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ENDING THE DUAL SYSTEM OF AMERICAN PUBLIC EDUCATION: THE URGENT NEED FOR LEGISLATIVE ACTION

Erwin Chemerinsky*

Almost three decades have passed since the Supreme Court proclaimed in Brown v. Board of Education\(^1\) that separate but equal has no place in American public education. Unfortunately, despite thirty years of heated battles urban schools remain separate and unequal. In almost every major city the pattern is the same: inner city school districts comprised predominantly, or even exclusively, of racial minorities, surrounded by suburban schools whose enrollments are nearly totally white.\(^2\) In major metropolitan areas, three out of four black children attend predominantly black schools.\(^3\) Forty percent of black students attend schools that are ninety to one hundred percent black.\(^4\)

Perhaps this segregation would be tolerable if inner city and suburban schools were otherwise equal.\(^5\) By any measure, however, white schools are far superior to those attended by racial minorities.\(^6\) On the average, it is

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2. Justice Thurgood Marshall has observed that there is "an expanding core of virtually all negro schools immediately surrounded by a receding band of all white schools." Milliken v. Bradley, 418 U.S. 717, 785 (1974) (Marshall, J., dissenting). See also United States Comm’n on Civil Rights, Fulfilling the Letter and the Spirit of the Law: Desegregation of the Nation’s Public Schools 153-54 (1976) (Denver’s public school student population has a higher percentage of minorities than the general population); Note, Interdistrict Remedies for Segregated Schools, 79 Colum. L. Rev. 1168, 1173-74 (1979) (discussion of “white flight” resulting in black inner city schools and white suburban schools in Wilmington, Chicago, Louisville, Kansas City, and New York) [hereinafter cited as Interdistrict Remedies]. See infra notes 16-35 and accompanying text.


4. Statement, supra, at 3. According to the most recent statistics, in Illinois 68% of black students attend schools that are 90-100% black. Illinois Schools Most Segregated, Chicago Sun Times, Sept. 5, 1982, at 6, col. 1.

5. It should be noted that some prominent black educators favor abandoning efforts to desegregate schools, preferring that all energies be devoted to improving the quality of black schools. See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 480-82, 488-93 (1976) (opposition to busing increasing in black community because of its small effect on the quality of education) [hereinafter cited as Serving Two Masters].

estimated that twenty percent more is spent on each white student's education than on each black pupil's schooling. White students have better teachers, better facilities, and better curriculum. This disparity in resources is reflected in differences in achievement: whites continually outperform blacks in every measure of educational attainment. It is beyond doubt that American public schools are separate and unequal.

These inequities might be acceptable if education were of little importance. However, few would disagree with Justice Warren's observation in Brown that:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education in our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms.

It is now almost thirty years since the Supreme Court ordered school desegregation to occur with all deliberate speed. In light of the inequalities
in urban public education, it is imperative that action be taken to make Brown's dream a reality.

Since beginning the battle to end the dual system of education, efforts generally have focused on obtaining judicial orders to desegregate schools and equalize resources. Unfortunately, restrictive Supreme Court decisions limiting the availability of judicial relief have made it impossible for the federal courts to remedy the inequities in American public education. Yet, despite the inherent futility of litigation, efforts remain almost exclusively centered on securing judicial remedies for segregated, unequal schools. Little attention has been paid to the possibility of legislative action to insure equal educational opportunity.

Only legislation creating metropolitan school districts can succeed in eliminating the dual system of education that has existed throughout American history. Such legislation, at either the federal or state level, is politically feasible and would guarantee equal educational opportunity for rich and poor, whites and minorities. Section one of this article discusses the urgent need for action to change the current educational system. Section two argues that only metropolitan school districts can achieve equal educational opportunity.

12. United States Comm'n on Civil Rights, Reviewing the Decade of School Desegregation, 1966-1975 1-1 (1977) (tables demonstrating that courts were the major intervening source of school desegregation). For a discussion of the judiciary's efforts to desegregate schools, see L. Graglia, Disaster By Decree (1976) [hereinafter cited as Graglia]; J. Wilkinson, From Brown to Bakke (1979) [hereinafter cited as Wilkinson].

13. In Milliken v. Bradley, 418 U.S. 717 (1974), the Supreme Court held that federal courts may not issue a multidistrict, area-wide remedy for a school segregation violation by a single district. The Court's rationale for this restrictive decision was that there was no proof that one district had caused segregation in another district, there was no proof that district boundary lines were formed to foster segregation, and there was no proof that the included districts were not given the opportunity to be heard. Further, in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court limited strict judicial scrutiny to school financing cases involving laws operating to the disadvantage of suspect classes or which interfere with fundamental rights. See also Wright, Are the Courts Abandoning the Cities?, 4 J.L. & Educ. 218, 220-22 (1975) (arguing that the combined effect of the Supreme Court's decisions in Milliken and Rodriguez is to prevent effective judicial action to create equal educational opportunity) [hereinafter cited as Wright]. For further discussion of restrictive Supreme Court decisions, see infra notes 141-69 and accompanying text.

