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Out of Focus: The Misapplication of Traditional Equitable Principles in the Nontraditional Arena of School Desegregation

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NOTES

Out of Focus: The Misapplication of Traditional Equitable Principles in the Nontraditional Arena of School Desegregation (A Case Study of Desegregation in Little Rock, Arkansas)

I. INTRODUCTION

Karl Marx wrote that all historical facts occur twice—the first time as tragedy, the second time as farce.[1] In the desegregation of Little Rock, Arkansas, the genres were reversed. In 1957 the opportunistic Governor Orvall Faubus reduced to farce the Little Rock Board of Education's initial attempt to comply with the United States Supreme Court's decree in *Brown v. Board of Education*[2] when he ordered the Arkansas National Guard to prohibit nine black students from entering Little Rock High School.[3] In 1983, after more than two decades of continuous court supervision and intermittent litigation, the tragedy began when the Little Rock School District (LRSD) sued the two contiguous school districts, the Pulaski County Special School District (PCSSD) and the North Little Rock School District (NLRSD), as well as the State of Arkansas, seeking an interdistrict remedy of countywide consolidation of the three school districts.[4]

Nine years earlier, in *Milliken v. Bradley* (*Milliken I*),[5] the Supreme Court had ruled that a court cannot grant an interdistrict remedy unless the plaintiff proves that constitutional violations by one school district produced significant discriminatory effects in another school district.[6] The plaintiffs never named the suburban school districts as defendants or put forth evidence of interdistrict violations by the suburban school districts. The district court had included the suburban school districts in the remedy because it determined that the Detroit school system contained too many blacks to desegregate it effectively within its own boundaries.[7] The Supreme Court rejected the district court's metropolitan remedy because it would force the suburban school districts to participate in a remedy for a constitutional violation that they had not committed.[8]

In *Little Rock School District v. Pulaski County Special School*

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1. K. Marx, *The Eighteenth Brumaire of Louis Bonaparte*, *in* THE MARX-ENGELS READER 594 (R. Tucker ed., 1978).
2. 347 U.S. 483 (1954).
3. *See infra* notes 37-38 and accompanying text.
4. *See infra* Part III.
5. 418 U.S. 717 (1974) (*Milliken I*).
6. *Id.* at 744-45.
7. *Id.* at 729-30.
8. *Id.* at 744-45; *see also* Hills v. Gautreaux, 425 U.S. 284 (1976) (explaining *Milliken I*).

District No. 1[9] the Court of Appeals for the Eighth Circuit approved the district court's finding that the two defendant school districts committed constitutional violations with discriminatory effects in the LRSD.[10] Yet the Eighth Circuit rejected the district court's consolidation remedy and formulated an alternative remedy that strictly adhered to the traditional equitable principles set forth by the Supreme Court in the remedy stage of *Milliken v. Bradley* (*Milliken II*):[11] (1) the scope of the remedy is defined by the nature of the constitutional violation; (2) the goal of the remedy is to place victims in the position they would have occupied absent the discriminatory conduct; and (3) the remedy must recognize the autonomy of the local school districts.[12]

The tragedy of the Little Rock case is that the court attempted to exercise judicial restraint by mechanically applying these traditional equitable principles in a nontraditional context. Ironically, the court succeeded only in formulating half-remedies that failed to cure the past violations, prolonged the need for court supervision, and further disrupted the autonomy of the school districts. Thus, a strict application of the *Milliken II* principles precipitated greater judicial intervention, not the envisioned judicial restraint.

This Note analyzes how the Eighth Circuit applied the traditional equitable principles discussed in *Milliken II* to the school desegregation remedy in Little Rock. Part II provides a brief history of desegregation efforts in Little Rock and Pulaski County prior to the 1983 suit and places those efforts in the context of the contemporaneous Supreme Court jurisprudence.[13] Part III reviews the history of the 1983 suit, which culminated in a court approved settlement in December 1990.[14] Part IV analyzes the Eighth Circuit's application of the three traditional equitable principles to the nontraditional area of school desegregation. This Note proposes that courts must modify these traditional principles in order to achieve the stated objectives in the school desegregation context. More specifically, when moving from the liability

9. 778 F.2d 404 (8th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1186 (1986).

10. *Id.* at 427-28.

11. 433 U.S. 267 (1977) (*Milliken II*).

12. *Little Rock*, 778 F.2d at 433-34 (citing *Milliken II*, 433 U.S. at 280-81).

13. A brief history of the efforts to desegregate the schools in Little Rock before 1983 is important because the 1983 suit was a continuation of this long struggle. The court recognized this by awarding attorney's fees which compensated the attorneys representing the Joshua Intervenors (black plaintiffs) for the entire 34-year history of the litigation. *See* Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 921 F.2d 1371, 1392 (8th Cir. 1990). For a more complete history of the Supreme Court's major decisions on desegregation before the 1983 Little Rock case, see J. WILKINSON, FROM BROWN TO BAKKE (1979); Kurland, *The School Desegregation Cases in the United States Supreme Court: 1954-1979*, WASH. U. L.Q. 309 (1979).

14. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 921 F.2d 1371 (8th Cir. 1990).

stage to the remedy stage, courts should change their focus from the defendants' past violative acts to the victims' future needs. In addition, courts must recognize that more immediate action may be required to forestall greater future intervention and prolonged court supervision that an incomplete remedy will necessitate.

II. BACKGROUND

A. *Little Rock Before* Brown v. Board of Education

Pulaski County, Arkansas is described best as one large metropolitan area,[15] dominated by the cities of Little Rock[16] and North Little Rock.[17] In the 1950s, before the crisis at Little Rock High School thrust it into the national spotlight, Little Rock was a relatively progressive city in comparison with its Southern neighbors.[18] Yet, progressive as Little Rock might have been in other areas, the schools of Pulaski County provided a prime illustration of the cynical facade of the "separate but equal" doctrine[19] that tarnished all aspects of Southern life.

In 1930 the PCSSD comprised twenty-five hundred students,[20] yet only twelve black students attended the titular high school provided for blacks—Pulaski County Training School.[21] The PCSSD had, in effect, abandoned its responsibility to educate black youths, explaining that any black resident who desired a "city school education" easily could travel to the school systems of Little Rock and North Little Rock.[22] Prior to 1954 Dunbar High School in Little Rock was the only accredited black high school in Pulaski County, Arkansas.[23] Black students traveled from all over the state[24] to attend what were known in the

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15. The population of Pulaski County is 349,660. U.S. CENSUS BUREAU, 1990 CENSUS REPORT (1990).

16. The population of Little Rock is 175,795. *Id.*

17. The population of North Little Rock is 61,741. *Id.*

18. *See* H. ASHMORE, ARKANSAS: A HISTORY 149-50 (1978).

19. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

20. The Pulaski County School District (later renamed the Pulaski County Special School District) was created by the consolidation of over 50 school districts in 1927. Until 1968 it comprised all of the area of Pulaski County outside Little Rock (serviced by the LRSD) and North Little Rock (serviced by the NLRSD).

21. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 584 F. Supp. 328, 329 (E.D. Ark.), *rev'd*, 738 F.2d 82 (8th Cir. 1984).

22. *Id.*, 584 F. Supp. at 329.

23. *Id.* at 330. The differences in expenditures per black student also highlight the discrepancies in the schools. The LRSD spent $39.54 per black pupil in 1938-1939, compared to $16.33 spent by the NLRSD and $13.74 spent by the PCSSD. *Id.*

24. *Id.* at 329-30. Dr. Leroy M. Christopher, later principal of Dunbar High School, traveled almost 100 miles from Forrest City to attend Gibbs High School (Dunbar's predecessor) because his home town had no schools available to blacks. *Id.*

black community as the "heavenly schools"[25] in Little Rock.

B. *The Crisis at Little Rock High School*[26]

In 1954, in *Brown v. Board of Education* (*Brown I*),[27] the Supreme Court ruled that "[s]eparate educational facilities are inherently unequal."[28] In contrast to the massive resistance that this decision sparked throughout the South, three days after the ruling the Little Rock School Board formally stated its intention to comply with the Supreme Court's order as soon as the Court specified the required procedures.[29] One year later the Court provided the awaited guidance with its cryptic decision in *Brown II*,[30] ordering school districts to dismantle segregated institutions and implement nondiscriminatory educational programs "with all deliberate speed."[31]

In 1956 Little Rock began its long trek through the federal courts with the filing of a class action suit seeking desegregation of the public schools.[32] The Little Rock Board of Education proposed a gradual desegregation plan, to be implemented fully by 1963, based on geographical attendance zones.[33] The Eighth Circuit approved the plan with the understanding that the district court would retain jurisdiction to ensure the effectuation of an adequate remedy.[34]

The State of Arkansas was less cooperative than the Little Rock Board of Education. In 1956 the Arkansas General Assembly enacted a pupil assignment law that authorized the transfer of students between districts and enabled school districts to avoid desegregation more eas-

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25. *Id.* Dr. Christopher testified at trial:

> [W]e used to call the schools in Little Rock "Heavenly Schools" because everyone wanted to go—it's kind of like going to heaven, you know. I mean, when you're a child, when we were children everybody looked forward to something good, and so we all looked forward to what we called "Heavenly Schools" over here in Little Rock, Arkansas.

Id.

26. For a more complete history and analysis of the events at Little Rock High School, see D. BATES, THE LONG SHADOW OF LITTLE ROCK, A MEMOIR (1987); V. BLOSSOM, IT HAS HAPPENED HERE (1959); T. FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION (1984); E. HUCKABY, CRISIS AT CENTRAL HIGH, LITTLE ROCK, 1957-58 (1980).

27. 347 U.S. 483 (1954).

28. *Id.* at 495.

29. " 'It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed.' " Cooper v. Aaron, 358 U.S. 1, 7 (1958) (quoting Statement of Policy of the Little Rock School Board, *Supreme Court Decision—Segregation in Public Schools* (May 23, 1954)).

30. Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*).

31. *Id.* at 301. One commentator claimed *Brown II* "reflected compromise and equivocation in virtually every line." Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 56 (1979).

32. Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957).

33. Aaron v. Cooper, 243 F.2d 361 (8th Cir. 1957).

34. *Id.*

ily.[35] That same year, the General Assembly enacted Amendment XLIV to the Arkansas Constitution, which codified the State's opposition to the *Brown I* ruling and its determination to avoid desegregation in "every Constitutional manner."[36]

Despite the adamant stance of the State, the Little Rock Board of Education took preliminary steps to admit nine black students to Little Rock High School in the fall of 1957. The nine black youths arrived at Little Rock High School only to find their entrance blocked by the Arkansas National Guard under orders from Governor Orvall Faubus that declared the school off limits to black students. President Dwight Eisenhower responded by dispatching federal troops to secure admission for the nine students. The black students and the federal troops remained the rest of the year.[37]

At the end of that traumatic school year, the Little Rock Board of Education requested a two-and-one-half year moratorium on desegregation, hoping that the resistance fervor eventually would subside. In *Cooper v. Aaron*[38] the Supreme Court denied the School Board's request with forceful language condemning the actions of Governor Faubus.[39] On September 13, 1958, the day after the Supreme Court rendered its decision in *Cooper v. Aaron*, Governor Faubus, exercising the power granted by legislation he had pushed through an emergency session of the General Assembly the previous month, closed the Little Rock schools for the 1958-1959 school year. Thereafter, the Board attempted to lease the public school facilities to a segregated private school system. The district court declared the school closure unconsti-

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35. Arkansas Pupil Assignment Law of 1956, 7 ARK. STAT. ANN. §§ 80-1519 to 80-1547 (1960 Repl.).

