through minimum wage legislation I can destroy all the commissioners' jobs, if I said the minimum wage for a commissioner has to be \$70,000—

COMMISSIONER RUIZ. We work for nothing; we are volunteers'

DR. WILLIAMS. Suppose you are earning \$40,000 or \$45,000. I impose a minimum wage law. You would be unemployable. Anybody is unemployable at some wage. I think it is arrogant of us to say either you get \$2.00 an hour or you don't deserve to work.

CHAIRMAN FLEMMING. Mr. Buggs?

MR. BUGGS. You proceed from the assumption, as you phrase it, that racial integration is not a direct goal of public educational policy. You indicated before that statement that you did not believe integration is a necessary requirement for educational excellence.

You use, as a single example, Dunbar High School. I suppose it would not be too difficult to suggest that, even before there were public schools for blacks, Mr. Dunbar himself probably never saw the inside of any school. There are people who, because of their own inherent value and worth and ability, rise above the crowds.

Suppose we assume, for the purpose of your paper, that educational equality requires the integration of schools. That is the basis upon which we have called this conference. What would that do to your paper?

DR. WILLIAMS. Nothing. I would say the voucher system would probably produce greater integration than most other systems.

MR. BUGGS. I was a firm believer in the voucher system for about 5 minutes, when it became evident to me that more bigots would prefer that system to the present school system.

DR. WILLIAMS. They would be choosing for the wrong reason. I will ask you this. Are you saying when you say integration is necessary, is that statement the same as saying that it is not possible for blacks to achieve high-quality or excellence without the presence of whites?

MR. BUGGS. Of course not. I am saying the evidence, as demonstrated ever since this Nation has been a nation, is there no such thing as equal education where the races are separate. In the desegregation of schools that we are now attempting to implement, whenever whites move into black schools all kinds of good things happen. Trees are planted on the campus; walls are painted, poor lighting is taken out and fluorescent lighting is put in; in place of one microscope more than 120 are put in. Most people are concerned about quality education and equal education.

VICE CHAIRMAN HORN. The witness is saying if you can get assured equal financing something is likely to happen.

DR. WILLIAMS. I was going to respond similarly to Mr. Buggs' remark. You find more microscopes not because of the presence of whites but because of the presence of bucks. Whites don't get microscopes. It is bucks.

MR. BUGGS. We have private academies that have developed because of people not wanting blacks to go to schools with their children. We have asked IRS several times not to classify them as nonprofit schools eligible for tax breaks, but we still have those kinds of schools.

As a result of desegregation, they do not seem to be in the mood for integration. Why do you think the voucher system would change that? There is the fact of discrimination, the fact of racism, the fact of bigotry. If you discount the facts, you might be right.

DR. WILLIAMS. I don't understand your question. With the voucher system, a simple stipulation. All schools eligible to cash in vouchers must accept them from anyone.

MR. BUGGS. Who is going to do it, HEW?

DR. WILLIAMS. Whoever enforces it.

MR. BUGGS. Dr. Williams, you are talking about food stamps that come through the mail. They are not the same as an institution.

DR. WILLIAMS. How would one insure under a voucher system a black parent could enroll his student in a private school? The only requirement would be that similar to the GI bill. Schools must accept qualified applicants.

MR. BUGGS. A group of black people could probably set a grand and glorious school. The problem is that education goes farther than what happens within the walls of the schoolhouse. It is a process of socializing as well as educating. It attempts to bring people to an understanding and a consciousness, to develop a situation and a system, so that individuals, regardless of who they are, will understand and appreciate each other.

If we separate people out, if we build 10,000 schools for black children and 10 times that for white children, we are separating this Nation more than we ever did before. We are saying that integrated schools are important in terms of an educational process.

But more important than schools is society itself. The school is an institution which offers an opportunity to exercise an influence in bringing people together or in separating them. I say the voucher system has the inherent capability and surety of separation.

DR. WILLIAMS. So does the public school.

MR. BUGGS. That is right, as we now operate them.

CHAIRMAN FLEMMING. The Chairman will have to say, I am sorry to interrupt. We do have one other area to cover before adjournment. I think Professor Williams and members of the panel have done a great job.

Next is the presentation on implications for desegregation centers by Gordon Foster, director of the Florida School Desegregation Consulting Center at the University of Miami.

IMPLICATIONS FOR DESEGREGATION CENTERS

Milliken v. Bradley:

Implications for Desegregation Centers

and Metropolitan Desegregation

**Gordon Foster
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The Detroit decision by the Supreme Court contained few direct implications for the 27 desegregation centers, now somewhat euphemistically but correctly captioned "general assistance centers" and funded by the U.S. Office of Education under the Bureau of Equal Educational Opportunities. This was because most of these centers, with the exception of four or five of the early ones established in the South, have not been significantly involved in working with school districts or courts on actual plans for desegregating schools. Since there has been considerable confusion about the role of desegregation centers, however, I will take this opportunity to review their historical and contemporary functions. I will, thereafter, be speaking from my own role as an expert witness in desegregation litigation¹⁶⁸ and as a consultant to many school systems and public and private agencies, both North and South, concerned with the desegregation-integration process.

I perceive the Civil Rights Commission to be concerned broadly with the effects that the *Milliken* decision might have on future school desegregation efforts and particularly on those efforts in relation to metropolitan areas. Does the decision sound a death knell for urban desegregation? Will it make the realization of quality integrated education an impossible dream for most of our urban students? Will the gains that have been made to date—particularly in the South—be reversed, moving us closer to complete racial and ethnic separation and a divided society? I will review briefly the legal and educational goals

¹⁶⁸ Metro cases: Detroit, Richmond, and Wilmington; potential metro cases: Dayton, Grand Rapids, Memphis, Philadelphia, Hartford, and Kinlock (Missouri).

for desegregation and the strategies and techniques used, thus far to move toward these goals; discuss the particular problems associated with urban desegregation and the relevance of metropolitan remedies, and present some estimate of the decision's effect on these phenomena as well as on the future of desegregation generally.

The Role of Desegregation Centers

Title IV of the Civil Rights Act of 1964 in section 403 authorized the Commissioner of Education upon request to provide technical assistance to public school districts in the preparation, adoption, and implementation of plans for the desegregation of their schools. Technical assistance was further defined as helping to cope with special educational problems occasioned by desegregation. In section 404 the Commissioner was authorized to set up inservice training programs or institutes for school personnel so that they might be able to deal more effectively with these problems. Under these two provisions what is now the Florida School Desegregation Consulting Center at the University of Miami in Coral Gables was funded in the fall of 1965, and contracts or grants were soon made to other Southern institutions of higher education to set up similar centers in each State.

The Miami center prepared a desegregation plan for one of the six administrative areas of the Dade County (Miami) schools in 1967 and for the Duval County (Jacksonville) board in 1968 after it had been ordered by the district court to request center assistance.¹⁶⁹ With the pressures for desegregation expanding from

¹⁶⁹ The Duval board had to vote several times before it could get a majority to agree to do what the court had ordered.

both HEW and the Federal courts about that time, particularly following the *Alexander v. Holmes* decision¹⁷⁰ which ruled that boards should desegregate now and argue about it later, a few centers became actively involved in preparing plans.¹⁷¹

With the change of national administrations, however, all HEW-prepared plans became subject to review by a Washington committee which was more attuned to the political winds of the new "Southern Strategy" than to legal or educational concerns. Center activity in plan-making ground to a sudden halt in Memphis in early January of 1972 when a team that had been assisting the Memphis board under court direction was relieved from further participation in the case by Judge McRae because of new guidelines from the Washington Equal Educational Opportunities Office, which prevented the team from making any objective recommendations or from presenting a team plan.

Technically, centers can still serve in an advisory capacity to school boards on desegregation plans, but they may no longer fulfill the valuable function of absorbing some of the political heat and community ire generated against both the school system and the district court in the desegregation process. The Miami center is currently, for example, giving advisory services to the Broward County (Ft. Lauderdale) schools on the possibility of changing their present plan to make it more effective educationally while maintaining its level of desegregation. The Midwest center at the University of Missouri is assisting several communities in its four-State area to prepare for anticipated desegregation on the assumption that if they proceed voluntarily on their own initiative the end results educationally would likely be superior to those arrived at under outside constraints. This would help school boards in these communities actually live up to their historic role as described by Mr. Chief Justice Burger in *Milliken*:

¹⁷⁰ *Alexander v. Holmes County Board of Education* 369 U.S. 19 (1969).

¹⁷¹ The Miami center was requested to assist in most of the Florida districts and in fulfilling these requests eventually became the target of political criticism from the Governor and a Florida Congressman who labelled the center "a beehive of balancers and bussers" and requested an investigation of its activities by the General Accounting Office.