14. This Article does not suggest that it is not the proper role of the courts to act to desegregate schools and equalize educational opportunity. Rather, the point is that recent decisions by the Supreme Court indicate that effective judicial actions will not be forthcoming. Hence, attention must turn to the legislature and the possibility for statutory action to solve the problem. See infra notes 141-89 and accompanying text.

15. G. Orfield, Must We Bus? 454-55 (1978) [hereinafter cited as Must We Bus?]. Professor Orfield has recognized that:

[There has been little serious discussion of the many ways Congress could exercise its power to address public concern about the desegregation process, to set national minimum standards that would produce some desegregation even without court orders, and, on the most ambitious level, to replace the judicial process by enacting legislation that would remedy all constitutional violations.

Id. at 442.
and considers the possible arguments against metropolitan districts. Finally, section three outlines the need for legislative action, examining the impossibility of effective judicial relief and the desirability of legislation to create metropolitan school districts.

THE IMPERATIVE FOR ACTION: URBAN EDUCATION IN THE 1980’s

The Current Realities

In most major cities school district lines parallel political boundaries. That is, there is a separate school district for each political subdivision; each city and suburb has its own school system. Although, in itself, such fragmentation of authority over schooling among many different districts in a single metropolitan area is not objectionable, the effect is to separate whites from blacks, and rich from poor. In virtually every urban area, the inner city is predominantly, and increasingly, comprised of racial minorities. By contrast, the surrounding suburbs are almost exclusively white. What little minority population does reside in the suburbs is concentrated in isolated towns that are almost entirely black.


18. In fact, some might praise the existence of separate school districts on the ground that they help provide for local control over education. See, e.g., Milliken v. Bradley, 418 U.S. 717, 741-44 (1974) (local autonomy over schools believed to be necessary to the quality of the educational process); C. Benson, Economics of Public Education 226-29, 241 (1961) (discussion of the economic benefits of local control of school funding); M. Cohen, B. Levin, & R. Beaver, The Political Limits to School Finance Reform 21-23 (1973) (proponents of local control contend local control depoliticizes education and preserves financial and educational resources) [hereinafter cited as Political Limits]. Such praise of localism, however, may be no more than a rhetorical cover to permit white suburbs to devote all of their educational resources to their residents’ advantage in segregated schools. See Taylor, Avoiding the “Thicket,” 2 J. L. & Educ. 482, 483 (1973). See generally W. Riker, Federalism: Origin, Operation, Significance 146-47 (1964) (claims of localism permit local majorities to suppress local minorities). Moreover, it is quite possible to preserve local control while still eliminating separate, unequal schools. See infra notes 122-32 and accompanying text.


20. See supra note 17.

It is impossible to identify any single cause for the separation of whites and blacks into segregated cities and suburbs. A complex set of factors have combined to create this racial isolation including exclusionary zoning, restrictive covenants, discriminatory insurance and loan policies, location of public housing, and individual discriminatory practices of real estate brokers and property owners. It must be emphasized that the segregation of cities and suburbs is not a matter of each race simply choosing to live by itself or economics precluding the races from being able to live together. Segregation is largely a product of governmental policies and practices throughout the course of American history. For example, until relatively recently, the Federal Housing Authority officially encouraged separation of the races in issuing mortgages and loan guarantees. The FHA Official Manual prohibited issuance of loans which would cause "[i]nfiltration of unharmonious racial or nationality groups." This translated into whites receiving federal assistance to buy homes in the suburbs, while blacks only could obtain aid for central city dwellings.

Similarly, during the 1950's and 1960's, urban renewal caused the destruc-

22. As one commentator noted:

[most residential segregation observable throughout the United States is probably
due to a combination of institutional and individual discrimination having little
to do with school authorities: exclusionary zoning, restrictive covenants, discriminatory
Federal Housing Administration and Veterans Administration insurance and loan
policies, siting of public housing, and the practices of mortgage lenders, real estate
brokers, and individual property owners.