36. ARK. CONST. amend. XLIV, repealed by ARK. CONST. amend. LXIX (1990).

37. Eight of the black students remained for the full school year. One was expelled in February for calling a white student "white trash" in retaliation for a racial slur. *See* Diamond, *Confrontation as Rejoinder to Compromise: Reflections on the Little Rock Desegregation Crisis*, 11 NAT'L BLACK L.J. 151, 160 n.74 (1989). The federal district court subsequently enjoined Governor Faubus from using the Arkansas National Guard to obstrnct or interfere with court orders. Aaron v. Cooper, 156 F. Supp. 220, 226-27 (E.D. Ark. 1957), *aff'd sub nom.* Faubus v. United States, 254 F.2d 797, 806-808 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958).

38. 358 U.S. 1 (1958).

39. *Id.* at 16. The Court stated:

> The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. . . .
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> . . . In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."

Id. at 16-17 (quoting Smith v. Texas, 311 U.S. 128, 132 (1940)).

tutional[40] and enjoined the transfer of facilities.[41]

When the school reopened for the 1959-1960 school year, the Board assigned students to schools according to criteria found in an Arkansas pupil assignment law.[42] In *Parham v. Dove*[43] the Eighth Circuit held that the Board's plan was not unconstitutional on its face.[44] In 1961, however, the court found error in the implementation of the plan, ruling that the Board had deviated unconstitutionally from geographical boundaries in pupil assignment.[45] Thereafter, the Board adapted its application of the plan to give total consideration to pupil choices, which the Board allowed students at specified grade levels.[46]

In 1964, one year later than the Little Rock School Board's initial target year for full implementation of its desegregation plan,[47] over 180 black pupils in Little Rock chose to attend formerly all-white schools.[48] Although the Little Rock Board of Education was well behind the goal it set in 1956,[49] its efforts were more admirable than most of its Southern neighbors. In 1964 barely two percent of Southern blacks attended desegregated schools.[50] Closer to home, the PCSSD had made little effort to desegregate. The NLRSD would not make its initial efforts until the following year, 1965, when it implemented a freedom of choice plan.[51]

C. Movement Toward Desegregation

The Civil Rights Act of 1964[52] marked a turning point in desegregation. Federal courts interpreted Title VI[53] as a congressional mandate for change not only in the pace of desegregation but also in the method of implementation.[54] Justice Black expressed the Supreme Court's im-

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40. Aaron v. McKinley, 173 F. Supp. 944, 952 (E.D. Ark.) (three-judge court), *aff'd mem. sub nom.* Faubus v. Aaron, 361 U.S. 197 (1959) (per curiam).

41. Aaron v. Cooper, 261 F.2d 97, 108 (8th Cir. 1958).

42. 7 ARK. STAT. ANN. §§ 80-1519 to 80-1547 (1960 Repl.).

43. 271 F.2d 132 (8th Cir. 1959).

44. *Id.* at 136.

45. Norwood v. Tucker, 287 F.2d 798, 809 (8th Cir. 1961).

46. Clark v. Board of Educ. of Little Rock Sch. Dist., 369 F.2d. 661, 664 (8th Cir. 1966).

47. *See supra* text accompanying note 33.

48. *Clark*, 369 F.2d at 664.

49. *See supra* text accompanying notes 32-33.

50. J. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 27 (1984).

51. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 584 F. Supp. 328, 337 (E.D. Ark), *rev'd*, 738 F.2d 82 (8th Cir. 1984).

52. Civil Rights Act of 1964, tit. VII (codified at 42 U.S.C. §§ 2000e-2000e-17 (1988)).

53. Title VI of the Civil Rights Act of 1964 prohibits discrimination in federally assisted programs on the basis of race, color, or national origin. 42 U.S.C. § 2000d (1988).

54. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

patience with resistance to the *Brown I* decree in *Griffin v. County School Board*,[55] declaring that "[t]here has been entirely too much deliberation and not enough speed."[56] The federal courts gradually replaced the negative doctrine of *Brown I*[57] with an affirmative doctrine that required school boards to desegregate unlawful school systems and remedy pre-1954 conditions. This shift to an affirmative duty culminated in *Green v. County School Board*[58] in which the Court ruled a freedom of choice plan unconstitutional[59] and recharacterized the *Brown II* decision as an order for school boards to dismantle well-entrenched dual school systems and eliminate all vestiges of discrimination "root and branch."[60]

Green, however, involved a rural, racially mixed district with no significant patterns of residential segregation.[61] In 1971, in *Swann v. Charlotte-Mecklenburg Board of Education*,[62] the Supreme Court applied the *Green* ruling to an urban metropolitan school system with extensive areas of racial residential segregation. In *Swann* the Court for the first time imposed an affirmative duty upon school systems to remedy conditions that were not peculiar to the South, but prevalent throughout the country.[63] Furthermore, *Swann* marked the advent of the use of mandatory busing to effectuate school desegregation.[64]

Green and *Swann* precipitated a sharp increase in desegregation

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55. 377 U.S. 218 (1964).

56. *Id.* at 229.

57. Justice Powell noted that although some of the language in *Brown I* was expansive, the holding was "essentially negative: It was impermissible under the Constitution for the States, or their instrumentalities, to force children to attend segregated schools." Keyes v. School Dist. No. 1, 413 U.S. 189, 220 (1973) (Powell, J., concurring in part, dissenting in part). *See generally* Graglia, *From Preventing Segregation to Requiring Desegregation*, in SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE 69 (W. Stephan & J. Feagin eds., 1980).

58. 391 U.S. 430 (1968).

59. *Id.* at 437. The Court noted:

> In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system.

Id.

60. *Id.* at 437-38. The Court went on to declare that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work . . . *now*. . . . until it is clear that state-imposed segregation has been completely removed." *Id.* at 439 (emphasis in original).

61. *Id.* at 432.

62. 402 U.S. 1 (1971).

63. Keyes v. School Dist. No. 1, Denver, Colo. 413 U.S. 189, at 223 (1973) (Powell, J., concurring in part, dissenting in part).

64. Cisneros v. Corpus Christi Independent School District, 324 F. Supp. 599 (S.D. Tex. 1970), was the first judicially proposed busing remedy. Shortly after the case, President Richard Nixon criticized the *Corpus Christi* decision and first raised the specter of "forced busing." *See* Gordon, *School Desegregation: A Look at the 70's and 80's*, 18 J.L. & EDUC. 189, 192 (1989).

efforts in the South and throughout the country.[65] By the early 1970s the Office of Civil Rights had investigated over 3000 school districts in the South,[66] and the federal courts had handed down over 150 desegregation orders.[67]

Little Rock had achieved significant progress as well. In the 1969-1970 school year, Central High School (formerly Little Rock High School) had 1542 white students and 512 black students.[68] In 1971 the Eighth Circuit approved a desegregation plan for grades six through twelve in the LRSD.[69] One year later the Eighth Circuit approved the Board's plan for elementary school desegregation.[70] Thus, since 1972 all grade levels in the LRSD have operated under a desegregation order.

During this period, the courts finally prodded the PCSSD and the NLRSD into action. Integration began in the PCSSD when a private desegregation suit was filed in 1968.[71] This litigation resulted in a plan, first implemented in the 1971-1972 school year, that called for the integration of staff and faculty and a limited integration of four elementary schools.[72] Under the plan, six of the twenty-seven schools in the district remained all white,[73] and almost one-half of the black students were funneled into three schools.[74] In 1973 the PCSSD entered into the *Zinnamon* consent decree, which required, among other things, increased representation of blacks in the faculty and staff, the eradication of racially identifiable schools, biracial committees, and nondiscriminatory school construction plans.[75] The PCSSD continued to operate under

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65. In 1977 the United States Commission on Civil Rights concluded "that desegregation actions taken over the last 10 years were effective in achieving sweeping reductions in the isolation of racial and ethnic minorities within numerous school districts. . . . [T]oday a majority of school staff, students, parents, and community leaders accept school desegregation in most districts that took substantial steps to desegregate." UNITED STATES COMMISSION ON CIVIL RIGHTS, REVIEWING A DECADE OF SCHOOL DESEGREGATION, 1966-75: REPORT OF A NATIONAL SURVEY OF SCHOOL SUPERINTENDENTS 3 (1977).

66. J. HOCHSCHILD, *supra* note 50, at 28.

67. *Id.*

68. Clark v. Board of Educ. of Little Rock Sch. Dist., 426 F.2d 1035, 1041 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971).

69. Clark v. Board of Educ. of Little Rock Sch. Dist., 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

70. Clark v. Board of Educ. of Little Rock Sch. Dist., 465 F.2d 1044 (8th. Cir. 1972), *cert. denied*, 413 U.S. 923 (1973).

71. Zinnamon v. Board of Educ. of Pulaski County Special Sch. Dist., No. LR-68-C-154 (E.D. Ark. 1973).

72. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 584 F. Supp. 328, 336 (E.D. Ark), *rev'd*, 738 F.2d 82 (8th Cir. 1984).

73. 584 F. Supp. at 336.

74. *Id.* The court determined that it would be impracticable to achieve racial balance in the secondary schools because " 'there are simply not enough black secondary students in the district.' " *Id.* (quoting unpublished memorandum opinion).

75. *Id.*

this consent decree until the 1983 litigation.

By the 1968-1969 school year, although the NLRSD had been operating under a freedom of choice plan for four years, not one white student had expressed any desire to attend a black school.[76] Prompted by a suit filed by black parents in 1969,[77] the NLRSD struggled for the next three years to devise a desegregation plan that would merit the approval of the district court.[78] In the 1972-1973 school year, the NLRSD implemented the court-approved "Storm Plan,"[79] under which, with some modification,[80] the NLRSD continued to operate into the 1980s.

III. *Little Rock School District v. Pulaski County Special School District*

A. The Context of the Litigation

In the early 1980s all three school districts in Pulaski County were operating under court-ordered desegregation plans, and all three had failed to achieve unitary status. Although the LRSD had made considerable strides toward extirpating segregation in the areas of staffing[81] and educational programs,[82] the worsening racial imbalance in the student population thwarted efforts to achieve unitary status. In 1973-1974 forty-eight percent of the approximately 21,000 students in the district were black.[83] In 1976-1977 the proportion of black students increased to fifty-four percent.[84] In 1983-1984 the LRSD covered fifty-three square miles (approximately sixty percent of the City of Little Rock) and served 19,052 students—down 3000 from 1973-1974—seventy percent of

76. Graves v. Board of Educ. of N. Little Rock, Ark., Sch. Dist., 299 F. Supp. 843, 846 (E.D. Ark. 1969).

77. Graves v. Board of Educ. of N. Little Rock, Ark., Sch. Dist., 302 F. Supp. 136 (E.D. Ark. 1969).

78. *Little Rock*, 584 F. Supp. at 337-39 (chronicling the NLRSD's effort, or lack of effort, to develop an acceptable desegregation plan).

79. It was named for a member of the NLRSD board who was the plan's principal author. *Id.* at 338.

80. The court reluctantly approved the district's plan for segregated kindergartens in 1973, in Davis v. Board of Education of North Little Rock, Ark., School District, 362 F. Supp. 730 (E.D. Ark. 1973), and mandated specific recruitment policies to ameliorate the underrepresentation of blacks in the teaching, coaching, and administrative staff. Davis v. Board of Educ. of N. Little Rock, Ark., Sch. Dist., 635 F.2d 730, 732 (8th Cir. 1980), *cert. denied*, 454 U.S. 904 (1981).

81. In 1983, 48% of staff members, including teachers, principals, and administrators, were black. *Little Rock*, 584 F. Supp. at 345.