No single tradition in public education is more deeply rooted than local control over the operation of schools; ***[it] affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."¹⁷²

The major concern of Title IV centers has always been either to help prepare districts for desegregation (mostly in the North) or to help them deal with educational matters in desegregated schools, including discipline, testing, grouping for instruction, reading, extra-curricular activities, transportation, administrative leadership, human relations, bilingual education, and the like.¹⁷³

Furthermore, centers can function only at the pleasure of area educational agencies, since their services, by regulation, have to be requested. While the center network has been expanded to all parts of the country in anticipation of Northern desegregation, the units operating in areas where substantial desegregation has occurred will continue for some time to serve an invaluable function assisting school districts to move toward true integration. This is not an automatic success story that takes place in the year or two following desegregation but requires a sustained effort on the part of all participants in the educational business.

Goals for Desegregation

It may be helpful in discussing goals of desegregation to differentiate between legal and educational objectives.

¹⁷² *Milliken v. Bradley* (42 LW at 5257). It may be that the phenomenon of local control, as well as the neighborhood school, is more mythical than factual. Educational researchers, as well as courts, have found that local control is rather ephemeral, given an inadequate property tax base, a locked-in minority district, State constitutional and legislative regulations, or some combination of the above.

¹⁷³ Problems arising in these areas are commonly referred to as "second generation desegregation problems," but this is an inaccurate designation. They are usually regular educational concerns which have been exposed for the first time or exacerbated by the desegregation process. For example, a racist teacher in a segregated school is not thought of as a serious problem but becomes one in a desegregated setting. It is ridiculous to believe that such problems are caused by desegregation, they are nothing more than dysfunctions of the educational machine which becomes abrasive in a desegregated situation.

Legal Objectives

The legal objectives of desegregation are simple and direct where illegal segregation has been established: "to dismantle the dual school system. A plan must accomplish maximum desegregation to the end there will be no black schools, no white schools, but "just schools." Any one school within the context of a total school system cannot be racially identifiable except for good reason. The plan should make every effort to achieve the greatest possible degree of desegregation taking into account the practicalities of the situation. The test of a plan is that it promises realistically to work, and promises realistically to work now. In addition to desegregation in pupil assignment, the plan must speak to unitary procedures in faculty and staff assignments, pupil transportation, site selection and construction policies, extracurricular activities, and school services. Carried to a logical conclusion, these affirmative measures to remedy past discrimination would have the same effect as a statistically random assignment of pupils and school personnel in terms of race. This would not constitute racial balancing but would simply make for assignments within a nonidentifiable racial range.

Effect of Milliken decision.—These legal objectives could be feasibly realized in most urban areas following the Detroit decision which, in fact, is generally supportive in this regard. That is, children could be reassigned to the schools in the city of Detroit by September 1975 in such manner that individual schools would not be racially identifiable and the present duality of the system could be dismantled. Children in the Wilmington, Delaware, elementary schools could be reassigned so that the two predominantly white schools (which could now be described for all practical purposes as private white schools in an 84 percent black public system) could be made racially nonidentifiable. In like manner, desegregation in scores of urban districts could be started or completed with no viola-

¹⁷⁴ Mr. Justice Powell in *Keyes* (concurring in part and dissenting in part) argued that "whenever public school segregation exists to a substantial degree there is prima facie evidence of a constitutional violation by the responsible school board." Were this the total Court's conclusion, legal objectives would be identical for all systems, North and South. *Keyes v. School Board No. 1, Denver*, 413 U.S. 189 (1973).

tion to the *Milliken* decision: Philadelphia, Miami, Cleveland, Cincinnati, Atlanta, Dayton, or Grand Rapids, to name a few.

The catch with all this, of course, is that, within the context of several large metropolitan areas that include majority black cities such as St. Louis, New Orleans, and Wilmington, both inner-city and suburban schools would remain racially identifiable as long as desegregation was confined to district lines; it is alleged that the legal (and educational) objectives to be gained from the single district desegregation would thus be lost. It is argued further that the small minority of whites left in some cities would immediately move to the suburban schools, leaving virtually all-black systems.

On the other hand, it would seem just as logical to desegregate the few schools that are identifiably white in an 85 percent black system as it is to desegregate the identifiably black schools in an 85 percent white system. If it is discriminatory to maintain majority black or Chicano schools in a predominantly white system, it would seem equally discriminatory to allow whites to maintain their own schools in majority black systems like Atlanta and Wilmington.

Educational Objectives

The legal goals for desegregation may be relatively clear, but a definition of the Nation's educational goals in this regard is much more difficult. The national confusion is illustrated by the Florida electorate, which in the spring of 1972 had the effrontery to cast a majority of straw ballots for desegregation on the one hand but, at the same time, disavowed the use of any busing to achieve it. In the State primary elections Floridians cast 1,105,000 votes for and only 387,000 votes against the question: "Do you favor an amendment to the United States Constitution that would prohibit forced busing and guarantee the right of each student to attend the appropriate public school nearest his home?" This was a vote of 74 to 26 percent in favor of a constitutional amendment against busing for desegregation and for assignment to neighborhood schools.

On the same day the Florida voters predictably, but illogically, cast 1,066,000 votes

for and 290,000 votes against the question. "Do you favor providing an equal opportunity for quality education for all children regardless of race, creed, or color, or place of residence and oppose a return to a dual system of public schools?" While this was a vote of 79 to 21 percent in favor of equal opportunity, it is interesting to note parenthetically that something like one-fifth of the voters in Florida were against it.

In retrospect, this was a remarkably satisfying day for the Florida voter as he was able in one fell swoop to go on record for desegregation, to vote against busing and for neighborhood schools, thus denying the possibility of desegregation for many youngsters, and to support Shaw's tenet of "One simpleton, one vote."

Many school systems exhibit similar confusion in their policy pronouncements. All of them have equal educational opportunities as a stated goal and the inherent right of every student to go as far as his ability will allow in the educational game. All systems support the concept of a quality education for all clients. At the same time, many of these same systems will commit vast amounts of money and their own professional and legal talent to maintaining segregated second-class schools on the premise that desegregation is not a viable goal for one reason or another.

Part of the confusion is, of course, attributable to the lack of positive leadership. While the goal of a desegregated education in the public schools is the only alternative that makes any sense morally or educationally—as well as legally—we have had dwindling support for this position in the past year or so. Every time we seem to be making progress the administration, some Congressman, a black separatist in search of a political power block, or a professor from Harvard will move to put on the brakes.

While desegregation was providing a legal remedy for constitutional violations, it was also hoped it would speak to the following educational objectives:

- (1) Reduction of the achievement gap between majority and minority students.
- (2) Reduction of racial tension.
- (3) Preparation for living in a pluralistic society.

(4) Provision in every school of reasonably equal educational services and the potential for educational excellence insofar as race is an inhibiting factor.

National expectations were obviously overoptimistic in regard to the potential of the desegregation process to meet these goals in a short time frame and in a society plagued by individual and institutional racism, there is ample evidence to demonstrate, however, that, in those systems where a conscientious and intelligent attempt was made to make the process work, significant results have been achieved.

Put another way, educational goals for desegregation could be summarized in the form of one objective: to desegregate the school system in such fashion that quality integrated education can take place in the shortest possible time frame. It then becomes the educator's responsibility, supported by the total community, to see that the schools move forward toward integration. A good desegregation plan, thus, becomes imperative and requires meeting a number of criteria or guidelines. The following list is not exhaustive but, rather, illustrative.¹⁷⁵

- (1) Necessary adjustments must be borne by the entire community; there must be equitable and reciprocal treatment for both majority and minority groups.
- (2) Perceived constitutional requirements must be met.
- (3) Economic feasibility.
- (4) Transportation would be kept to a minimum in achieving the greatest possible degree of desegregation.
- (5) Transportation would not be so great in time or distance as to risk the health of children and significantly impinge on the educational process.
- (6) Stable feeder patterns of children from the elementary level to middle school and then to high school would be utilized so that, wherever possible, pupils could proceed through school together from the kindergarten to grade 12.¹⁷⁶

¹⁷⁵See National Education Association school desegregation guidelines for local and State education associations, Washington, 1974.

¹⁷⁶This would not preclude pupils from two residential areas, instead of one, going through school together.

(7) Participation of the total community in an advisory capacity in the planning process where time permits.

(8) Provision for inservice training for all role groups in the school system in cultural content and human relations processes.

(9) Equitable and educationally sound pupil transfer policies which do not dilute the desegregation process.

(10) Equity in curriculum offering, methodology, and content.

(11) Alternative instructional programs which would be optional for individual students, especially at the secondary level.

Where time has allowed or especially in voluntary desegregation activity, criteria for plans have been more carefully articulated. These have been included on occasion in actual plans reviewed by courts, but more generally are the concern of postdesegregation educational strategies by the schools. The question of how many objectives can be included in a desegregation plan is certainly debatable, but a plan will carry only so much baggage and the courts are reluctant to instruct a school board on educational matters absent constitutional considerations. The courts may confine their activity to purely legal issues, but to hold that school systems should not be held accountable on these matters is to belittle the role of education in our society. It may seem an unfair burden to professional educators—and probably is—but what other agency in our repertoire can even attempt such a task?