See J. DENTON, APARTHEID AMERICAN STYLE 37-75 (1967); R. FORMAN, BLACK GHETTOS, WHITE

23. STATEMENT, supra note 3, at 14-15 (segregation today still largely due to state action
rather than income differences or individual choice). See Farley, Residential Segregation and

v. Bradley, 21 WAYNE L. REV. 751, 765-68 (1975). The practices discussed in this article
include discrimination in the issuance of federal mortgage insurance during the 1930-40's, state
court enforcement of private restrictive covenants, and the ineffectiveness of recent governmen-
tal attempts to provide fair housing. The article also notes that segregation in cities and suburbs
cannot have been caused by economic factors because blacks often pay higher rents than whites,
blacks often do not live close to their job location, and few blacks hold jobs in suburbs.

25. C. ABRAMS, FORBIDDEN NEIGHBORS 229-43 (1971). The Federal Housing Administration
(FHA) adopted a segregation of races policy that existed until 1950. Id. at 234. The FHA's
official manual stated that properties within a neighborhood must be occupied by "the same
social and racial classes" if stability was to be maintained. Id. at 234. Pursuant to this policy,
FHA agents prevented minorities from buying homes in white neighborhoods and pressured
builders and lenders not to deal with minorities. Id. at 229-30. See also Comment, The Public
Housing Administration and Discrimination in Federally Assisted Low Rent Housing, 64 MICH.
L. REV. 751, 762-63 (1966) (discussion of intentional segregation on the part of the Public
Housing Administration).

26. The Federal Housing Authority Official Manual (FHA Official Manual) is quoted in
(4th Cir. 1972), aff'd by evenly divided Court, 412 U.S. 92 (1973). See also STATEMENT, supra
tion of 400,000 housing units, but only three percent of the residences ever were rebuilt. The result was to force many black families to relocate to the poor, more blighted areas, because they could not obtain homes outside the central cities. Furthermore, low-income public housing was constructed almost exclusively in inner cities because the FHA permitted suburbs to veto construction of such housing. The net effect of these and similar governmental practices was to separate the races along the political boundary lines of cities and suburbs.

Because school district lines are drawn to match political boundary lines which separate whites from blacks, inevitably schools are racially segregated. In 1980, "63 percent of black students and 66 percent of hispanics were in segregated schools, that is, schools with more than half minority enrollment." The statistics for specific cities are even more startling. In Chicago, in 1981, whites comprised only 17 percent of students in the public school system. In Washington, D.C., the public schools are over 96 percent black. In Baltimore, Dallas, Detroit, Houston, Los Angeles, Miami, Memphis, New York, and Philadelphia whites constitute less than one-third of the students enrolled in public schools.

Moreover, political boundary lines do not just divide on the basis of race, they also separate on the basis of income. The suburban school systems are much wealthier than central city school districts. This difference in wealth translates into great disparity in the ability to provide revenues for education.

Local governments provide the majority of funding for schools. Ninety-eight percent of local governmental revenues are derived from property taxes. Altogether, local property taxes provide about sixty-two percent of

27. NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 163 (1968).
28. STATEMENT, supra note 3, at 25.
30. See supra note 24.
34. UNITED STATES DEPT. OF HOUSING AND URBAN DEV., THE PRESIDENT'S NATIONAL URBAN POLICY REPORT, 1980 at 10-12.
38. NATIONAL EDUC. FINANCING PROJECT, ALTERNATE PROGRAMS FOR FINANCING EDUCATION 61 (1971) [hereinafter cited as NATIONAL EDUC. FINANCING PROJECT]; THOMAS, supra note 37, at 261.
educational expenditures. Property taxes raise money relative to the value of the property. The greater the assessed valuation of the property, the larger the amount of tax money available. Thus, political boundary lines create cities and suburbs with markedly different resource bases. As the National Educational Financing Project noted: "Variations in assessed valuation of property exists in some states exceeding 10,000 to 1. . . . Other states have variations on the order of 500 to 1." For example, in Cook County, Illinois, the wealth of the richest elementary school district was thirty-five times that of the poorest. In California, "the assessed valuation per unit of average daily attendance of elementary school children ranged from a low of $103 to a peak of $952,156—a ratio of nearly 10,000 to 1."

These variations in wealth mean that poor school districts must tax their property at exorbitant rates to get the same amount of revenue that richer school districts can obtain with much lower assessments. In other words, districts with low tax bases must often tax themselves at rates much higher than wealthier districts. The facts in *San Antonio Independent School District v. Rodriguez* illustrate this disparity. The town of Edgewood, Texas, with an assessed property value per pupil of $5,960, taxed property owners at a rate of 1.00 percent of assessed valuation, and raised $26 for the education of each child. State and federal support increased Edgewood per pupil expenditures to $356. By contrast, the Alamo Heights, Texas school district had a property tax base of more than $49,000 per pupil. Implementing a tax rate of only .85 percent, the town of Alamo Heights raised $333 per student, which together with federal and state grants yielded a total expenditure of $594 per pupil.