82. The LRSD had established a Free Reading program primarily for blacks, had developed programs to address the gap in SRA scores, and had designed a "master learning concept" to assist teachers in becoming more sensitive to the needs of minority students. *Id.*

83. Clark v. Board of Educ. of the Little Rock Sch. Dist., 705 F.2d 265, 266 (8th Cir. 1983).

84. *Id.*

whom were black.[85] A team of experts from Stephen S. Austin State University predicted that, if the demographic shifts and white flight continued, the LRSD would have a virtually all-black enrollment by the end of the decade.[86] The LRSD fast was becoming a black school district.[87]

The NLRSD, meanwhile, covered an area of twenty-six square miles and served 9051 students of whom thirty-six percent were black.[88] The PCSSD covered a much larger area of 755 square miles and served 27,839 students, of whom only twenty-two percent were black.[89] These disparities in racial composition prompted the LRSD to file a desegregation suit[90] against the PCSSD, the NLRSD, the Arkansas Board of Education, and the State of Arkansas,[91] alleging that the defendants engaged in intentional segregative actions that had an interdistrict effect on racial segregation in the LRSD.[92] The LRSD requested the court to order the consolidation of the three districts.[93]

B. The District Court's Ruling

In a memorandum opinion issued April 13, 1984,[94] the district court found that all of the defendants had engaged in unconstitutional racial discrimination with segregative effects in Little Rock.[95] The district court's findings of violations by the two defendant school districts fall into three broad categories: (1) interdistrict cooperation on student transfers, annexation, and consolidation plans; (2) discriminatory housing policies; and (3) school desegregation policies.

The district court pointed to numerous findings of interdistrict cooperation in student transfers and annexations to support its conclusion that the three school districts had engaged in a collective effort to avoid compliance with the *Brown I* ruling. Prior to 1954, at least for the pur-

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85. *Little Rock*, 584 F. Supp. at 339.
86. *Clark*, 705 F.2d at 271.
87. *Little Rock*, 584 F. Supp. at 351.
88. *Id.* at 339.
89. *Id.*
90. *Id.* at 351.
91. The State of Arkansas later was dismissed as a party because injunctive relief could not be awarded against the State without its consent to be sued. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 560 F. Supp. 876, 878 (E.D. Ark. 1983).
92. The court permitted the intervention of the Joshua Intervenors, a group that represents the interests of the black children and parents in the three school districts. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 409 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986).
93. *Id.*
94. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 584 F. Supp. 328 (E.D. Ark), *rev'd*, 738 F.2d 82 (8th Cir. 1984).
95. *Id.* at 353.

pose of educating black students, school district boundaries were ignored in Pulaski County.[96] Furthermore, the LRSD's maintenance of the only accredited black high school in the area led to a concentration of blacks in that district.[97] The court also found that when Little Rock High School closed in 1958, the NLRSD and the PCSSD allowed white students, but not black students, to transfer to their respective districts.[98]

Throughout the 1960s the three districts discussed options for consolidation and engaged in two major efforts to consolidate, first in 1960 and later in 1967.[99] Until 1968 the PCSSD routinely allowed concurrent annexation of lands by the City of Little Rock and the LRSD. The PCSSD's sudden boundary freeze coincided with and, according to the district court, was motivated by the LRSD's implementation of a desegregation plan and the Supreme Court's recharacterization of desegregation policy in *Green*.[100] In light of the numerous interdistrict transfers, the patterns of annexation, the interdependence of the metropolitan area, and the history of general cooperation, the court concluded that the three school districts had historically fiuid boundary lines and were not meaningfully autonomous.[101]

Second, the district court found numerous discriminatory actions in housing policies, which exacerbated segregation in the LRSD. Although the Pulaski County government has no housing authority, the Little Rock and North Little Rock housing authorities are empowered to construct public housing within ten miles of their respective corporate limits. These housing authorities, however, never constructed public housing in the PCSSD.[102] The court found that both North Little Rock and Little Rock housing authorities had adopted policies that contributed to the concentration of blacks in certain areas of the cities.[103] Specifically, the court found that in 1953 the PCSSD, the LRSD, and the State of Arkansas cooperated in the development of a major, all-black housing project, Granite Mountain, which was intended to channel black residential patterns toward the southeast boundaries of

96. *Id.* at 352.

97. *Id.* at 330.

98. *Id.* at 339-40.

99. *Id.* at 340-41.

100. *Little Rock*, 778 F.2d at 419. As a result of this freezing of LRSD boundaries, attractive residential and industrial areas in Little Rock were not a part of the LRSD. In 1984 the LRSD would have been 60% black (as opposed to 70%) if its boundaries were coterminous with the City of Little Rock. *See id.*

101. 584 F. Supp. at 341.

102. *Id.*

103. *Id.* at 341-42.

Little Rock.[104] In addition, the Arkansas General Assembly enacted legislation[105] that allowed the LRSD to annex the Granite Mountain territory from the PCSSD because the Assembly agreed that the LRSD was the only district capable of providing education for blacks.[106] Private citizens also engaged in discriminatory housing practices, such as redlining[107] and steering,[108] which further increased residential segregation in Little Rock. The district court concluded that the combined actions of the three school districts, local and state governmental bodies, and private parties—and not simply a series of individualized housing choices—produced the current segregated residential patterns of Pulaski County.[109]

Third, the district court ruled that the failures of the NLRSD and the PCSSD to comply with desegregation orders were constitutional violations that produced interdistrict effects.[110] The court found that the PCSSD, in addition to other violative acts, failed to adhere to the *Zinnamon* decree requirements;[111] constructed schools in locations that ensured the schools would be racially identifiable;[112] failed to equalize transportation burdens between blacks and whites;[113] refused to hire and promote black faculty and staff;[114] failed to assign pupils to schools so as to maximize desegregation;[115] and created and maintained a racial imbalance in almost one-half of the schools.[116] The court found that the NLRSD, in addition to other violative acts, failed to distribute the bus-

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104. *Id.*

105. ARK. STAT. ANN. § 80-436 (Repl. 1980).

106. 584 F. Supp. at 342.

107. "Redlining" is the practice of withholding home loan funds or insurance from minority neighhorhoods considered poor economic risks. *Id.*

108. "Steering" is the practice hy which real estate agents direct black and white customers exclusively to neighborhoods of their respective race. *Id.*

109. 584 F. Supp. at 352.

110. *Id.* at 349-51.

111. "In summary, the Pulaski County Special School District Board has failed to demonstrate any efforts or intentions to comply with the directives of the *Zinnamon* decree. . . ." *Id.* at 337.

112. *Id.* at 346-47. Dr. Robert Dentler, LRSD's expert witness, testified that PCSSD "took pains not to site new schools where they would be accessible to blacks, and others [sic] they dusted off old dilapidated plants and arranged to have them as walk-in schools for black students out of reach of possible transportation by white students." Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 421 (8th Cir. 1985).

113. The court found that the school districts were two-and-one-half times more likely to bus blacks for desegregative purposes than whites. Furthermore, the court found that the districts bused some blacks long distances to attend a school tliat was already predominantly black. 584 F. Supp. at 348.

114. *Id.*

115. The court found that the PCSSD clearly maintained some racially identifiable schools by "simply refusing to bus in whites or by busing in additional blacks." *Id.*

116. *Id.* at 353.

ing burden equally among blacks and whites; failed to assign blacks to central administration, high school principalship, and coaching positions; assigned students to special education and gifted programs on a discriminatory basis;[117] and concentrated white students in schools in one area of the district, and black students in schools in another area.[118] The district court concluded that interdistrict relief was necessary and instructed the three districts to devise consolidation plans that would set the groundwork for a unitary school system, allow economy in administration and transportation, and promote greater financial support for the public schools.[119]

The NLRSD proposed a voluntary plan that relied largely on majority-to-minority transfers. The NLRSD plan defined a desegregated school as one having between twenty and fifty percent black enrollment and a racially isolated school as one having ninety percent or more students of one race.[120] Under the plan, the NLRSD retained its separate autonomous identity. The plan, however, did provide for a realignment of the boundaries between the PCSSD and the LRSD to achieve a more equitable racial balance.[121] the PCSSD proposed a plan that retained all three autonomous school districts and relied solely on the development of magnet schools to attract interdistrict transfers.[122]

The district court concluded that both the PCSSD plan and the NLRSD plan were unacceptable because they relied on the voluntary motivations of the county patrons. The court feared these plans would yield only temporary solutions that would not provide a complete remedy for the constitutional violations,[123] and determined that only a countywide interdistrict remedy would correct the countywide interdistrict violations and restore the victims of school segregation to the position they would have occupied absent the discrimination.[124] To that end, the court approved the LRSD plan without modification.

The LRSD plan divided Pulaski County into six subdistricts and

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117. The court found a grave discrepancy in the percentage of blacks classified as retarded or having a learning disability—LRSD: 5.66%, NLRSD: 19.41%, and PCSSD: 11.40%. Furthermore, in the NLRSD the gifted program was only 9.4% black. Dr. Martin Shapiro reported that this is an underrepresentation of 6.8 standard deviations, which would only occur 7 times in a billion by chance. *Id.* at 349.

118. *Id.* at 353.

119. *Id.* at 351-52.

120. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 597 F. Supp. 1220, 1223 (E.D. Ark. 1984), *remanded*, 778 F.2d 404 (8th Cir. 1985).

121. *Id.*

122. *Id.* at 1222-23. A magnet school is a school with an enhanced or specialized curriculum designed to attract a target student population.

123. *Id.*

124. *Id.* at 1225.

utilized a "geocoding" process to assign students.[125] The plan established a racial composition standard of plus or minus twenty-five percent from the racial makeup of the student population. In adopting the LRSD plan, the district court ruled that the schools should minimize busing, use the shortest possible bus routes, and control the financial impact of transportation costs. Although the court rejected a primary reliance on magnet schools, it approved their use as a complement to consolidation that would encourage voluntary desegregation.[126] The LRSD plan also required that school administrations reflect a desegregated staff at all levels and in all units. Finally, the plan created a countywide school board composed of nine members elected from nine single-member districts—a structure that the court hoped would facilitate more minority involvement in the school system.[127]

In addition to adopting the LRSD desegregation plan, the district court ruled that the Arkansas Board of Education must participate in and contribute financially to the desegregation of Pulaski County schools.[128] The court found that the Board had never acknowledged its affirmative duty to assist local school districts in their efforts to dismantle segregation,[129] nor had it promulgated any rules that would encourage or reward local desegregation efforts.[130] The court determined that the Board's lack of effort was most detrimental in areas of school construction, student transportation, and financial assistance to local districts and concluded that, had the Board undertaken its affirmative duty to aid the local school systems, desegregation in Pulaski County would be more successful.[131]

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125. *Id.*

126. *Id.*

127. *Id.* at 1225-26.

128. *Id.* at 1228.

129. The court found that the Board of Education has numerous statutory duties and powers that would enable it to assist and encourage local school districts in desegregation efforts: general supervision over all public schools in Arkansas, ARK. STAT. ANN. § 80-113 (1947); approval of plans and expenditures of public funds for construction of new schools, *id.* §§ 80-113, 80-3506; power to approve or disapprove local school district budgets, *id.* §§ 80-113, 80-1305; administration of all federal funds for education, *id.* §§ 80-123, 80-140; disbursement of State Transportation Aid Funds, *id.* §§ 80-735, 80-736; lending funds from the State Revolving Loan Fund to local school districts, *id.* § 80-942; approval or disapproval of bonds issued by local school districts, *id.* § 80-1105; and regulating the operation of school buses, *id.* §§ 80-1809, 80-1809.2. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 597 F. Supp. 1220, 1227 (E.D. Ark. 1984), *remanded*, 778 F.2d 404 (8th Cir. 1985).

130. *Little Rock*, 597 F. Supp. at 1228.

131. *Id.*

C. The Court of Appeals' Ruling

The Court of Appeals for the Eighth Circuit found no reversible error in the district court's ruling that the defendant school districts had committed constitutional violations which contributed to the segregation in Little Rock schools.[132] Nevertheless, the court concluded that the consolidation remedy prescribed by the district court was not essential to correct the constitutional violation, and, thus, that it could not prescribe such a remedy.[133]

Citing *Milliken II*, the court put forth three reasons for this conclusion. First, the court of appeals found that the consolidation remedy exceeded the scope of the violation,[134] and that the district court's finding that the three school districts were not autonomous was clearly erroneous.[135] Second, the court determined that alternative remedial measures would better restore the victims of segregation to the position they would have occupied absent the school districts' segregative conduct.[136] Third, the court ruled that the district court's consolidation remedy failed to preserve the important interests the three school districts had in managing their own affairs.[137]

Instead of remanding the case for further consideration,[138] the court of appeals formulated its own detailed remedial decree, addressing what it found to be the areas of salient violations—annexing and deannexing, segregated housing, school siting, student assignment, special education, transportation, employment of faculty and staff, and black participation in school affairs.[139] Under the Eighth Circuit's desegregation plan, each school district would remain independent and retain an elected school board with its own administrative structure and

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132. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 408 (8th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1186 (1986).