Effect of Milliken decision.—Following *Milliken* the chances for addressing these educational objectives of desegregation are greatly reduced in a number of our larger cities. In those many metropolitan areas that include a city school system with a majority of minority students surrounded by suburban systems that are predominantly white, there is little or no likelihood. Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia said recently:¹⁷⁷

If the Supreme Court should ever hold that the mandate of *Brown* applies only within the boundaries of discrete school districts, the national trend toward residential, political and

educational apartheid will not only be greatly accelerated, it will also be rendered legitimate and virtually irreversible by force of law.

In a few instances lawyers may be able to come forth with the proof required to justify cross-district remedies; but it appears that the Court has basically made a political decision to abandon the major cities to their fate with the belief that the remedies required would be too great a shock for the American public to countenance at this time.

If this is a correct assumption, it could be argued that desegregation proponents should concentrate their efforts for the foreseeable future on the large number of districts that could still be effectively desegregated without cross-district movement. The *Milliken* decision, while supporting this approach on the record, more realistically may give a hidden message that depresses desegregation activity at all levels. Continuing efforts to bring relief in city districts like Corpus Christi, Knoxville, Dayton, and Montgomery up to *Swann*¹⁷⁸ and *Davis*¹⁷⁹ standards have thus far been disappointing.

Strategies and Techniques in Desegregation

An overview of the general strategies or patterns that have more or less fortuitously developed in the desegregation process will now be presented along with the logistical techniques for pupil assignment plans which constitute the major part of any desegregation effort.

General Strategies

There was some hope early on that voluntary desegregation efforts would be made by school districts, but very few ever jelled and they often had the threat of forced action in the background. It is safe to say that no district of any size will be apt to move voluntarily for desegregation at this time unless there is a real threat of litigation or loss of funds. Thus, the Office of Civil Rights, the Justice Department, private plaintiffs, or an occasional State agency like the Pennsylvania

¹⁷⁷ Editorial, "Wrong without remedy," *New York Times*, July 28, 1974. 16-E.

¹⁷⁸ *Swann v. Charlotte-Mecklenburg*; 420 U.S. 1 (1971).

¹⁷⁹ *Davis v. Board of School Commissioners of Mobile County*, 420 U.S. 33 (1971).

Human Relations Commission are the only sources of desegregation activity. The Office of Civil Rights has been conspicuously silent for the past several years; the Justice Department surfaces once in a while in uncertain postures, and State agencies are subject to tremendous restraining pressures from their enabling legislatures. This leaves a small band of lawyers for private plaintiffs who are generally overworked and underpaid but persistent. At least five general strategies have evolved from these groups over the years either to promote desegregation or impede it.

(1) *Simple-to-complex*.—A supposedly effective strategy for any change in social systems has been to move from the least difficult to the most difficult, to prepare everybody along the way, to experience some successes at the easier stages so that momentum can be gathered, and to secure popular understanding beforehand through education and persuasion. The "simple-to-complex" strategy with some modification helped to bring desegregation to the rural South and many smaller city districts both North and South, either partially or totally, by 1969. Lengthy negotiations were carried on; enforcing agencies went the "second mile"; good faith was presumed, and freedom of choice was the modus operandi. It became clear that this strategy was only meeting modest success and would not work for the larger-sized districts. Furthermore, it could be said that the litigation in Detroit violated this strategy because plaintiffs had not yet dealt with a system approaching this size or racial makeup, especially a Northern district.

(2) *Do it now*.—The Court in 1968 and 1969 became impatient with the deliberate speed with which Southern districts were proceeding and encouraged a change in strategies by ordering remedies that worked to be effectuated immediately.¹⁸⁰ Empirical evidence has strongly suggested that desegregation is much better done all at once than through any delayed or step-by-step arrangement.¹⁸¹ School superintendents have frequently said

¹⁸⁰ *Green v. County School Board*, 391 U.S. 430 (1968) and *Alexander v. Holmes*, 399 U.S. 19 (1969).

¹⁸¹ The agony that Boston is now going through can be accounted for partially by the two-stage plan which is encouraging continued opposition from the population to be affected.

they would prefer to "get the job done, do it right, and then get on with the business of education" (assuming, of course, that they're convinced the job has to be done).

(3) *White comfort*.—The major premise of this strategy is that a sort of practical, desegregation comfort level exists beyond which whites should not be expected to sacrifice. Crain explained it in this way:¹⁸²

1. Blacks benefit from attending majority white schools, but there is no additional benefit beyond a 70 percent white majority.¹⁸³

2. Whites benefit from interracial contact, and a school must be at least 5 percent black to provide such benefits.

3. "Social and political constraints make it inadvisable to bring black students into all-white schools in excess of 30% of the enrollment. This is a conservative assumption. A number of school systems have found that schools which are half black are viable as desegregated schools, and there is no educational research which demonstrates that a 70% white school is superior to a 50% white school. However, it seems likely that were we to propose a figure below 70% white, many school administrators and white leaders would object."¹⁸⁴

(4) *Share the wealth*.—This strategy is a sort of second-stage maneuver that is brought into play by the majority group when it perceives its majority being threatened. For example, the school systems in both Richmond and Detroit fought at great length in the courts to avoid desegregation. Once the decision was made by the local district court that

¹⁸² See R. L. Crain and C. H. Rossell, *Evaluating school desegregation plans statistically*. Center for Metropolitan Planning and Research, Johns Hopkins University, 1973, pp. 18-19.

¹⁸³ Cf. the arguments of the Norfolk (Va.) Board in *Brewer* (1969, 1970) based on 17 educational principles. *Brewer v. Norfolk*, 308 F. Supp. 1274 (E.D. Va. 1969) and 434 F.2d 408 (4th Cir. 1970).

¹⁸⁴ Most white educational administrators, school boards, and teachers will attest to the 70-30 white-black mix as the highest possible black proportion allowable for good education. Consequently, many districts will propose plans dispersing their black students to white schools at about this level except for the surplus blacks who are left in all-black schools. This is referred to in the trade as the "warehousing" technique, because the remaining all-black schools are often large capacity, warehouselike structures in the middle of the ghetto. See *Northcross* and *Carr*. *Northcross v. Memphis*, 489 F.2d 15 (6th Cir. 1973), cert. denied, 410 U.S. 926 (1974); *Carr v. Montgomery*, 377 F. Supp. 1123 (M.D. Ala. 1974). The Norfolk Board clothed a similar proposal in the guise of SES considerations rather than racial ones, but the intent was obvious (*Brewer*).

a remedy was in order, both systems joined plaintiffs' forces in asking that neighboring white districts "share the wealth" by accepting minority students from the city.

In the South Dade area of Miami the unusual situation arose of white parents in several desegregated schools agitating for greater desegregation efforts by the school board because they found their children in schools less than 50 percent white. As a result, other majority white schools that were close at hand were added to the desegregation clusters, making the "share the wealth" strategy an effective force for greater desegregation.

(5) *Sue the State*.—Legal strategy has for some time been swinging around to setting up the State as the primary target in discriminatory action. This is a logical development, since authority for public education is vested in the State and "local control" is more and more under criticism as an accurate description of educational realities.

Effect of Milliken Decision

In terms of these general strategies what does the *Milliken* decision have to say about further desegregation efforts? Perhaps the following.

(1) Litigation efforts should be concentrated in smaller districts than Detroit.

(2) Litigation efforts should not count on the "do it now" strategy; school boards are back at the old game of avoiding September action deadlines. Quality litigation becomes again more important than speedy litigation.

(3) It remains important to press for a fully desegregated system even in majority black cities; at the same time, the minority that is in the numerical majority should exercise control and direction of the system. As long as whites are permitted to maintain majority white schools and control the educational system, little press will be made for metropolitan remedies.

(4) Voluntary methods of desegregation (e.g., Metco) on a small scale should be supported in spite of their shortcomings, and help should be afforded cross-cultural educational activities throughout the metropolitan area. While these are not adequate solutions, they keep the flame alive for long-range efforts.

It should be clearly understood, however, that these activities will in no way serve as a genuine substitute for desegregation.

Desegregation Techniques

There are a number of proven techniques for desegregating schools and a number of voluntary, optional methods that have seldom proved effective.¹⁸⁵ In the North, the latter have more often than not served as a form of State-imposed segregation.

Redrawing attendance zone lines (sometimes referred to as "reverse gerrymandering"), pairing and grouping (clustering) of contiguous or noncontiguous schools, changing feeder patterns from the elementary to secondary levels, reassigning faculties and other school personnel so that no school can be identified racially on the basis of its employees, and adoption of certain site selection and construction policies are all legitimate techniques for desegregating schools. The use of transportation is, of course, often concomitant to noncontiguous grouping practices.

Among the less effective and sometimes spurious optional methods are the use of optional zones, open enrollment (freedom of choice), majority to minority transfers, magnet schools, cultural exchange programs (including desegregation by television), metropolitan plans transporting inner-city children to the suburbs, and open housing.

Effect of Milliken Decision

No direct implication for any specific one of these desegregation methods is evident in the Detroit decision. However, it can be generalized that:

(1) The efficient utilization of desegregation techniques will be inhibited because of the restriction to district lines. In almost every metropolitan situation there are opposite-race schools, school clusters, and communities juxtapositional, allowing for maximum desegregation with minimal effort.