133. *Id.* at 434. The court stated: "[W]e express our agreement with the district court that consolidation would be a cost-effective and efficient method of desegregating the three school districts, but under *Milliken I*, we cannot require that remedy unless it is essential to correct a constitutional violation." *Id.*

134. *Id.*

135. *Id.* The court noted that each school district had its own identity, elected its own school board, controlled its own budget, coordinated its own transportation system, constructed its own schools, and decided individually whether to annex additional lands. *Id.*

136. *Id.*

137. *Id.*

138. In his concurring and dissenting opinion, Judge Arnold criticized the majority for not remanding the case to the district court for further findings and a detailed remedial decree:

> Although we have *power* to modify a decree at the appellate level, it is unwise to exercise that power. The District Court . . . is in the best position to write a decree. Instead, a decree today springs full-grown from the brow of this Court, a decree that will, I dare say, startle all the parties to this case, including even those (if there are any) who like what they see.

Id. at 437 (Arnold, J., concurring in part, dissenting in part).

139. *Id.* at 434.

powers of taxation.[140] The NLRSD would keep its presuit boundaries because, according to the court, the NLRSD's violations were less serious and the district's current racial ratio mirrored that of the whole metropolitan area.[141] The LRSD, on the other hand, would expand to include all of the City of Little Rock and concurrently would return the Granite Mountain subdivision to the PCSSD.[142] The court ruled that each attendance zone must reflect the overall racial composition of the district, but allowed a deviation of plus or minus twenty-five percent of the remedial guideline for either race.[143] Furthermore, the court encouraged voluntary majority-to-minority transfers and ordered the State to pay for all interdistrict transfers.[144] Finally, the court called for a limited number of magnet schools, which the State also would have to fund in part.[145]

D. Effectuating the Remedy

Initially, the Eighth Circuit's decision created some confusion as to whether the LRSD boundaries were to expand to the city limits only as they existed at the time of the en banc opinion, or continually as the city limits expanded in the future. The district court then ruled that the LRSD would expand automatically whenever the City of Little Rock annexed new territory.[146] The court of appeals, however, reversed, stressing that it intended the remedy to be a full and complete cure only for all past interdistrict violations.[147]

The district court and the three school districts next turned to the task of drawing up an acceptable desegregation plan for each district. In 1986 the NLRSD adopted a desegregation plan that the district court approved with minimal controversy.[148] The LRSD and the PCSSD, however, struggled for three more years to develop plans that would satisfy the courts, the school districts' patrons, and the present needs and future goals of the two districts.

The PCSSD faced the greatest difficulties. In the aftermath of the Eighth Circuit's remedial decree, the PCSSD became a geographically truncated district, extending over seven hundred square miles. South of

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140. *Id.*
141. *Id.* at 434-35.
142. *Id.* at 435.
143. *Id.*
144. *Id.* at 436.
145. *Id.*
146. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 805 F.2d 815, 816 (8th Cir. 1986).
147. *Id.* at 816-17.
148. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 659 F. Supp. 363, 368 (E.D. Ark. 1987).

the Arkansas River, the PCSSD served two noncontiguous areas separated by a large area ceded to the LRSD.[149] Even with the annexation of the Granite Mountain subdivision, the PCSSD had a higher percentage of white students in 1987 than in 1982.[150] The southeast sector of the PCSSD, which had by far the highest percentage of black students in the district, still had a higher percentage of white students than the adjacent LRSD attendance zone.[151] More ominously, the PCSSD, which had been financially dependent on its association with Little Rock,[152] now faced increasing deficits due to the loss of tax revenue and, thus, a diminishing ability to effectuate remedial measures.[153]

In 1988 the parties began developing a settlement agreement. The district court approved a joint proposal by the PCSSD and the Joshua Intervenors[154] that the 1988-1989 school year would be a stabilizing year during which all of the parties would retain their present student assignment plans while they hammered out long-range plans.[155] Since the district court already had approved the NLRSD's plan, the NLRSD did not submit a separate, long-range plan, although it did propose additional, specific provisions for magnet schools and majority-to-minority transfers.[156]

The PCSSD agreed to recruit black students actively from the LRSD for the PCSSD magnet schools and to promote additional voluntary majority-to-minority transfers.[157] The PCSSD further agreed to achieve a minimum black student enrollment of twenty percent in all PCSSD schools by the end of the six-year implementation period[158] and set a goal that, by the end of the same period, the composition of all PCSSD schools would fall within a range of plus or minus twenty-five percent of the then district-wide average of blacks by organizational level.[159] Finally, the PCSSD agreed that if any PCSSD school maintained a black enrollment that exceeded the prevailing black-white ratio in the LRSD, the Joshua Intervenors could apply for an

149. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 656 F. Supp. 504, 505 (E.D. Ark. 1987).

150. *Id.* at 506.

151. *Id.*

152. In 1984 the PCSSD received $4,504,073 in taxes generated from properties located within the boundaries of the City of Little Rock. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 584 F. Supp. 328, 341 (E.D. Ark.), *rev'd*, 738 F.2d 82 (8th Cir. 1984).

153. *See infra* notes 286-87 and accompanying text.

154. *See supra* note 92.

155. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 921 F.2d 1371, 1378 (8th Cir. 1990).

156. *Id.* at 1379.

157. *Id.* at 1378.

158. The one exception to this goal was a geographically isolated school, Metro Bayou. *Id.*

159. *Id.*

implementation of a mandatory reassignment plan in order to achieve a racially balanced school system.[160]

The LRSD settlement plan concentrated on efforts to desegregate and attract whites into the elementary schools. The LRSD plan designated eight "Incentive Schools" that initially would be virtually all black, but would receive twice the funding of the "elementary academies" and have a maximum student-teacher ratio of twenty to one.[161] The plan established twenty-two elementary academies, each with a black pupil population of fifty to sixty-two percent. Under the plan, any white could attend an incentive school and any student in an incentive school attendance zone—the great majority of whom were black—could choose to attend one of the academies.[162] The settlement agreement also provided for interdistrict transfer options with transportation paid by the State if the transfers would promote desegregation.[163] In addition to the six interdistrict magnet schools previously approved by the court,[164] the settlement plan included six more interdistrict magnet schools that would serve primarily black students from the LRSD and white students from the PCSSD.[165]

On June 27, 1989, the district court rejected the settlement plans, finding them constitutionally deficient and well outside the scope of the Eighth Circuit's order.[166] The district court appointed Eugene Reville[167] as Metropolitan Supervisor and gave him control over all desegregation matters.[168] All three school districts and the Joshua Intervenors ap-

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160. *Id.* at 1379.

161. *Id.*

162. *Id.*

163. *Id.*

164. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 659 F. Supp. 363 (E.D. Ark. 1987).

165. 921 F.2d at 1379-80.

166. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 716 F. Supp. 1162 (E.D. Ark. 1989), *rev'd*, 921 F.2d 1371 (8th Cir. 1990). Finding that the plans were "facially unconstitutional and [did] not even purport to be within the mandates of the Court of Appeals," *id.* at 1169, the district court criticized the plan as follows:

> In LRSD's proposed plan almost one-fourth of the elementary schools are contemplated to be all black. The entire mandatory busing burden at the elementary level for desegregation purposes falls on black children. LRSD, in its objections, points out that a few white elementary children are bused, but the fact is that not one white elementary child would be mandatorily bused east of University Avenue. All of the historically "black" schools lie east of University Avenue, and all are proposed to be all-black incentive schools.
>
> Double funding is promised for the all-black schools. Yet it is impossible to determine from the submissions how the funds will be spent.

Id. at 1167.

167. *Id.* at 1164-65. Reville, an educator, was closely involved in the desegregation of the schools in Buffalo, New York. *Id.*

168. *Id.* at 1165.

pealed this order.[169]

The General Assembly, meanwhile, enacted a law that committed the State to payments in excess of $100,000,000, as authorized, for the settlement agreement.[170] The monies included payments to the LRSD, the NLRSD, and the PCSSD totaling $107,732,175 over the following ten years.[171]

In light of the General Assembly's actions, the parties submitted the settlement plan to the district court for reconsideration. The district court rejected the plan again, but, instead of returning the case to the docket for continued litigation, the court added certain conditions to the settlement, purported to approve it as so modified, and directed the parties to carry out the court's version of the settlement.[172] On appeal, none of the parties asked that the Eighth Circuit affirm the judgment in its entirety. Thus, the court allowed a group of parents to intervene in support of the judgment.[173] Meanwhile, District Judge Henry Woods recused himself from the case because he believed he was unable to provide a sufficient remedy to the children of Pulaski County under the restrictions imposed by the court of appeals.[174] Characterizing the district court's modification of the settlement as amounting to a virtual "de facto consolidation" of the three school districts, the Eighth Circuit summarily overruled the district court and ordered the district court to approve the settlement plans and agreement as submitted by the parties.[175] The Eighth Circuit concluded its opinion on a somber but optimistic note, expressing the hope that the court's ruling would lead to a "period of calm" in which the school districts could put the

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169. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 921 F.2d 1371, 1381 (8th Cir. 1990).

170. *Id.*

171. *Id.* at 1380. This was the first time that any state legislature had voluntarily paid out money in reparations for past discriminatory acts. *Id.* at 1381-82. To he sure, the legislators were cognizant and fearful of impending judicial action, which may have proved even more expensive than the reparations, and may have proposed the legislation reluctantly. In the end, however, the General Assembly did provide the necessary funding. *Id.* at 1381. The Eighth Circuit praised the legislature:

> [W]e think it should be said that the Legislature's enactment of the settlement bill, without precedent so far as we know in any other state, was a significant step towards erasing the legacy of lawlessness that had marked the State of Arkansas's initial reaction to the constitutional requirement of equal, integrated education.

Id. at 1381-82.

172. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 716 F. Supp. 1162 (E.D. Ark. 1989), *rev'd*, 921 F.2d 1371 (8th Cir. 1990).

173. 921 F.2d at 1376.

174. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 740 F. Supp. 632, 632 (E.D. Ark. 1990).

175. 921 F.2d at 1393.

litigation behind them and focus on education.[176]

Following the Eighth Circuit's ruling, the parties modified and resubmitted the settlement plans to the district court for approval. Although the district court found some of the modifications "both necessary and acceptable" in light of the two-year delay in implementing the plans, the court rejected other aspects of the plans that, in the court's opinion, exceeded the bounds delineated by the Eighth Circuit.[177] After the district court denied a motion to reconsider presented by the three school districts and the Joshua Intervenors,[178] all of the parties appealed the district court's order.[179] The parties argued that the district court's narrow reading of the Eighth Circuit's order was in error and that the district court had failed to adhere to the Eighth Circuit's directive to approach the settlement with a presumption of constitutionality.[180] Thus, almost one year after the Eighth Circuit ordered the district court to approve the settlement plans, the case is not only still in the court system, but once again before the Eighth Circuit on the very same issue—the constitutionality of the settlement plans.[181]

IV. Analysis: The Three Equitable Principles and Their Misapplication

Although the Eighth Circuit rejected the district court's consolidation remedy, it did not do so because it found the remedy inadequate to rectify the harm suffered by the black victims of segregation. The court of appeals frankly agreed that consolidation would be a cost-effective and efficient method of desegregating the three school districts.[182] Five years later, in its order approving the settlement agreement, the Eighth Circuit again acknowledged that consolidation might prove beneficial in

176. The court concluded its opinion as follows:

> The action we take today can lead to a period of calm in this case, perhaps even bringing the parties a happy issue out of all their afflictions. Whether this will occur rests largely in the parties' hands. If they scrupulously and diligently carry out the settlement plans and the settlement agreement, and if there is no major unforeseen change in circumstances, they should be able to devote more energy to education, and less to litigation.

Id. at 1394.

177. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, No. LR-C-82-866, slip op. at 1 (E.D. Ark. June 21, 1991).

178. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, No. LR-C-82-866, slip op. (E.D. Ark. July 15, 1991).

179. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, No. LR-C-82-866 (E.D. Ark. June 21, 1991), *appeal docketed*, No. 91-2640 (8th Cir. July 18, 1991). It is interesting to note that the parties filed a joint brief and, thus, there is no respondent in the appeal.

180. *See* Brief for Appellants, Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, No. 91-2640 (8th Cir. filed July 18, 1991, argued Sept. 23, 1991).

181. At this writing, the case still is pending before the Eighth Circuit.

182. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 434 (8th Cir. 1985) (en banc).

advancing racial and educational goals.[183] Nevertheless, the court emphasized that nothing in the Constitution compelled it to order a consolidation remedy.[184]

The remainder of this Note examines the three reasons the Eighth Circuit offered for forsaking the consolidation remedy it believed would be best if the court was free to base its decision purely on the social good: (1) that the scope of the remedy exceeded the scope of the violation; (2) that the consolidation remedy did not achieve the goal of placing the victims in the position they would occupy but for the segregation; and (3) that the remedy failed to recognize the autonomy of the school districts. These three reasons are simply a strict application of the three equitable principles the Supreme Court discussed in *Milliken II*.[185] The driving force behind these principles is the need for courts to exercise restraint so as to not aggrandize their own constitutional powers or usurp powers constitutionally allocated to other governmental and private entities. These three equitable principles, and their application in the context of school desegregation in Little Rock, provide a framework for analyzing how courts balance the need for an adequate and productive, even a socially good, remedy for constitutional violations against the need to exercise judicial restraint in a sensitive area of traditional local and democratic control.

A. The Scope of the Violation Defines the Scope of the Remedy

Formulating a remedy begins with a determination of the violation to be rectified and an identification of the perpetrator. To prove a violation of the Fourteenth Amendment, a plaintiff first must show that the defendant acted with a discriminatory purpose.[186] This requires the court to focus initially on the actions and motivations of the defendant, not on the harm suffered by the victim.[187] Although the harm to the

183. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 921 F.2d 1371, 1377 n.2 (8th Cir. 1990).

184. *Id.* Judge Arnold articulated the rationale of the court in his concurrence to the 1985 en banc opinion: "Our task as judges is not to force these school districts to do what we think is right or socially good, but to apply the law to the facts and announce the result, whatever it may be." 778 F.2d at 438 (Arnold, J., concurring in part, dissenting in part).

185. *Milliken II*, 433 U.S. 267, 280-81 (1977).

186. *See* Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1973); *see also* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976) (involving a discrimination claim under the Fifth Amendment).

187. For example, in Lee v. Lee County Board of Education, 639 F.2d 1243 (5th Cir. 1981), the plaintiff alleged that the school district had annexed territory in order to increase the number of white students in Auburn, Alabama, schools and to perpetuate the segregation of black students in neighboring Loachapoka. *Id.* at 1251. The Court of Appeals for the Fifth Circuit emphasized that the state of mind of the person who requested the annexation is irrelevant. Instead, the court focused exclusively on the state of mind of the city council that had approved the petition. *Id.* at

black victims may be equally great in a school system with de facto segregation as in a school system with de jure segregation,[188] the court should not focus on the victim when determining the liability of an alleged perpetrator. The proper question is simply whether the court can require remedial action by a specific defendant, not what kind of remedial action the court should decree. Many injuries exist in this world, but not all injuries are injustices, and, more important, not all injustices can be cured by the courts.[189]

Justice Douglas argued that de facto segregation is a misnomer because it is merely a more subtle or more passive form of state action that creates and perpetuates a segregated school system.[190] No majority of the Supreme Court, however, has ever adopted Justice Douglas's position, although the Court has placed certain affirmative duties upon school systems. In *Swann* the Court permitted an inference of current discriminatory intent from the continued existence of one-race schools in a system that had practiced de jure segregation prior to the *Brown* decision.[191] Similarly, *Keyes* permits a court to infer the existence of

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1269. The court ruled that the plaintiff's demonstration that the city council was aware of the white parents' intentions or of the shifting demographic patterns in the area was insufficient to show discriminatory purpose. The plaintiff must show that a desire to increase the racial imbalance between the two school systems motivated the city council. *Id. But see* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979) (stating that adherence to a particular policy with full knowledge of the predictable effects upon racial imbalance in the school system is one of many factors the court may consider in determining whether to draw an inference of segregative intent).

188. From the perspective of the black student, separate educational facilities are still "inherently unequal." Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (*Brown I*).

189. In Goldsboro City Board of Education v. Wayne County Board of Education, 745 F.2d 324 (4th Cir. 1984), the court recognized that the plaintiff had a "problem" but concluded that its problem was beyond the court's power to correct. *Id.* at 333. The court found that demographic shifts and private racism caused the racial imbalance between the neighboring school systems. *Id.* The court concluded that the plaintiff's only allegation of discriminatory action was the failure of the majority white school district to come to the aid of the majority black school district by agreeing to merge. *See id.* at 326.

190. Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 216 (1973) (Douglas, J., concurring). In his concurring opinion to *Keyes*, Justice Douglas argued that the state has an affirmative duty to desegregate, thus there is "no difference between *de facto* and *de jure* segregation. The school board is a state agency and the lines that it draws, the locations it selects for school sites, the allocation it makes of students, the budgets it prepares, are state action for Fourteenth Amendment purposes." *Id.* at 215 (Douglas, J., concurring).

191. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971). The court elaborated on this presumption in Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*):

> [T]he measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system. . . . As was clearly established in *Keyes* and *Swann*, the Board had to do more than abandon its prior discriminatory purpose. . . . The Board has had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices "are not used and do not serve to perpetuate or re-establish the dual system," and the Board has a " 'heavy burden' " of showing that

systemwide de jure segregation from proof that school authorities have pursued an intentional segregative policy in a substantial portion of the school district.[192]

In order to grant an interdistrict remedy such as consolidation, a court must find not only that the defendant school district committed discriminatory acts, but also that these acts had segregative effects in the school system in question. In *Milliken I*[193] the Supreme Court held that the state or a local school district must have committed racially discriminatory acts that were a substantial cause of interdistrict segregation.[194] The Court expressly refused to adopt a presumption that a significant disparity in the racial composition of autonomous school districts resulted from discriminatory actions by those districts.[195] Again, at this stage of the inquiry the focus remains on the actions of the perpetrator, not on the victims. As the Supreme Court has explained in *Hills v. Gautreaux*,[196] the Court rejected the interdistrict remedy in *Milliken I* not because the remedy included relief for the victims extending beyond the school system in which the violation occurred, but because the remedy required a judicial decree restructuring an autonomous school system that had not committed any constitutional violation.[197]

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actions that increased or continued the effects of the dual system serve important or legitimate ends.

Id. at 538 (citations omitted, quoting, respectively, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 460 (1979), and Wright v. Council of Emporia, 407 U.S. 451, 467 (1972)).

192. *Keyes*, 413 U.S. at 200-03. For a discussion of the difficulty of proving causation or the lack of it, and the importance of these presumptions, see Yudof, *Nondiscrimination and Beyond: The Search for Principle in Supreme Court Desegregation Decisions*, *in* SCHOOL DESEGREGATION 97, 101 (W. Stephan & J. Feagin eds., 1980).

193. Milliken v. Bradley, 418 U.S. 717 (1974). The request for an interdistrict remedy was first raised in Spangler v. Pasadena City School Board of Education, 311 F. Supp. 501 (C.D. Cal. 1970), and Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1971). Both district courts refused to grant remedies that extended beyond municipal boundaries.

194. 418 U.S. at 744-45.

195. *Id.* at 741 n.19.

196. 425 U.S. 284, 296 (1976).

197. *Id.* Fundamental to this analysis is an acceptance of the argument that the state board of education and the different local school districts are all separate, autonomous entities. A slim majority in *Milliken I* rejected the argument that the school districts are simply instrumentalities created by the state for administrative convenience and acting under power delegated to them by the state. Although the majority recognized that, initially, the state grants the school districts their power, the court also emphasized that the school districts are local democratic entities whose authority comes from local taxpayers. *See Milliken I*, 418 U.S. at 741-42 n.20. Justice White, joined by three Justices in dissent, argued that the state should not be able to "successfully insulate[] itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts." *Id.* at 763 (White, J., dissenting). One commentator views the *Milliken I* decision as a failed exercise in "interest balancing" in which the value of local autonomy for suburban subdivisions created by the state won out over the need for a more effective remedy. Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 645-50 (1983).

The impact of *Milliken* has been greatest in Northern cities where demographic shifts have made integration virtually impossible without the consolidation of black inner city school districts with white suburban school districts.[198] For the most part, courts have adopted a narrow reading of *Milliken* that precludes metropolitan consolidation remedies unless there is clear evidence of discriminatory intent with substantial and current interdistrict effects.[199] Thus, courts have limited interdistrict relief to cases in which government action fixes or ignores boundaries for segregative purposes,[200] cases of legislative gerrymandering in the original creation of school districts,[201] or cases challenging school systems that are not meaningfully autonomous.[202]

Before the Little Rock case, the Eighth Circuit had granted in-

198. Even after desegregation suits, many cities remain far from integrated and include many one-race schools. *See* United States v. Board of Educ., 554 F. Supp. 912 (N.D. Ill. 1983) (approving a plan that permitted white enrollment of 30% to 70% in a Chicago school district that included 91% minority students); Armstrong v. Board of Sch. Directors, 616 F.2d 305 (7th Cir. 1980) (approving a plan that permitted white enrollment of 40% to 75% in a Milwaukee school system that included 46% minority students); Adams v. United States, 620 F.2d 1277 (8th Cir. 1980) (approving a plan that permitted white enrollment of 50% to 70% in a St. Louis school system that included 75% minority students), *cert. denied*, 449 U.S. 826 (1980); Tasby v. Wright, 520 F. Supp. 683 (N.D. Tex. 1981) (approving a plan that permitted white enrollment of 25% to 75% in a Dallas school system that included 70% minority students), *aff'd in part and rev'd in part*, 713 F.2d 90 (5th Cir. 1983); Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973) (approving a plan that permitted white enrollment of up to 70% in an Atlanta school system that included 85% minority students), *aff'd following remand*, 522 F.2d 717 (5th Cir. 1975); Hobson v. Hanson, 269 F. Supp. 401 (D.D.C. 1967) (approving a plan that permitted white enrollment of up to 85% in a District of Columbia school system that included 90% minority students), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.D.C. 1969). *See generally* Geel, *School Desegregation Doctrine and the Performance of the Judiciary*, 16 EDUC. ADMIN. Q., Fall 1980, at 60. Furthermore, cities face an especially difficult problem in paying the cost of education because of the "municipal overburden" that results from greater costs for health, transportation, public works, sanitation, public welfare, public housing, and recreation. Cities on average devote 30% of their budgets to schools. Suburbs, with fewer municipal burdens, devote 50%. *See Milliken I*, 418 U.S. at 760 n.12 (Douglas, J., dissenting).

199. *See* Lee v. Lee County Bd. of Educ., 639 F.2d 1243 (5th Cir. 1981) (explaining that the Supreme Court's deliberate choice of phrases such as "substantial" or "direct cause" and "significant effects" belies a requirement that there be clear proof of cause and effect and a careful delineation of the extent of the effect); Taylor v. Ouachita Parish Sch. Bd., 648 F.2d 959 (5th Cir. 1981) (rejecting the arguments that prior transfers, a common taxation system, areas in which students could choose their district, and a common electorate for the school boards undermined the autonomy of the two districts within the meaning of *Milliken I* and *II*).