(2) Because genuine desegregation techniques are more inhibited, there will be a tendency to experiment with less effective surrogates which will prove more expensive.

¹⁸⁵See G. Foster, *Desegregating Urban Schools: a review of techniques*. *Harvard Educational Review*, 43, February 1973, pp. 14-26.

require more transportation in many cases, and produce little or no meaningful desegregation.¹⁸⁶

Urban Desegregation and Metropolitan Solutions

With the *Swann*¹⁸⁷ decision it appeared briefly as though the legal gates were open for substantial urban desegregation. Interpreted literally *Swann*, with some companion cases,¹⁸⁸ would have encouraged virtually complete desegregation of all but a few of the large city systems in the country, provided discrimination by official action could first be proved. Several districts with over 75,000 pupils had already been successfully desegregated.

Constraints in Urban Desegregation

In order to understand why more wasn't accomplished at that time it is necessary to list briefly some of the inhibiting factors:

(1) *Costs of city desegregation*.—With city districts undergoing all sorts of financial woes because of municipal overburden and declining property tax structures, the cost of desegregation becomes more important. It should be pointed out that school officials, however, have made all sorts of exaggerated claims about potential desegregation costs.

(2) *Neighborhood school mystique*.—A child's alleged right to attend his "neighborhood school" has become a rallying point against urban desegregation, even though the courts have repeatedly denied this prerogative.

(3) *Fears about academic achievement*.—The questions of whether desegregation serves to improve the academic achievement of minority pupils without impairing majority pupil performance and whether the degree of desegregation is a factor in this process are repeatedly raised.

¹⁸⁶ For example, examine the costs, transportation requirements, and desegregation results of Detroit's Magnet School Program (1971), Detroit's Special Humanities Schools (1972), the Memphis Cultural Exchange Program supplemented by a "Personalized Educational Television Program (PET) utilizing modern, space-age communication technology," and the Boston Metropolitan Planning Project (1973).

¹⁸⁷ *Swann v. Charlotte-Mecklenburg*, 420 U.S. 1 (1971).

¹⁸⁸ *Davis v. Mobile*, 420 U.S. 33 (1971); *Green v. New Kent County*, 391 U.S. 430 (1968), and *Alexander v. Holmes*, 369 U.S. 19 (1969).

(4) *The busing phenomenon*.—Segregated housing patterns in cities usually require additional busing. Of importance here is the fact that many cities have never provided children transportation because they were not reimbursed for such expenses, as were rural districts. Here again the claims of school officials and the public as to the amount of busing likely to be required are usually grossly exaggerated.

(5) *The national administration*.—It is quite clear that the Nixon administration had a very dampening effect on the national desegregation effort, both in the judicial and executive branches.

(6) *Litigation difficulties*.—Some local cases were poorly prepared; some local judges were adamant in following higher court decisions; and in many instances time, talent, or money were not available to assist a plaintiff to bring suit.

(7) *City topography*.—The physical problems of some urban systems in terms of waterways, highways, railroads, and natural boundaries assume much greater significance under a proposed desegregation plan than they actually possess.

(8) *City mayors*.—I have never heard of a city mayor who supported the desegregation of his city, although I'm certain there must have been one somewhere.

Metropolitan Solutions

One lesson to be learned from the Southern desegregation experience is the advantage of metropolitan solutions. Nashville, Charlotte, and all districts in Florida, since they are coterminous with county political units, are metro systems, all are fully desegregated except Dade County (Miami). In a metro situation more options are available for pupil assignments and, once made, a desegregation plan tends to stabilize population movement that can result from uneven desegregation. There are numerous advantages to a metro plan of school desegregation:

(1) The desegregation of pupils is easier, with less transportation required to achieve greater desegregation. In cities like Grand Rapids and Richmond, black city schools and white suburban schools are virtually "across the street" from each other.

(2) A metro plan provides better "delivery of services" to inner-city schools. When suburban white pupils and teachers are assigned to these schools, their very presence tends to guarantee equal treatment.

(3) A metro plan tends to lessen white flight and to stabilize communities, as there is less and less reason to move because of preferential school facilities.

(4) A metro system can reduce the inequality of educational conditions that now exists between the suburbs and the inner city.

(5) Contrary to Mr. Chief Justice Burger's belief that a metro plan in Detroit would have resulted in a vast new super school district, all sorts of imaginative possibilities existed for the governance of the metro system. A metro system can result in a centralized-decentralized form of governance with the best of both worlds—central efficiency of operation and a considerable amount of decentralized control. Through a system of interdistrict contracts all sorts of cooperative educational programs and support services could be facilitated which would be beyond the reach of individual districts. Ironically, the school systems in the Detroit metro area already participate extensively in these interdistrict arrangements.

Effect of Milliken Decision

There can be little doubt that the decision in Detroit has temporarily set back all the advantages that might have accrued from metropolitan solutions to the constraints against the desegregation of urban schools.

The Future of Desegregation in Cities

While the *Milliken* decision cast a pall of gloom over the total effort to desegregate city schools, there is still a wide range of activities that can be pursued by those who believe in the basic worth of the desegregation effort. Several factors are operative in support of eventual metropolitan solutions.

(1) The Nixon administration has left the country in a divided state as regards the desegregation of cities. Tampa and Ft. Lauderdale in Florida are desegregated completely; Miami is not. Nashville and part of Mem-

phis in Tennessee are desegregated, Knoxville is not. Nashville, Dayton, and Cincinnati are all in the jurisdiction of the Sixth Circuit Court of Appeals, Nashville is desegregated, Cincinnati and Dayton are not. It is more likely that cities not desegregated will be brought up to comparable standards than that cities segregated will return to a pre-*Brown* status.

(2) The necessity for increased economy and a better performance record in school systems continuously moves metro area schools to greater cooperation in every phase of education, even occasionally including pupil and teacher assignment. It makes little sense in this day and age for city systems like Cincinnati and Dayton to be surrounded by a multitude of suburban districts. One question that needs answering is how large a school system ought to be for maximum effectiveness.

(3) Black political forces in the center city and white economic power in the suburbs are beginning to feel their way toward a pluralistic concept of metropolitan accord. Atlanta is a prime example.¹⁸⁹

This means that white people in the suburbs will have to give up their prejudices and the blacks in the city will have to give up their selfishness about not wanting to dilute their power in city government***

Right now we have 80 different governments and 65 municipalities and 15 counties in the metro-Atlanta area. No one could run a business this way***[a metro government] is necessary for the salvation of the future of the city as well as the state and this whole part of the country.

In Summary

While not affected directly by the *Milliken* decision, Title IV desegregation centers have a continuing vital role in assisting already desegregated schools to move toward quality integrated education. Legal objectives of desegregation can still be realized, but the chances of achieving educational goals in large metropolitan areas are greatly reduced. Quality should come before quantity in further litigation and be concentrated in smaller dis-

¹⁸⁹Comments by business and government leaders at a September 25, 1974, forum in Atlanta. *The Atlanta Constitution*, Sept. 26, 1974, p. 22A.

tricts than Detroit, although the metro solution to urban desegregation should still be vigorously pursued through the courts. Pressure can still be maintained for full desegregation in majority black districts, but minorities should exercise more control and

direction of these schools. Although the Detroit decision set back the immediate prospect of metro solutions to urban ills, several forces both inside and outside of education are operative in support of reaching this end.

CHAIRMAN FLEMMING. Mr. Foster, we appreciate very much your paper and the contribution it has made to our thinking. We will be grateful to have a 10-minute summary of the highlights.

MR. FOSTER. Thank you, Commissioner. It is a pleasure to be here, particularly on the stand with two such distinguished reactors.

The Detroit decision by the Supreme Court contained few direct implications for the 27 desegregation centers now somewhat euphemistically but correctly captioned "general assistance centers" and funded by the U.S. Office of Education under the Bureau of Equal Educational Opportunities. This was because most of these centers, with the exception of four or five of the early ones established in the South, have not been significantly involved in working with school districts or courts on actual plans for desegregating schools.

Since there has been considerable confusion about the role of desegregation centers, however, I will take this opportunity to review their historical and contemporary functions. I will, thereafter, be speaking from my own role as an expert witness in desegregation litigation and as a consultant to many school systems and public and private agencies, both North and South, concerned with the desegregation-integration process.

In my paper I reviewed the legal and educational goals of desegregation, strategies and techniques to move towards these goals, and discussed the particular problems connected with urban desegregation and the effects of the *Milliken* decision on these phenomena.

Title IV of the Civil Rights Act of 1964 in section 403, authorized the Commissioner of Education upon request to provide technical assistance to public school districts in the preparation, adoption, and implementation for plans of the desegregation of their schools. At no time have centers been involved in compliance activities.

The Florida School Desegregation Center at Miami, which was funded in 1965, prepared a desegregation plan for one of the six administrative areas of the Dade County schools in 1967 and for the Duval County (Jacksonville) board, in 1968, after it had been ordered by the district court to request center assistance. The Duval board had to vote several times before it could get a majority to agree to do what the court had ordered.