200. *See, e.g.*, Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974) (granting an interdistrict remedy because the legislature purposefully manipulated school district boundaries to maintain segregated school districts), *cert. denied*, 421 U.S. 931 (1975).

201. *See, e.g.*, United States v. Board of Sch. Comm'rs of Indianapolis, 637 F.2d 1101 (7th Cir. 1980) (finding that the legislature made with discriminatory purpose important decisions that set the boundaries of school districts), *cert. denied*, 449 U.S. 838 (1980).

202. *See, e.g.*, Evans v. Buchanan, 393 F. Supp. 428 (D. Del.) (three-judge court) (finding that the municipal school system and the surrounding suburban school district were not meaningfully autonomous), *aff'd per curiam*, 423 U.S. 963 (1975).

terdistrict relief in only two cases. In *Morrilton School District No. 32 v. United States*[203] the court found that the legislature purposefully gerrymandered the boundaries of the school systems in order to create predominantly black and predominantly white school districts.[204] As a result, some black students rode buses up to twenty-five miles through white districts in order to attend a black school.[205] The court concluded that consolidation of the school systems was the only viable plan.[206]

The Eighth Circuit's decision in *United States v. Missouri*[207] is more problematic. There, the court ordered the consolidation of three school districts even though it found evidence of gerrymandering with a discriminatory purpose in only two of the districts. The court included the third district in the remedy because of that district's continued resistance to numerous proposals to alter the considerable racial imbalance among the school systems.[208] In approving the interdistrict remedy in the *Missouri* case, the Eighth Circuit was willing to apply interdistrict remedies to defendants whose only discriminatory action was inaction—adamant resistance to efforts to correct segregation. Likewise, the Eighth Circuit applied an expansive reading of *Milliken* when it approved an interdistrict remedy in Pulaski County even though it found that the school districts were historically autonomous.[209]

Once the court determines that a defendant has committed an interdistrict violation, the court must decide how to remedy the impact of this violation, an inquiry that returns the court to the Supreme Court's invocation of judicial restraint in *Swann*: "The nature of the violation determines the scope of the remedy."[210] The Eighth Circuit strictly applied this equitable principle in the Little Rock case. The court enumerated the specific violations committed by the defendant school districts[211] and then carefully tailored guidelines for a remedy to correct each of these violations.[212] The court rejected the consolidation remedy because the numerous violations did not add up to a forfeiture of autonomy by the school districts.[213]

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203. 606 F.2d 222 (8th Cir. 1979), *cert. denied*, 449 U.S. 826 (1980).

204. *Id.* at 227.

205. *Id.*

206. *Id.* at 229.

207. 515 F.2d 1365 (8th Cir. 1975).

208. *Id.* at 1370.

209. Little Rock Sch. Dist. v. Pulaski County Sch. Dist. No. 1, 778 F.2d 404, 434 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986). *See supra* notes 133-35 and accompanying text.

210. Swann v. Charlotte-Mecklenhurg Bd. of Educ., 402 U.S. 1, 16 (1971).

211. The court listed "violations relating to annexations and deannexations, segregated housing, school siting, student assignments, special education, transportation, employment of faculty and administrators, and black participation in school affairs." 778 F.2d at 434.

212. *Id.* at 434-36.

213. *Id.* The court pointed to numerous areas where the three school districts had retained

The Supreme Court, however, also has given the traditional equitable principles a more liberating spin when a particular case demands greater judicial intervention.[214] This liberation survives scrutiny because dichotomies exist even within the *Swann* doctrine itself.[215] For example, despite the Court's invocation of judicial restraint in *Swann*, the Court also acknowledged that district courts have broad authority to develop unitary remedies when school districts abdicate their own authority and duty to fashion appropriate remedies.[216] Thus, a court may choose the language it wishes to emphasize when formulating a remedy.

The dichotomies in *Swann* are not only textual, but also substantive. While the central theme of *Swann* is tailoring the remedy to correct past violations, the beneficiaries of the relief are the present and future students. Furthermore, although *Swann* requires school systems to take affirmative steps to eliminate de jure discrimination, it does not require strict racial balance[217] and, in fact, permits one-race schools in certain circumstances.[218] Finally, *Swann* cautions courts to practice judicial restraint in addressing past discriminatory violations and restructuring defendant school systems, but requires the same courts to exercise great control and continued judicial supervision over violators until the reconstituted school district achieves unitary status.[219]

Courts do not have to extend their powers or their willingness to exercise those powers in order to work within these apparent dichotomies because the real dichotomy lies not in doctrine but in time. Because a dichotomy exists between different stages of the court's duties—between the past and the future—the problem, at its core, is not one of judicial restraint but of judicial perspective. When the court moves from the liability stage to the remedy stage of a case, the court also must change its focus from the past to the future, from the segre-

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their own independent structures and powers. *See supra* note 135.

214. *See Swann*, 402 U.S. at 15 (noting that "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies"); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971) (stating that "all reasonable methods [should be made] available to formulate an effective remedy"); Davis v. Board of Sch. Comm'rs, 402 U.S. 33, 37 (1971) (suggesting that "the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation").

215. For a discussion of these dichotomies see Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 LA. L. REV. 789, 802-03 (1988).

216. *Swann, 402* U.S. at 16. "In default by school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." *Id.*

217. *Id.* at 25.

218. *Id.* at 26.

219. *Id.* at 31-32.

gative acts to the impact of those acts, from the perspective of the perpetrator to the perspective of the victim.

This needed change in focus and perspective has two key components. First, when formulating a remedy, the court should focus on the harm suffered by the victims and not on the violative acts committed by the perpetrator. Once the court has determined that the perpetrator has committed a constitutional violation, the court then must examine the effects of that violation in order to formulate a successful remedy. As the Supreme Court stated in *Milliken II*, the remedy must address the condition that offends the Constitution and the resulting inequalities.[220] Furthermore, the Court has recognized that the discriminatory acts of school officials are closely intertwined with societal discrimination and private prejudices.[221] Thus, in some contexts, it is unrealistic for courts to require explicit proof of cause and effect and a clear showing of the extent of the effect.[222] Not only is it virtually impossible for plaintiffs to meet such strict standards of proof, but more important, courts cannot make such findings accurately. When judges apply such a standard, they do not exercise true judicial restraint; rather, they throw up their hands because they are faced with a complex, but not impenetrable, problem in need of a remedy.

A change in focus, however, does not mean that the court must ignore the extent of the defendant's involvement or saddle the defendant with damages or remedial duties for harms to which it did not contribute. The court still should tailor a remedy in response to the facts. The change in focus merely requires the court to address the present conditions that the remedy must rectify in order to tailor a remedy that actually fits the community which must wear it in the future.

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220. Milliken v. Bradley, 433 U.S. 267, 282 (1977).

221. In *Swann* the Supreme Court pointed out the far-reaching effects of a school board's decisions concerning school construction and school closing:

> Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

402 U.S. at 20-21. In the Little Rock case, the district court found that the decline in the number of white students enrolled in the LRSD

> could generally be explained by the movement of white families from the district to the suburbs, some of them to avoid sending their children to integrated schools, and by an increase in the black population in the school district, caused in part by a higher birth rate in the black population.

Clark v. Board of Educ. of Little Rock Sch. Dist., 705 F.2d 265, 267 (8th Cir. 1983). One commentator argues that "exclusive judicial consideration of the school board's behavior wrongly ignores the link between the school board and the broader political system and community of which the board is only a part." Note, *Attacking School Segregation Root and Branch*, 99 YALE L.J. 2003, 2005 (1990).

222. *See* Lee v. Lee County Bd. of Educ., 639 F.2d 1243, 1256 (5th Cir. 1981).

The change in focus from the violative acts to the harm suffered must include a correlative change in perspective from that of the perpetrator to that of the victim. For example, the Eighth Circuit found that the three school districts in Pulaski County were autonomous because each school district elected its own school board, managed its own budget, hired its own personnel, developed its own transportation system, constructed its own schools, and made its own decisions concerning annexations.[223] Yet, this laundry list does not include the areas of greatest importance from the perspective of the victim—assignment of black students, efforts to resist the *Brown* decree, and cooperation to maintain a dual system. The court must focus on these areas in order to fashion meaningful and successful remedies because these are the areas of the greatest harm and these are the areas that will undergo the greatest transformation once the remedy is implemented.

Second, and the logical extension of the first component, the court must focus on the future and not the past when formulating a remedy.[224] Judicial restraint should be salient in the court's actions, but the court must choose the best way to exercise this restraint. Specifically, the court must decide whether to exercise restraint by respecting the autonomy of the present school system guilty of past violations or by respecting the future restructured school system that must rectify the harm caused to the black community.[225]

Although the court may identify past violations, the court's true goal should be to prevent future violations. In actuality, the court cannot remedy past wrongs because the majority of the victims of past discriminatory acts are no longer patrons of the school system. Past victims will receive no direct compensation for the harm they suffered.[226] Thus, when the court fashions a remedy, it addresses the problem of present and future wrongs, and present and future students are the beneficiaries of the remedy. The court must have some vision of the ideal future school system whether or not it articulates that vision. Identifying the proper goals of desegregation points to the flaws in the second reason the Eighth Circuit offered for rejecting the consolidation

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223. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 434 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986).

224. Justice White alluded to this in his dissent in *Milliken I*:

> The task is not to devise a system of pains and penalties to punish constitutional violations brought to light. Rather, it is to desegregate an *educational* system in which the races have been kept apart, without, at the same time, losing sight of the central *educational* function of the schools.

Milliken v. Bradley, 418 U.S. 717, 764 (1974) (White, J., dissenting) (emphasis in original).

225. This Note addresses these issues in subpart IV(C).

226. For a discussion of damages remedies for black victims of segregation, see generally B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973).

remedy in the Little Rock case.

B. *The Remedy Must Restore the Victims to the Position They Would Have Occupied in the Absence of the Discriminatory Conduct*

In *Berry v. School District of Benton Harbor*[227] the Sixth Circuit neatly applied the second equitable principle. The Michigan State Board of Education had approved the transfer of students in a white residential area[228] from a predominantly black school district to a predominantly white school district.[229] The court rejected the plaintiff's request for an interdistrict desegregation plan. Instead, the court simply turned back the clock to the time before the latest and most easily isolated discriminatory conduct by approving a plan that returned the white residential area, its two hundred pupils, and its four-room school house to the predominantly black school district.[230]

Benton Harbor, however, at least as the court presented it,[231] is an unusually simple case. In contrast, most school desegregation cases are highly complex and continue for many years, even decades.[232] Each year the problem remains unresolved is another year in which not only the black students but the entire community suffers.

Little Rock's struggle to achieve some kind of peace with the *Brown* decree has continued for almost forty years, not simply in the courts, but also in the schools, the streets, the neighborhoods, and the board rooms. This struggle has earned Little Rock an international reputation for racial problems in its public schools.[233] When a problem looms so heavily over a community, it not only augments the residential segregation,[234] it becomes intertwined with, and, hence, less distinguishable from, societal discrimination.[235] Furthermore, the problem and its long, seemingly endless trek through the judicial system have had indi-

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227. 698 F.2d 813 (6th Cir. 1983).

228. The Board approved the transfer petition only after the petitioners revised it to exclude a substantial number of black children. *Id.* at 815.

229. *Id.* at 815-16.

230. *Id.* at 816-17.

231. *Benton Harbor* may be more complex than the court was willing to recognize. The allegations of interdistrict violations appeared in the latter stages of the case, 16 years after the litigation began. Furtbermore, Benton Harbor claimed that the psychological impact of the white flight was much greater than the numerical impact might indicate. *Id.* at 818.

232. For a discussion of the inability of school systems to extract themselves from litigation and court supervision, see Canady, *Overcoming Original Sin: The Redemption of the Desegregated School System*, 27 HOUS. L. REV. 557 (1990).

233. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 740 F. Supp. 632, 633 (E.D. Ark. 1990); *see, e.g.*, Reed, *School Resegregation May Overtake Little Rock, Other Cities: A Symbol Once Again?*, L.A. Daily J., Apr. 9, 1985, at 4.

234. *See supra* note 221 and accompanying text.

235. *See* Note, *supra* note 221.

rect effects throughout all areas of the Little Rock community including stagnating economic growth, increasing the flight of more progressive individuals from troubled areas, discouraging more progressive people from moving to Little Rock, and increasing public agitation for a quick remedy—"peace-at-any-price."[236]

In this context, the court's goal of placing the victims of segregation in the position they would have occupied had the defendants not committed constitutional violations[237] appears naive, if not ludicrous. To achieve the goal it articulates, the court, in order to formulate a remedy to be implemented in the future, must travel into the past to a fictional time before segregation existed. Then, the court must make it back to the present down a road of racial equality that, at best, has long been barricaded, or, more accurately, probably never existed. In Little Rock, and in most American cities, there is no Eden before the Fall to which a court can refer as it seeks to formulate appropriate remedies for the future. Thus, the second equitable principle is really an empty vessel of words that the court can fill surreptitiously with whatever substantive policies the court desires.

Although courts ostensibly use the second equitable principle to ensure judicial restraint, the principle has no inherent value as a restraining mechanism and could camouflage judicial activism. When the court fails to articulate a clear goal for the discrimination remedy it formulates, the court makes it more difficult for the public to discern just what the court truly intends the remedy to accomplish. Only the court is privy to what it sees when it develops real world remedies while looking to a mythical, victimless world that could have been. The likely result when the court uses the second equitable principle in this fashion is half-measure remedies clothed in the language of judicial restraint. Courts must articulate clearly their vision of desegregation in order to avoid unwanted judicial activism because only then can higher courts, other governmental branches, and the public accurately assess and monitor the participation of courts in the effectuation of desegregation remedies.

Although, depending on the severity and complexity of the dual system to be eradicated, specific goals of desegregation must vary from case to case, several general goals of desegregation can be gleaned from

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236. Judge Woods warned against the temptation for "peace-at-any-price" when he recused himself from the case: "In the words of Martin Luther King, Jr., what the children in this community, black and white, need and deserve is '[n]ot a negative peace which is the absence of tension, but a positive peace, which is the presence of justice.'" 740 F. Supp. at 633.

237. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 434 (8th Cir. 1985).

the leading cases.[238] First and foremost, the court must strive to dismantle de jure segregation and end racial isolation.[239] The Supreme Court, however, has not stressed racial balance above all else,[240] and, consequently, lower courts have allowed the perpetuation of one-race schools in some circumstances.[241] Several other goals follow from the need for racial balance: increasing minority representation on the faculty and staff,[242] lessening the transportation burden borne by minorities,[243] improving minority participation in extracurricular activities,[244] enhancing minority self-esteem,[245] and strengthening race relations.[246] Finally, some aspects of the status quo should be retained. Thus, the courts must avoid white flight to private schools and majority white public schools,[247] minimize disorder in the community during the transition to a unitary system,[248] prevent new forms of segregation,[249] and resist resegregation after the school system has achieved unitary status.[250]

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238. The following discussion of general goals is based on the list in J. HOCHSCHILD, *supra* note 50, at 44-45.

239. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

240. One commentator has argued: "The time has come for civil rights lawyers to end their single-minded commitment to racial balance, a goal which, standing alone, is increasingly inaccessible and all too often educationally impotent." Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, *in* LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 569, 612 (H. Kalodner & J. Fishman eds., 1978).

241. *See* Lee v. Lee County Bd. of Educ., 639 F.2d 1243, 1254 (5th Cir. 1981).

242. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971).

243. *Id.* at 29-31.

244. *See* Green v. County Sch. Bd., 391 U.S. 430, 435 (1968).

245. Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954).

246. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting).

247. *See* United States v. Board of Educ., 554 F. Supp. 912, 920 (N.D. Ill. 1983) (noting that it would be "tragic" if a well-intentioned desegregation plan accelerated white flight and, thus, defeated the goal of the plan). For a discussion of how the courts should balance the need for a remedy with the need to avoid a crippling resistance, see Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

248. Brown v. Board of Educ., 349 U.S. 294, 299-301 (1955).

249. *See* Monroe v. Board of Comm'rs, 391 U.S. 450, 459-60 (1968) (holding unconstitutional a "free transfer" plan that would permit resegregation); McNeal v. Tate County Sch. Dist., 508 F.2d 1017, 1019 (5th Cir. 1975) (warning against using a discriminatory pupil placement procedure to resegregate classrooms after a desegregation order is in place). *See generally* Landsberg, *supra* note 215.

250. *See* Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 434-35 (1976) (holding that once a district court has implemented a racially neutral attendance pattern in order to remedy a constitutional violation, the district court has performed its duties fully and cannot readjust attendance zones at a future date absent a showing of a new violation by the defendant); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971) (recognizing that the court cannot require communities that reach unitary status to make further adjustments in the absence of a showing of a purposeful discriminatory act by the school system or some state official intended to fix attendance zones). For an example of a postunitary debacle, see Riddick v. School Board of Norfolk, 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 470 U.S. 938 (1986).

In the Little Rock case the Eighth Circuit articulated no goals other than those of addressing particular past violations directly and placing the victims in their well-deserved "could-have-been" position.[251] With such an ambiguous statement of the court's goals, evaluating the success of its remedy, or what steps are necessary to achieve a unitary system in Pulaski County, is virtually impossible unless one uses the general goals as gap-fillers. Focusing on the court's restructuring of school district boundaries provides a useful means of analyzing this problem.

In lieu of the consolidation remedy, the Eighth Circuit issued a remedial decree,[252] which retained the existing NLRSD boundaries, expanded the LRSD to the city limits of Little Rock, and annexed the Granite Mountain subdivision to the PCSSD.[253] Despite the historical intention that the boundaries of the LRSD remain coterminous with the City of Little Rock,[254] the court's ruling fixed the boundaries of the LRSD and prevented their expansion along with the City of Little Rock.[255] Although this remedy has improved slightly the present racial balance in the three school systems,[256] it does not allow the school districts the flexibility necessary to devise a student assignment plan that can take into account the changing demographics and the future ramifications of those present patterns.[257]

The Supreme Court has established that once a school district successfully implements a court-ordered desegregation plan, the district court cannot restructure that plan in order to correct racial imbalances arising from subsequent demographic shifts unrelated to actions by

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251. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 434 (8th Cir. 1985).

252. *Id.* at 445. Although the final remedy is the one that the parties independently agreed upon in the settlement, the Eighth Circuit's remedial decree formed the basis of that settlement and defined the constitutionally acceptable parameters. Furthermore, the difficulty and frustration the parties encountered in attempting to effectuate the remedy, in part, precipitated the settlement.

253. *Little Rock*, 778 F.2d at 435.

254. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 584 F. Supp. 328, 340 (E.D. Ark.), *rev'd*, 738 F.2d 82 (8th Cir. 1984).

255. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 805 F.2d 815, 816-17 (8th Cir. 1986).

256. For the 1991-1992 school year, the percentages of black students in the three school districts are as follows: LRSD, 63.9%; PCSSD, 27%; and NLRSD, 46.9%. Telephone interviews with the Student Assignment Offices of the LRSD, PCSSD, and NLRSD (Oct. 7, 1991). These statistics demonstrate a slight improvement over the percentages for the 1983-1984 school year: LRSD, 70%; PCSSD, 22%; and NLRSD, 36%. *See supra* notes 83-89 and accompanying text.

257. The district court acknowledged the changing demographics in Little Rock and the movement of whites from the inner city to the outer regions of the metropolitan area. 584 F. Supp. at 347.

school authorities.[258] Yet this does not mean that the court must ignore the future and the specter of resegregation. Although the court cannot refashion remedies in the future, it can, and should, issue a remedial decree in the present that allows the school district an opportunity to fulfill its duty to provide the best education for all students.

By setting the LRSD boundaries at the 1985 city limits of Little Rock, however, the Eighth Circuit has curtailed the LRSD's ability to construct a student assignment plan that can accommodate the City's changing demographics. At the root of this problem is the Eighth Circuit's inability to bridge successfully the dichotomies between past and future. The court narrowly focused on past violations and a snapshot of the present.[259] Although a court must isolate in time a past discriminatory act in order to identify it, perpetrators do not commit discriminatory acts in a static world. Just as a school district may be guilty of structuring student assignment plans and district boundaries in accordance with present racial demographics, a school district may be equally guilty of purposefully structuring such boundaries with an eye to patent demographic patterns and the future consequences of those patterns.[260]

Furthermore, just as school districts do not commit discriminatory acts in a static world, courts should not formulate remedies to be applied in a static world. For example, stressing that the remedy must

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258. Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 440-41 (1976). The need for the court to provide a remedy in which the school district can continue to seek racial balance without affecting educational opportunities is especially important in light of the Supreme Court's holding in Board of Education of Oklahoma City v. Dowell, 111 S. Ct. 630 (1991). In *Dowell* the Court ruled that dissolution of a desegregation decree was proper when the "purposes of the desegregation litigation had been fully achieved." *Id.* at 637. The Court defined the purpose of the litigation to be the operation of the Oklahoma City School District in compliance with the Equal Protection Clause of the Constitution. *Id.* at 636-37. The Court stated that continued displacement of local control by a federal court after compliance had been achieved would be a violation of the Constitution. *Id.* at 637. Thus, if the district court finds "that the Oklahoma City School District [is] being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it [is] unlikely that the school board would return to its former ways," *id.* at 636-37, the school district will be free to return to a neighborhood plan if they do so without discriminatory intent. Therefore, when a district court formulates a remedy, it is imperative that it formulate a lasting remedy—one within which the school district can live comfortably—not by increasing judicial intervention and supervision, but by increasing flexibility and formulating remedies with an eye to the future.

259. The court stated that "[t]he remedy prescribed was intended to be a full and sufficient correction of wrongs done in the past." Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 805 F.2d 815, 816 (8th Cir. 1986).

260. For example, in *Lee County*, the court ruled that the school district's annexation of a predominantly white area did not have an interdistrict effect because the plaintiff failed to prove that students moved there in response to the annexation. The court, however, asked the wrong question. The court should have asked whether the school district was aware of the changing demographics and approved the annexation with the intent to increase the racial imbalance between the school districts. Lee v. Lee County Bd. of Educ., 639 F.2d 1243, 1265-66 (5th Cir. 1981).

address the harm in its present incarnation as caused by wrongs done in the past, the Eighth Circuit reversed the district court's order that the LRSD boundary would expand automatically with the City of Little Rock.[261] The court reasoned that the boundary change between the LRSD and the PCSSD must be a one-time change unless there was proof of violations in the future.[262] Yet this reasoning ignores the fact that the harm is not static and that the demographic patterns will continue in the future and will further exacerbate the problem.

In sum, in order to show judicial restraint, the court has curtailed its present action, but in doing so has provided an incomplete remedy for the future. This action, in fact, may necessitate greater intervention at a later date. Thus, one must ask whether the second equitable principle truly curtails judicial activism or simply postpones judicial intervention and, in turn, increases the period of judicial supervision.

C. *The Court Must Take into Account the Interests of State and Local Authorities in Managing Their Own Affairs*

In *Milliken I* the Supreme Court ruled that the district court could not treat the school district boundaries as an administrative convenience or as arbitrary dividing lines.[263] On the contrary, when considering an interdistrict remedy, the court must respect the autonomy of the state, its authority to create the separate school districts,[264] and the independence of those school districts as democratic entities free to administer their own affairs.[265] The Court emphasized that local control over the operation of schools is a deeply rooted tradition in American public education, one that is essential to the aggregation of public support and to the quality of the educational process.[266] Furthermore, the Court consistently has recognized that courts lack expertise in the field of education.[267] Thus, a court's exercise of its equitable power to fashion school desegregation remedies not only raises difficult questions about the authority of popularly elected school district officials, but also

261. *Little Rock*, 805 F.2d at 816.