With the pressures for desegregation expanding from both HEW and the Federal courts about that time, particularly following the *Alexander v. Holmes* decision which ruled that boards should desegregate now and argue about it later, a few centers became actively involved in preparing plans.

Shortly after the change of national administration, HEW plans became subject to review by a Washington committee. It was a political type of review and not subject to educational concerns. There was HEW planning going on in Memphis when a team assisting the Memphis board was relieved from further participation by U.S. District Judge McRae because of new guidelines which indicated the team should not prepare a "team" plan or make their own recommendations to the court.

Centers can still serve in a advisory capacity in school board desegregation plans. They may no longer fulfill the useful function of absorbing political heat generated against the school system and the district court in the desegregation process.

The Miami center is currently assisting Fort Lauderdale to make some changes in their plans that would provide as much desegregation but hopefully would make for a better educational system. The other and major concern of Title IV centers has been to help the desegregating district in matters such as testing, extracurricular activity, human relations, and the like.

The center network has been expanded to all parts of the country in anticipation of Northern desegregation. The units operating where desegregation has occurred will hopefully continue for some time and will serve an invaluable function of helping schools that are moving towards integration. This is not an automatic process but requires a sustained effort on the part of all.

It may be helpful in discussing goals to differentiate between legal and educational objectives. The legal objectives of desegregation are simple where legal discrimination has been established; that is, simply, to dismantle the dual school system.

Legal objectives could be realized following the Detroit decision. That is, children could be reassigned to the schools in the city of Detroit by September 1975 in such a manner that individual schools would not be racially identifiable and that dual structures could be dismantled.

Children in Wilmington (Delaware) elementary schools could be reassigned so that the two predominantly white schools that are really like private schools in an 84 percent black public school system could be made racially nonidentifiable.

Desegregation could be completed with no violation to the *Milliken* decision in scores of urban districts. Philadelphia, Miami, Cleveland, Cincinnati, Atlanta, Dayton, or Grand Rapids, to name a few. Within the context of several large metropolitan areas that include major black cities, both inner city and suburban schools would remain racially identifiable so long as desegregation was confined to district lines.

It was hoped that desegregation would speak to the following educational objectives. reduction of achievement gaps, reduction of racial tensions, and provision in every school for reasonably equal educational services and the potential for educational excellence.

National expectations were overoptimistic in regard to the potential of the desegregation process to meet these goals in a short time frame in a society plagued by racism. I think there is ample evidence to demonstrate that, in those systems where a sincere attempt was made to make the process work, significant results have been achieved.

Following *Milliken*, chances for addressing these educational objectives are greatly reduced in a number of our larger cities. In metropolitan areas, including city school systems where minority schools are surrounded by whites, there is little or no likelihood. Lawyers may come forward with proof to justify cross-district remedies, but it appears the courts have decided to abandon the major cities to their fate.

There are at least five general strategies which I spoke to in my paper which have been tried to impede desegregation or to promote it. One is a simple-to-complex strategy with some modifications which helped to bring about desegregation in the rural South and in many smaller city districts there. Lengthy negotiations were carried on, enforcing agencies went the second mile, and freedom of choice was the modus operandi. It was clear this would only have a modest success and would not work in the large districts.

The second strategy was do it now. Empirical evidence suggested desegregation is better done all at once than through any delayed arrangement. School superintendents have often said they prefer to get the job done, do it right, and get on with the business of education (assuming they were convinced that the job had to be done).

The third theory is the white comfort strategy. A practical desegregation comfort level exists beyond which whites should not be expected to sacrifice. Most white educators will set a 70-30 percent white-black mix as the highest allowable for good education. Consequently, plans are made to disperse minority students to white schools except for surplus blacks who are left in all-black schools. This is a "warehousing" technique because the remaining all-black schools are often large-capacity, warehouse-like structures in the middle of the ghetto. A good example is *Montgomery v. Carr*. There was a similar proposal from the Norfolk board in the guise of SES considerations rather than racial ones, but the intent was obvious.

The fourth strategy is to share the wealth. It is brought into play by the majority group when it perceives its majority being threatened. The school systems in Richmond and Detroit fought to avoid desegregation, but, once a decision was made that a remedy was in order, both systems joined plaintiffs' forces and asked the neighboring suburbs to share the wealth by accepting minorities from the city.

A fifth strategy which is now in operation is to sue the State rather than the school board. You will notice that all of the desegregation litigation presently involves State action. This is a logical development, since authority for public education is vested in the State.

In terms of these five strategies, what does the *Milliken* decision have to say? One, litigation effort should be concentrated in smaller cities than Detroit. Litigation should not count on the do-it-now strategy. School boards are back at the old game of avoiding September action deadlines. Quality litigation becomes again more important than speedy litigation.

It remains important to press for a fully desegregated system in major black cities. At the same time, the minority that is in the numerical majority should exercise control and direction of the system. As long as whites are permitted to maintain majority white schools and control the educational system, little press will be made for metropolitan remedies.

Fourth, voluntary methods such as Metro on a small scale should be supported. Help should be afforded cross-cultural activities throughout the metropolitan area. These are not adequate solutions. However, they keep the flame alive for long-range efforts.

These are not legitimate substitutes for desegregation. You cannot have quality integrated schools unless you first desegregate. There are a number of proven techniques for desegregating schools and a number of optional methods that have more often than not served as a form of State-imposed segregation. Redrawing attendance zone lines, pairing and grouping patterns, site selection and construction are legitimate techniques. Among the less effective and sometimes spurious optional methods are the use of optional zones, freedom of choice, majority to minority transfers, cultural exchange programs including desegregation by television, metropolitan plans transporting inner-city children to the suburbs, and open housing.

No direct implication for any specific one of these methods is evident in the Detroit decision. It can be generalized that the efficient utilization of desegregation techniques will be inhibited because of the restriction to district lines. In almost every metropolitan situation, there are opposite-race schools, school clusters, and communities juxtapositional, allowing for maximum desegregation with minimum effort.

Because genuine desegregation techniques are more inhibited, there will be a tendency to experiment with less effective surrogates, which will prove more expensive and require more transportation in many cases and produce little or no meaningful desegregation.

There are a number of constraints in urban desegregation which I will note. The costs of city desegregation, the neighborhood school mystique, fear about academic achievement, the busing phenomenon, the national administration, the litigation difficulties, the city topography, and the city mayors.

One lesson to be learned from Southern desegregation is the advantage of metropolitan solutions. Nashville, Charlotte, and all districts in Florida are metropolitan systems. All of them are fully desegregated except Dade County.

There are numerous advantages to a metropolitan plan. Desegregation is easier with less transportation required to achieve greater desegregation. Metropolitan plans provide greater delivery of services. They lessen white flight and have a stabilization effect. They reduce the inequality of educational conditions that now exist between the suburbs and the inner city. Contrary to Mr. Chief Justice Burger's belief that a metro plan in Detroit would have resulted in a vast new super school district, all sorts of imaginative possibilities existed for the governance of the metro system.

There can be little doubt that the decision in Detroit has temporarily set back all the advantages that might have accrued from metropolitan solutions to the constraints against desegregation. In closing, I would point out there are several factors in support of eventual metro solutions, regardless of what happens in the courts.

First, the country is in a divided state regarding the desegregation of cities. Tampa and Fort Lauderdale are completely desegregated, Miami is not. Nashville and a part of Memphis in Tennessee are desegregated, Knoxville is not, Nashville, Dayton, and Cincinnati are all in the jurisdiction of the Sixth Circuit Court of Appeals, Nashville is desegregated; Cincinnati and Dayton are not. The cities not desegregated most likely will be brought up to comparable standards.

Secondly, the necessity for increased economy continually moves metropolitan area schools to greater cooperation in every phase of education, even occasionally including student and teacher assignments. One question that needs answering is how large a school system ought to be for maximum effectiveness.

Thirdly, black political forces and white power in the suburbs are beginning to feel their way in some cities toward a pluralistic concept of metropolitan accord. Atlanta is a good example.

One final comment. There was a dialogue this morning on the Rand study, with which the Commission has been dealing, between Commissioner Horn and Dr. Pettigrew. I will say I think the problem of the study is a lack of understanding on the part of the Rand people of what desegregation in schools is in terms of legality. As it now stands, the Rand proposal is simply a study of schools with biracial school population and has little or nothing to do with desegregated schools.

CHAIRMAN FLEMMING. Thank you very much. I first recognize Gregory Anrig, State Commissioner of Education of Massachusetts. We are happy to have you with us here today. I would appreciate having your reactions to Dr. Foster's paper.

MR. ANRIG. Thank you. I first would like to say this. For all of us who are in good faith trying to deal with the issues of equal educational opportunity, I think the role this Commission has played through the years, even with changing membership, has been one of steady and consistent encouragement. I want to express my personal appreciation to you as members of the Commission and to you as the Director.

When I was working in the Federal Government, I had an opportunity in 1967 to attend a meeting that was called by Peter Libasse, then head of the Office of Civil Rights. Peter had revised the HEW Title VI guidelines to apply for the first time to school districts in the North.

He thought it appropriate to bring in Northern and Southern chief State school officers to review these guidelines. We met in the Commissioner's conference room and Peter explained how these guidelines would affect Northern districts. A Northern State commissioner said he thought it was unrealistic. We had to deliberate about these things.

A Southern State superintendent grinned from ear to ear. "I want to welcome you Northern saints to the company of us Southern sinners."

I come to you as a Northern "saint" who is going through the pangs of what Southern "sinners" have gone through. For all that attention which has focused on Boston, however, I want to point out that there was another city in Massachusetts, Springfield, that desegregated this year without incident and without national news coverage.

The subject for discussion is the implications for desegregation centers of the *Milliken v. Bradley* decision. I was in on the development of the centers as they first began. The kind of objectives we had in mind were not in the brochure describing them or in the testimony before the congressional committees. These objectives were the following:

First, it was clear in our minds that along with Federal *enforcement* of civil rights laws should go Federal *help*. Second, in trying to do this in areas such as the South, it would be helpful to provide this help with indigenous people from the South rather than so-called "carpetbaggers" from the North. There was sensitivity from the summer of 1965 or 1966 when a lot of law school graduate interns went South to negotiate on plans. That left a residue of something less than good feelings in the South.

The third objective was that this should be *comprehensive* help. This should not deal with just training. The Title IV experience with training institutes for a number of years proved that training separate from the actual carrying out of a desegregation plan would have little effect. The best thing to do was to tie this training in with development and implementation of a desegregation plan. A fourth objective was to locate centers regionally on university campuses where they would be more accessible and hopefully more insulated from political pressure.

These objectives were achieved during a period of time that I considered to be the centers' heyday—during 1968, 1969, and 1970—until the decision Mr. Foster referred to. I felt the objectives were being achieved. We need to achieve them again.

There were some incidental results as well. Centers developed an able core of people highly experienced in the process of desegregation who could serve privately if not publicly as expert witnesses in court cases. Gordon Foster has done this with great distinction as well as others in the audience here.

Secondly, there is a developing of a new generation of experts through training programs which are part of but separate from the centers in the university setting we have. There is an excellent training program at the University of Miami, for instance, developing the next generation of people who might be the expert witnesses.

Finally, a benefit was that the Federal Government had available to it flexible staff resources when called upon for extraordinary efforts in civil rights. They could draw upon this manpower on short notice. I would point out that in 1969 the President decided to shift enforcement of desegregation to the courts. The next day there was an announcement by the Attorney General to group cases together statewide and seek single court orders. The U.S. Office of Education was immediately faced with developing 22 plans in South Carolina, 43 in Louisiana, and 36 in Mississippi.

This was done all at once. But we were able to draw upon the center staffs on very short notice to help in that process. The process was successful. The end result was not. The implications of the January 1972 abandonment of the role of centers where plans are developed and training is done in context of those plans were two short range and one long range.

On the short range side, it did this. It placed back on *local* elected officials the full burden of developing and presenting a desegregated plan. The centers played a valuable role in taking heat off Southern school officials. That proved to be a helpful thing. The superintendent would say, "This is what I think is the best plan." The center would work out the plan and present it

publicly. They would have names called. They would be able to go back safely to their campus and the superintendent could pick up the ball and run with it.

A second short range result of the pullback was that training resources which had been available to Southern districts were not to be available to Northern districts facing desegregation.

A long range implication, and one where I hoped the centers would be at this point in time, is the fact that, as we begin to get into more complex urban desegregation situations in the North and South, Federal judges are left alone and without help to carry out the 14th amendment requirements in these urban situations.

There now is no federally-supported expertise available to judges directly to help them carry out that responsibility. I believe in the North it would have been good if the Federal courts had the same kind of help they had in the South. There is a need for a role similar to the "master of the court." Someone who works for the judge, who is accountable solely to the judge and who is knowledgeable and efficient in planning and implementing the process of desegregation. The university centers could have been a resource for such a master role. Unfortunately, they are not.

In terms of the implications of all of this for *Milliken, v. Bradley*, I don't think there are any. Let me talk about that.

I concur with the idea, the point that Gordon Foster has raised as far as what I see as the next steps. I didn't feel discouraged by the Detroit decision until this morning when I heard that the Legal Defense Fund is going to pull back from metropolitan litigation. I did not feel *Milliken* was that discouraging. It says you have to go different ways, and you have to be better at bringing the case forward. I think we can do it and I think we should.

I don't think the *Milliken* case was a turndown. That case was not strong enough to justify that remedy. The case is not lost. We ought to look for better opportunities to advance the same points in the future. Mr. Pettigrew's paper this morning was extremely encouraging. I urge you to read it. There is evidence that can be presented that will come up with satisfactory conclusions. I think that is a challenge, not something to back off from. We ought to be persistent.

While we are looking for a better case, there is an opportunity for political leaders to move ahead on voluntary metropolitan approaches. This should be good impetus for breaking ground and to show it can be done and that it ought to be done. *I say this, because I think this is a responsibility not so much at the Federal level, but I do believe it is a responsibility at the State level.*

State leadership and governments have an obligation to move as far as they can with voluntary programs until legal case law catches up with us and we find we can go further in that area. I believe there is a role for university centers in helping States devise and implement voluntary educational programs.

In Massachusetts, we have three on the way. There are 2,400 black children that get on the bus each morning in Boston and attend suburban schools under a program called Metco. The Governor and legislature recently approved almost \$2 million for magnet programs in Boston and Springfield to attract suburban and urban students on a desegregated basis. We received \$1.1 million for Federal ESAA funds for a metropolitan planning project in the Boston area. One result of this planning is the State board of education proposed 2 weeks ago a voluntary metropolitan educational programs bill, which we hope will be favorably considered by the legislature this year.

We can move ahead here without a court decision. I encourage State action in that direction.

There are two areas that are in need of correction. There was an Emergency School Aid Act "set aside" for metropolitan planning. That set-aside was deleted through an amendment sponsored by Congresswoman Green. I think that section should be restored. There should be set-aside money to help districts in a metropolitan area, by their own decisions, to plan their future.

I think Title I of the Elementary and Secondary Education Act can encourage interracial programs, including those across district lines. Because of the "concentration of funds" requirement, you must put those Title I dollars where you have the most segregation in urban school districts. They cannot be used in the areas where you have the most desegregation without violating Office of Education "concentration of funds" guidelines. We should take a good constructive step backwards on that and turn to the former policy that Title I dollars should follow the Title I pupil wherever he goes.

Let me close by saying that I don't propose in any way that voluntary metropolitan programs are a substitute for desegregation. Boston and Massachusetts must go ahead, as indeed they have. These programs can be valuable supplements, however, to open up future possibilities. With that, I will lateral over to Mr. Panetta.

CHAIRMAN FLEMMING. Thank you very much. Next, we are happy to have Mr. Leon Panetta. He is an attorney and former Director of the Office for Civil Rights, HEW.

MR. PANETTA. Members of the Commission, I deeply appreciate the opportunity to participate in this conference. As one of the first to have left the Nixon administration, I take pride and comfort in the fact when I come to Washington I don't have to report to Judge Sirica's courtroom or to a probation officer.

I want to give you my compliments. I believe that providing this forum at this time is extremely important. As a result of the reactions to Boston and busing, as a result of the *Milliken* decision, and as a result of the general political and educational and emotional confusion regarding desegregation, this country again is faced with the decision of whether we are going to stick by the commitment that *Brown* made of equal education or whether we are going to retreat from that commitment.

The fact is there is no middle ground, as politically comforting as that might be. For 20 years in this area, people have been trying to find the nice middle ground of not having to advance but, also having to respect the Constitution and its requirements.

The fact is ineffective desegregation can be as destructive as no desegregation at all. *Milliken* tries to take the middle ground. In so doing, I think it is a symbol of our times. Gordon Foster said that attitude was reflected in the vote in Florida in 1972. The people voted 79 to 21 percent for the principle and goal of equal education. At the same time, they voted 74 to 26 percent in favor of a constitutional amendment against busing. The same is true in government. As Mitch said, watch not what we say, but what we do.

While the Government has stood for the principle of equal education and opportunity through HEW and the Justice Department, it has acted against the means of achieving the goal. In the *Milliken* case, the Court has done the same thing.

I think the rhetoric of *Milliken* is to support the desegregation. It says segregation in Detroit is bad. It says there won't be an effective way of dealing with the problem in Detroit.

The reality of dealing with effective desegregation is that we cannot divide the principle or the goal from the means. We cannot divide the problem or the right from the remedy, or segregation from desegregation. Most assuredly, you cannot divide the work of the desegregation centers from strong and effective enforcement of law by the Federal Government.

The role of the desegregation centers was outlined in Title IV of the Civil Rights Act. It was to provide technical assistance to public schools in the preparation, adoption, and implemen-

tation of plans for desegregation of schools. It was not intended to provide general assistance nor was it intended to provide guidance in human relations problems.

The purpose was a tool for effective desegregation at the request of the district. The fact was no district made the request for assistance unless they were faced with some form of legal pressure or compulsion to eliminate segregation. And the compulsion came from HEW or the Justice Department or from the courts. The voluntary efforts, as nice as they would be and as comforting as they would be for all of us, just don't happen that often, if at all.