262. *Id.*

263. Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (*Milliken I*).

264. Often, the state is a defendant in the suit. If the court finds the state liable for discriminatory acts, the court should temper its respect for the state's power in accordance with that liability. Yet the court still must acknowledge the state and the school districts as separate entities. *See supra* note 201.

265. *Milliken I*, 418 U.S. at 741-42. In Hills v. Gautreaux, 425 U.S. 284 (1976), the Supreme Court distinguished a housing discrimination case from a school discrimination case and allowed a broader remedy against the Department of Housing and Urban Development (HUD) because HUD could use discretion in the allocation of funds without consolidating, or in any way restructuring, local governmental entities. *Id.* at 305-06.

266. *Milliken I*, 418 U.S. at 741-42.

267. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977).

forces the court to address complex issues that school officials are better qualified to decide.[268] Finally, courts fear that ordering remedies which extend busing requirements will exacerbate public resistance[269] and create public discord that could diminish the perceived legitimacy and authority of the courts.[270]

Although these concerns are equally relevant in the Little Rock case, the Little Rock case is fundamentally different from *Milliken*. In *Milliken* the Supreme Court refused to approve an interdistrict remedy for Detroit, finding it improper for a court to intervene in the affairs of an autonomous school district without proof that the school district has committed a constitutional violation.[271] In the Little Rock case the Eighth Circuit concluded that the NLRSD and the PCSSD had committed constitutional violations with interdistrict effects and, thus, were liable for the harm suffered by the black victims.[272] At the remedy stage of the proceedings, however, the court continued to recognize the autonomy of the school districts and refused to order a remedy that would endanger that independence.[273]

The dichotomy between past and future in *Swann*[274] reappears in *Milliken*. The relationship between the court and the defendant school district undergoes a fundamental transformation once the court finds a violation.[275] As the Supreme Court stated in *Swann*, "[j]udicial authority enters only when local authority defaults."[276] After a court decides it

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268. Lee v. Lee County Bd. of Educ., 639 F.2d 1243, 1256 (5th Cir. 1981). Such issues include the manner in which tax rates are determined and tax revenues are distributed among the districts, the validity of long-term financial obligations of school districts, and the locus of authority in matters regarding curriculum, faculty hiring, and assignment. *Id.*

269. Statistical studies show that the public's linkage of busing with desegregation remedies is unfounded. The Civil Rights Commission surveyed 1000 school superintendents in 1977. The Commission concluded that, between 1966 and 1975, only 3% more white students and 9% more minority students were bused for desegregation purposes than had been bused beforehand. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 65, at 48. In 1984 over 50% of all American children were bused to school for nonracial reasons. Only about an additional 5% were bused for desegregation purposes. J. HOCHSCHILD, *supra* note 50, at 62.

270. *See* Days, *School Desegregation Law in the 1980's: Why Isn't Anybody Laughing?* (book review), 95 YALE L.J. 1737 (1986).

271. *Milliken I*, 418 U.S. at 741-42.

272. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 427-28 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986).

273. *Id.* at 434.

274. *See supra* notes 215-19 and accompanying text.

275. *See* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982). Fletcher argues that trial court remedial discretion in institutional remedies is inevitably political in nature and, thus, presumptively illegitimate. That presumption of illegitimacy, however, is rebutted when the political entity in question is seriously and chronically in default of its duty to exercise its authority. In that event, and for as long as the political entity remains in default, the court may exercise legitimately political discretion. *Id.* at 637.

276. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). One commentator

must intervene in the operation of a school district, it still should exercise judicial restraint. Nevertheless, the policies that precipitate the need for judicial restraint change when local authorities have failed in their designated duties. Thus, the manner in which the court exercises judicial restraint also should change to effectuate those policies better.

In the Little Rock case the Eighth Circuit exercised judicial restraint by instituting an incremental remedy that requires a minimal restructuring of school district boundaries and is highly dependent on voluntary desegregation.[277] This remedy may require less immediate intervention by the court, but it does not result necessarily in judicial restraint. Such judicial action amounts to nothing more than half-measures or incomplete remedies that may prolong the school district's struggle to reach unitary status and, thus, extend the period of judicial supervision;[278] require more drastic judicial intervention at a later date;[279] or cripple the school district by creating a flawed remedy in which it cannot perform its educational function.[280] In sum, a little change can be worse than no change at all. Restricted or partial plans may create new problems for both black and white students, without adequately addressing the lingering problems of the old dual system.[281]

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has observed that the general problem of courts being overworked is in large part "directly related to the lack of responsible effort by officials in other areas of government." The public views courts as a last resort to gain benefits and rights that are promised by other entities, but never received. Rebell, *Judicial Activism and the Courts' New Role*, 12 Soc. Pol'y, Spring 1982, at 26.

277. These voluntary measures include majority-to-minority transfers, incentive schools, and magnet schools. *See supra* text accompanying notes 146-56.

278. This is certainly what Judge Wood thinks happened in the Little Rock case. In his recusal he stated:

> I believe that, had the Court of Appeals affirmed that decision in 1984, we would now be several years into a productive workable plan. Instead, the Appellate Court, while affirming each of the one-hundred-five findings of fact in the 1984 decision, reversed the remedy and mandated a remedy of its own which turned primarily on redrawing boundary lines. In the five years since consolidation was rejected by the Court of Appeals, all efforts to untie this Gordian knot have inevitably resulted in one-year, stop-gap measures instead of sensible long-term plans.

Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 740 F. Supp. 632, 633 (E.D. Ark. 1990).

279. *See* Liddell v. Board of Educ., 851 F.2d 1104 (8th Cir. 1988).

280. *See infra* text accompanying note 286.

281. *See* J. Hochschild, *supra* note 50, ch. 4. In her study, Hochschild concluded:

> [An incremental policy] works poorly in two ways to desegregate schools. It does less than full-scale, rapid, extensive—but unpopular—change to improve race relations, achievement, and community acceptance and to minimize white flight. Both minorities and Anglos would benefit more from greater than from lesser change. More controversial and more serious, incremental policy-making sometimes causes more harm than no desegregative change at all would cause. Both minorities and Anglos can end up worse-off in a halfhearted, restricted, timid—but more popular—"reform" than if nothing had been done. Race relations worsen, minority self-esteem declines, black achievement declines absolutely or relatively, white flight and citizen resentment increase.

Id. at 91. Hochschild also points out that the uncertainty and instability which accompanies slow

Courts should exercise judicial restraint in a manner that curtails future intervention, even if such action actually requires greater initial intervention. To accomplish this task, courts should follow several principles. First, courts should seek input from the school districts that will implement the remedies. *Swann* requires courts to seek voluntary remedies and to formulate their own remedies only if the school districts default on this responsibility.[282] In the Little Rock case the district court followed the *Swann* directive by approving the LRSD's proposal without modification.[283] The Eighth Circuit, however, constructed a detailed remedial decree that differed greatly from the district court's order and refused to remand the case to the district court for further findings.[284] Ironically, the Eighth Circuit overturned the district court's consolidation remedy because the district court failed to recognize the autonomy of the school districts, but went on to formulate a remedy without recognizing the need for participation by these same school districts.[285]

A remand for further findings would have been more than a symbolic gesture of respect for the school districts. When the school districts submitted their initial proposals, they were appealing the court's liability finding as well as the court's remedy. Not surprisingly, the proposals exhibited a reluctance to change the status quo. Had the Eighth Circuit made it clear that the situation required an interdistrict remedy, the school districts may have faced the inevitable and more readily developed a remedy for the future. Thus, a remand likely would have produced much different proposals from the school districts.

In addition to restructuring the entities involved in their remedies, courts must set forth the parameters in which the restructured school districts will act. Courts also must supervise those actions of school districts without unduly encroaching on the administrative prerogatives. Thus, courts should grant school districts enough flexibility to meet future changes. Although carefully tailored remedies may curtail immediate judicial intervention, such remedies restrict the school districts'

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change adversely affect morale, achievement, race relations, and efficiency. *Id.* at 48-49. Uncertainty is especially taxing on parents because it involves their children—an aspect of their lives in which they strive for normalcy.

282. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971).

283. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 584 F. Supp. 328, 352 (E.D. Ark.), *rev'd*, 738 F.2d 82 (8th Cir. 1984).

284. Judge Arnold criticized this action in his concurring and dissenting opinion:

> [The District Court] is in the best position to write a decree. Instead, a decree today springs full-grown from the brow of this Court, a decree that will, I dare say, startle all the parties to this case, including even those (if there are any) who like what they see.

Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404, 437 (8th Cir. 1985) (Arnold, J., concurring in part, dissenting in part), *cert. denied*, 476 U.S. 1186 (1986).

285. *Id.* at 434-36.

ability to meet future challenges without first consulting the supervising court. Finally, courts should avoid micromanagement by implementing remedies that limit the courts' role to macromanagement. These principles are becoming increasingly important because schools under court supervision must be able to implement the fundamental changes in education that many educators and politicians now demand.

There is one final irony in the Little Rock case. The district court found that the PCSSD was not meaningfully autonomous, in part, because the PCSSD was financially dependent on the property tax monies it received from land in the City of Little Rock.[286] The Eighth Circuit rejected this conclusion and, furthermore, expanded the LRSD boundaries to be coterminous with the City of Little Rock. The district court's assessment of the situation now has proved to be painfully true. The PCSSD is currently in severe financial trouble due to the loss of the tax monies from the lands lost in the annexation.[287] The PCSSD now faces three possibilities for the future. First, the State may take over the school district. Second, the court may fragment the PCSSD and merge the pieces into several surrounding school districts. Under this plan, some PCSSD schools would become part of rural school districts that are virtually all white. Finally, the court may split the PCSSD in half, and consolidate the area north of the river with the NLRSD and the area south of the river with the LRSD.[288]

V. CONCLUSION

Education is an inherently future-oriented endeavor—one generation of society prepares the next generation for its individual and collective future. Traditional equitable remedies require the court to focus on the past; the court identifies past violations and introduces corrective measures to cure the effects of those violations. Thus, in school desegregation cases, the courts must formulate remedies to correct past violations, and educators must work within the courts' remedial guidelines to educate students for the future.

One solution to this dichotomy is for the courts to withdraw from school desegregation remedies.[289] Yet constitutional violations mandate that courts enter the fray. Still, courts can adhere to the three traditional equitable principles, but they should not do so mechanically. The

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286. Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 584 F. Supp. 328, 341 (E.D. Ark.), *rev'd*, 738 F.2d 82 (8th Cir. 1984).

287. Telephone interview with M. Samuel Jones III, Attorney for Pulaski County Special School District No. 1 (Aug. 30, 1991).

288. *Id.*

289. *See* L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).

courts must recognize that they are applying traditional equitable principles in a nontraditional forum and adjust these principles accordingly. Thus, courts still may define the scope of the remedy by the scope of the impact of constitutional violations, but courts also must focus on the gravity of the present harm, not simply on the severity of the past violation.

Likewise, courts still can tailor remedies to place black children in a position they could have occupied were there no discriminatory acts, but the courts must recognize that this is a highly subjective goal. Thus, courts must articulate their vision of this goal so that their role in its effectuation is clearly defined and may be monitored by local entities.

Finally, courts still should respect the autonomy of the defendant school districts, but the courts should not do so by mechanical half-measures that lead to incomplete remedies. First, courts must recognize the necessity of immediate intervention to curtail long-term intervention. Then, courts must structure the broad outline of a complete remedy and allow school districts the fiexibility and autonomy to effectuate that remedy with minimal long-term judicial intervention.

Joseph Henry Bates