At the Office of Civil Rights, we had a white- and black-hat approach to desegregation. We would inform school districts they were in noncompliance with the law. OCR represented the black hat of enforcement. The white hats, the educators of Title IV, would then go into the system and develop the plans needed to meet the requirements of the law. This was the way that most of the districts were dealt with in the South.

The desegregation centers and Title IV educators came up with as many as eight plans in a particular district to desegregate the system. Those plans were presented to a school board to decide which to put into effect. Even in private practice, I find in negotiation with universities that you can talk with them forever about voluntary action but it is not until you file a suit in Federal court that you begin to sit down and work out the elements.

Title IV made big advances when educators would go into a system to develop these plans. When politics were interjected into this process and plans had to be cleared by political committees, and when Title IV became a tool to be shot into Federal courts and pulled back, it lost its flexibility and effectiveness.

The desegregation centers are only as good as the enforcement agencies that surround them, the agencies that are there to back them up. They are only as good as the flexibility provided them to come up with effective plans.

These things that are said here today are not new or untested ideas. As a matter of fact, I get the feeling I have been here before. We have heard these arguments. We have gone through this territory. We have done it for the last 20 years. The South is probably the greatest experience that we can draw upon in dealing with the future.

In 1964 when the Federal Government began to apply pressure under the act, the South turned to "free choice." That is similar to what we talk about when we say voluntary efforts. In 1968 when the *Green* decision knocked down free choice, the districts asked for more time. In 1969 the *Holmes* decision said there would be no more time. You have to do it now. When things got tough again, the resistance turned to forced busing. In 1971 the Court via *Swann* said busing is okay as long as you don't take it too far. It is a tool to be used in desegregation.

In 1974 the South has accomplished much of the task because of the work of the desegregation centers and continued efforts in enforcement in the South towards the goal we were seeking.

Now, we have the *Milliken* decision. *Milliken* itself, for better or worse, can be played within the courts. Lawyers can do that very well. But the issue is the psychological impact. There are a lot of districts out there that are desegregating and have gone through the process and are now wondering if it was all worthwhile.

So, the question is, are we now at the point where we have to go through everything we went through in the South in the North again? Are we going through the same code words used for the last 20 years?

If there is something *Milliken* recognizes, it is that in the North or the South, whether you call it de facto or de jure, if you have segregation, you have to deal with it. You have to desegregate. We cannot hide behind legalisms anymore in dealing with the problem.

The goal of desegregated education in the public schools is the only alternative that makes sense morally, educationally as well as legally. That is what Dr. Foster says.

You can read his approaches. We have the means. Men like Gordon Foster have worked on different plans. They have different approaches to desegregation. They have the means. It does take more, including the moral leadership of the country, strong enforcement of the law, the cooperation of educators. All of this will bring about the support of the community.

There is a story that I often tell, that Jim Nabrit of the Defense Fund knows well, about the rabbi and the priest who decided to get to know each other better. They went to a boxing match.

Before the bell rang, one boxer made the sign of the cross. The rabbi nudged the priest and asked what it meant. The priest said, "It does not mean a damn thing if he cannot fight."

The point is this: *Milliken* blesses itself with the rhetoric of commitment but says we can do less. I think it is up to the Government and this Commission and the people in this room to make sure we do more in achieving equal education.

CHAIRMAN FLEMMING. Thank you.

COMMISSIONER FREEMAN. Dr. Foster, I would address my question to the role of the desegregation center, not just from the general standpoint of desegregation, but more specifically, its role in the implementation of a desegregation plan. Would you comment on whether a center might have been effective in the Boston situation?

MR. FOSTER. Greg can comment better on that.

COMMISSIONER FREEMAN. I am going to ask him, too.

MR. FOSTER. Depending on the nature of the center and the experiences it had and so forth, I think the center could have been helpful in that sort of situation. Everything that is involved in Boston we have experienced already in our center work.

There is nothing that would lead me to believe that the resources available to a center could not be very helpful in Boston now. I think one reason they are surviving is probably the efforts of the State commissioner, which would be similar to what a center does.

MR. ANRIG. If there had been a center at the time the State board of education and I were confronted with the fact we would have to develop the plan, we would have used it. The Boston officials refused to develop a plan, we had 30 days to develop a plan within tight limitations set by the State court.

I had three people on my staff who could work on this. If there had been a center there, we could have expanded that. We could perhaps have been better able to get at the data. We probably would have come up with a better plan. We also did not have a resource to turn to in terms of teacher-parent training and indeed working with students. We have had meetings with universities in the Boston area. We told them what they could and should do to help. They answered that they don't have the money to do that.

The nearest center to us is Hartford. Because it is a general assistance center, it is not allowed to work on desegregation plan development.

CHAIRMAN FLEMMING. Commissioner Horn?

VICE CHAIRMAN HORN. Based on your experience as the director of this center, do you have views you could share with us as to what teachers need in terms of experiences to better the school system and to be successful in either an interracial context or in an all-black school in an urban central city?

MR. FOSTER. I think they need work on attitudes and content in terms of a pluralistic society and different lifestyles and ethnic groups. They also need some hard knocks experience in running a classroom.

It is true a desegregated classroom is different to run than a segregated one. The biggest difference the teacher has in facing a desegregated classroom is the problem of dealing with a wide range of achievements and backgrounds, which they simply are not used to.

Many teachers used to think the 30 kids in front of them were exactly alike. They aren't. The only way you can really deal with any classroom for that matter is to move towards this realization. Berkeley has a rule that teachers have to have six academic hours or the equivalent in multicultural content and human relations techniques. There is no magic in getting college credit, of course, in terms of human relations and content in cultural diversity.

MR. ANRIG. We are looking at our certification requirements. My feeling, based on the experience I had with offering Title IV institutes before desegregation, is that trying to prepare a person before they are on the job is difficult. There should be something on the undergraduate level, but it is more important to direct help to teachers *once they are on the job*.

VICE CHAIRMAN HORN. Am I correct in understanding that, in Boston, you were precluded from having Federal funds available because of an HEW blockage placed on Federal funds?

MR. ANRIG. Yes. There was a deferral of funds in Boston until after the judge's order. I believe it was in August that the deferral was lifted. The point I made about the center is what I want to reiterate. Centers have worked with terminated school districts in the South. That was not possible in Boston. I am not directing this negatively towards Mr. Goldberg, by the way, but at the prevailing policy.

VICE CHAIRMAN HORN. Presumably, he has no choice. Is it a wise policy to always use the nuclear bomb approach and shut off all funds to a school district when conceivably by selective allocation of funds you could have made progress in preparing teachers and staff, etc., in order to have more successful desegregation?

MR. ANRIG. The Boston situation had gone on 9 years in negotiation with the State. The State found it necessary twice before to cut off all State funds to Boston. In most cases funds are terminated only when negotiations were exhausted and only the financial action is possible. I think the history of Title VI enforcement indicates it was as a last result that the funds were cut off.

VICE CHAIRMAN HORN. Mr. Foster, you mentioned in your conclusion that you felt the so-called Rand study—which the Commission has requested as one potential design in order to get data as to what is going on in American schools—lacked understanding of what a desegregated school is. Would you define how you would pinpoint a desegregated school?

MR. FOSTER. The danger if they complete such a study is that it will not be a study of desegregated schools. Their definition is erroneous. The only way to define a desegregated school is in the context of the system within which you find the school. You cannot say that in every school such and such a racial percentage results in a desegregated school. You have to relate it to the total district where it is located.

VICE CHAIRMAN HORN. You have to go to the classroom?

MR. FOSTER. Yes, you do that also.

VICE CHAIRMAN HORN. Mr. Foster, to try to implement the clear constitutional mandate, do you not feel that it is important to desegregate American public education? The question is, how we can successfully do it? Do you not think that it is important to have data to know the intended and unintended consequences of our actions and to know the processes which seem to be more successful than others? To do this, don't we need to examine all schools in America?

MR. FOSTER. Primarily the legally desegregated and segregated ones. I agree with the process study. It is important. It is important to understand what works and what does not. It should not be done, however, in the name of desegregated schools. When something does not work, you are not really studying desegregated schools versus segregated schools unless you do it in the context we mentioned.

VICE CHAIRMAN HORN. Should we deal with just that?

MR. FOSTER. I don't know why not.

VICE CHAIRMAN HORN. You mentioned on page 4 Judge McRae on the new guidelines from the Equal Education Opportunities Office. Do you feel it would aid your paper if perhaps you furnished your guidelines and we inserted them?

MR. FOSTER. I would be glad to.

[On January 6, 1972, Herman R. Goldberg, Associate Commissioner for Equal Educational Opportunity, Office of Education, Department of Health, Education, and Welfare, Washington, D.C., communicated these guidelines in a letter to Dr. Josiah Hall, Florida School Desegregation Consulting Center, University of Miami, Coral Gables, Florida. Text of this letter follows:

"We have received a copy of Judge McRae's letter to you of December 10, 1971, requesting your assistance in helping the Memphis School District meet the requirements of his recent school desegregation court order.

"You should of course, continue to assist the school district in meeting its obligation to desegregate, and for that purpose to work with the school board and school staff. But Judge McRae's order of December 10 has raised questions as to our proper role which merit clarification.

"First, our authority to fund your activities is limited by the requirement that you act on behalf of duly constituted school authorities. We do not have authority to render technical assistance to others. Under Section 403 of Title IV of the Civil Rights Act of 1964 (P.L. 88-352) the Division of Equal Educational Opportunity on behalf of the Commissioner of Education, is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools.' (emphasis added)

"Secondly, we have consistently made clear throughout these proceedings that not only will we render assistance as and when requested by school authorities, but also that the nature of our assistance would relate to helping those authorities develop their plans for the desegregation of their schools. The constitutional obligation is theirs to fulfill, as Judge McRae has clearly pointed out.

"Our particular expertise lies in truly educational matters related to desegregation, i.e., programs directly affecting the *quality of education* in the classroom. Recent experience with assisting almost 1,000 superintendents and their staffs under the Emergency School Assistance Program demonstrated that the Division of Equal Educational Opportunity best fulfills its role by offering assistance primarily in programmatic areas that directly contribute to quality education, such as:

- curriculum revision
- teacher preparation and development programs
- special community programs
- student to student programs
- pupil personnel programs

"On the other hand, our experience also indicates that in matters of logistics, such as school building capacities and conditions, zone boundaries, pupil assignment arrangements, teacher assignments, peculiarities of local geography, transportation routes, traffic safety, etc., our personnel are handicapped by a lack of detailed knowledge of local conditions. The local school staff, on the other hand, possesses both this knowledge and the competence necessary to design the required logistical arrangements. It follows that the mechanical tasks involved in the detailed design of specific plans should not be carried out independently by the Division. This can best be accomplished by the local school staff, we will, naturally, provide whatever advice they request.

"It is also our view that a locally developed plan, both because it is likely to be more accurate and because it is locally developed, is more likely to win the broad community acceptance which is critical to any plan's success.

"Therefore, in carrying out responsibilities to the school board, you should keep the above guidance in mind. It is, we believe, the best method by which we can assist local school authorities to develop educationally sound and feasible desegregation plans."

VICE CHAIRMAN HORN. On page 8, you said, "If it is discriminatory to maintain majority black or Chicano schools in a predominantly white system, it would seem equally discriminatory to allow whites to maintain their own schools in majority black systems like Atlanta and Wilmington." What about the constitutionality of that? Do you think that would be held constitutional by the courts or is there more of an affirmative response of de jure segregation of blacks than nonwhites?

MR. FOSTER. In the purest way, this statement would be true. In the present legal standard, it might not hold water. Most district judges perceive the black percentage as more important than the white. They do not perceive whites as a problem in desegregation.

MR. PANETTA. I think he is correct.

VICE CHAIRMAN HORN. On page 17, you say, "Empirical evidence has strongly suggested that desegregation is much better done all at once than through any delayed or step-by-step arrangement." Is that based on experience or what?

MR. FOSTER. There are no particular studies. It has been evidenced in the South. It worked much better in a place like Tampa where Judge Kreptzman, after coming out of his had experience with the Governor in Bradenton, let the Tampa board know they might be held in contempt if they did not come up with a plan in 3 or 4 weeks.

They decided he was serious. They did it. It has worked well in most senses. In Miami, every year the community gets upset because they want to know what is coming up this year, and you have the whole scene all over again. One case went smoothly. The other was a hassle. The Boston situation is apparently not really a step thing. Commissioner Anrig might want to speak to that.

VICE CHAIRMAN HORN. Do you, Dr. Anrig?

MR. ANRIG. The footnote implied it was a staged plan. It was not. It was as far as you could go under State law. The Federal court can go much further under Federal standards.

VICE CHAIRMAN HORN. My last question is this. On page 27, you say under subject number two, "One question that needs answering is how large a school system ought to be for maximum effectiveness."

We have heard a lot of discussion on problems of community control in relation to desegregation. This Commission was practically driven out of New York when we investigated education for Puerto Ricans. Is it valuable to be gathering political power in central cities with a declining tax base? Is it better to decentralize? You have had a lot of experience. Do you have a feeling on that?

MR. FOSTER. There have been research programs, although not too scientific. I think they indicated that when a city or district gets beyond 75,000 pupils you begin to get questions as to whether it is too large or not. The research was done at the University of Florida.

Ironically, in Detroit under the Roth Panel plan which was prepared there were 17 clusters, none of which would have had over 50,000 or 55,000 children. If a contractual arrangement had been worked out for governing the metropolitan plan for Detroit, assuming 290,000 pupils is a bad arrangement, the plan would have served to arrive at a better situation than they have now.

VICE CHAIRMAN HORN. Do you have any feeling on that, Dr. Anrig?

MR. ANRIG. Yes. There are areas where scholars can be helpful. This is an area where they have not been helpful. We recently had a commission study on adequate school district size. With authoritative evidence, they came up with four different answers.

The issue is not a magic number. The key test is, how do the consumers or parents feel about their schools? Are there mechanisms where they are involved and that the schools indeed are public and not controlled by professionals? Given the community that will be larger or smaller, I would not look for a magic number. I would point out the 30 decentralized school districts in New York City, any one of those in the sixth largest school district in New York State. We are talking about mammoth and large school districts.

CHAIRMAN FLEMMING. Mr. Ruiz?

COMMISSIONER RUIZ. I have contended that there may be curricula for Puerto Ricans in a desegregated school, even though racially integrated. This goes to the definition of what is meant by integration in public schools. We have been talking about black and white in Boston only. Does this mean bilingual problems with Puerto Ricans have been solved? If not, what is the principal problem from this bicultural point of view in Boston?

MR. ANRIG. In answering for Boston, the Federal case was originally brought on the complaint of black parents. The remedies, however, are being shaped to involve the non-English-speaking population. That includes Spanish, Puerto Ricans, Chinese, and so forth. We have a multicultural city. There are advisory councils being formed to advise the judge. On those are represented the non-English-speaking groups as well as blacks and whites.

I am rather pleased to say Massachusetts is one of the few States that has by State action, passed a transitional bilingual education act. Bilingual, bicultural programs are provided to children whose native language is not English. Our problem still remains in the city of Boston. Our problem is to identify the youngster and to be sure the program is provided to him or her.

COMMISSIONER RUIZ. I heard a statistic yesterday that you might or might not confirm. In these bilingual experiments and funding bilingual education, there is more parental involvement and a statistic is beginning to emerge with respect to the staying power of the particular students and less involvement in juvenile delinquency.

This seems to be an emerging statistic. It has not been confirmed as yet. In the event that does follow through, I am inclined to believe that the taxpayer, with respect to law enforcement and juvenile delinquency, will see a lot of strength in that and the value of this bilingual education. Do you know anything about that emerging statistic?

MR. ANRIG. I can confirm the fact that there is more parental involvement in the bilingual program than other programs. On the second part, I cannot confirm that. I can confirm that there were only seven Spanish speaking children graduating from Boston high schools several years ago. That number is increasing now. In terms of holding power, that is increasing. Ironically, there is a problem resulting from that. Our program is a *transitional* bilingual education act. Within 3 years, the child should be proficient in English. But they like the teachers and the program. Nor do the teachers want to give up the students. We run into Title VI problems then.

CHAIRMAN FLEMMING. Well, may I express to the members of this panel and and of the other panels the deep appreciation of the Commission for your time and thought in dealing with these issues. I am sure everyone here knows that the Civil Rights Commission is thoroughly and firmly committed to the concept that our Nation must continue to implement the constitutional right that all young people have for a desegregated education.

This was reaffirmed by the Commission most recently when it responded to a request from Capitol Hill to comment on legislation that was pending at the time and identified as "antibusing" legislation. We did respond to that with a series of findings and one recommendation that all of the legislation be defeated.

When the *Milliken v. Bradley* decision was handed down by the Supreme Court, the Commission recognized that some basic issues were raised. The Commission felt that it had an obligation not only to identify those issues, but to develop a report for the President and for the Congress, which would include findings and recommendations growing out of those issues. We felt that it would be extremely helpful to us, in developing such a report and in developing findings and recommendations, to have the benefit of participating in the kind of discussion that we have had today.

We all recognize that in this Nation there are many, many men and women who have devoted many, many years of coming to grips with these issues. Personally, I was delighted with the responses received from those we invited to develop papers and to serve as reactors.

May I also say that I am very conscious of the fact that throughout the day, right down to now, we have had listening in to this discussion many, many members of what I think of as the civil rights community. I think this says something in terms of the commitment of that community. We will examine very carefully these papers and the comments made on these issues by persons who have participated in the discussion. At some point down the road, we will submit to the President and to the Congress our findings and our recommendations on these issues.

I do appreciate so much the various significant contributions that have been made to the thinking of all of us. Do other members have comments?

COMMISSIONER RUIZ. I concur.

CHAIRMAN FLEMMING. Thank you all very much.