Unfortunately, even imposing extraordinarily high tax rates, the poor school districts cannot match the expenditures of the wealthier school systems.

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40. Thomas, *supra* note 37, at 261 (property taxes vary according to community's wealth and willingness to tax).
47. Id. at 12-13.
48. Thomas, *supra* note 37, at 261; Shalala & Williams, *supra* note 44, at 368. Moreover, there is an inequity in forcing poor districts, with little resources, to tax themselves at exorbitant rates. Specifically, there is a decreasing marginal utility of money. To illustrate, if one individual has $100,000 and another individual has $1000, and both individuals lose 5% to tax, the impact on the wealthier individual is much less than that of the poorer individual. As such, rich districts could more easily tolerate a higher rate of taxes than poor districts.
As a result, far more money is spent for the education of suburban students than for inner city pupils. For example, the Clayton School District, a predominately white suburb of St. Louis, spends $3,441 per student on education, while St. Louis, a school system that is over 70% black, spends $1,863 per student. Overall, on the average, 15% to 20% more is spent on each white student’s education than on each black student’s.

The difference in expenditures translates into vast disparities in the quality of educational programs. Charles Benson, Professor of Educational Administration at Berkeley, observed:

In general, low quality of programs and high tax load were positively correlated. Even by taxing themselves far above the average, poor districts still were able to finance only a meager set of educational offerings. Indeed, the poor places could not, under any reasonable interpretation of public duty, fulfill the minimum state mandated requirements for schools.

Inadequate resources mean that poorer, predominantly black, inner city districts hire less qualified teachers and have significantly higher teacher-pupil ratios. Similarly, inner city students attend the shabbiest, most outmoded schools, with the fewest materials for learning. The separation of school districts along political boundary lines has created wealthy schools for whites and comparatively inadequate schools for blacks. State aid intended to equalize expenditures for education “is insufficient to overcome variations in local revenues based on the property tax.” The politically powerful suburban areas have acted to create “floors” and “ceilings” on aid which make it impossible for even state grants to eliminate the disparities in expenditures. States provide a minimum amount of aid for all districts regardless of their wealth and set a maximum amount of state aid, limiting what even the poorest districts can receive from the state.

The total picture emerging from this description is one that cannot be ignored. America has a dual system of education: separate and unequal.

The Necessity for Action

Some might look at this analysis and argue that change is unnecessary because there is no significant harm from the inequities described above. They would point to studies which ostensibly demonstrate that segregation

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50. Jencks, supra note 7, at 28.
51. C. Benson, The Economics of Public School Finance 156-57 (2d ed. 1968) [hereinafter cited as Benson].
52. See Coleman, supra note 8, at 1-6, 125-83; Harris & Lindsay, supra note 8.
53. Thomas, supra note 37, at 261.
54. Id. at 260-61. The evidence is overwhelming that nothing has been done to eliminate or even reduce the inequities that studies in the late 1960’s and early 1970’s documented. See, e.g., Brown, Ginsburg, Killahela, Rosenthal, & Tron, School Finance Reform in the Seventies: Achievements and Failures, in Selected Papers on School Finance 57, 99-100 (1978).
55. Berke, supra note 45, at 14; Thomas, supra note 37, at 261-62.
has no ill effects on educational achievement. In fact, there is research that purports to prove that expenditures for schools have no relationship to educational quality or scholastic achievement. Furthermore, there are assertions that education itself does not matter because it has little effect on social advancement. Thus, some could argue that separate, unequal schools are tolerable because no concrete harms have been demonstrated.

However, for three reasons, the arguments against school integration are without merit. First, the denial of equal opportunity for racial minorities is, in itself, a mandate for action even if desegregation and increased expenditures would not improve learning or social status. The guarantee of equality is of central importance in American society; the assurance of equality is morally, analytically, and rhetorically necessary.

Equality is morally essential because it compels us to care about how people are treated in relation to one another. It is morally wrong for a majority to treat a minority differently than it treats itself. As Justice Jackson stated over a quarter of a century ago:

There is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which

56. See, e.g., Goodman, DeFacto School Segregation: A Constitutional and Empirical Analysis, 60 CALIF. L. REV. 275, 426-27 (1972) (impact of integrated education on students is uncertain and variable) [hereinafter cited as Goodman]; van der Haag, Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark, 6 VILL. L. REV. 69, 75-77 (1955) (no proof exists that segregation is more humiliating to black children than integration). But see Hawley, The New Mythology of School Desegregation, 42 LAW & CONTEMP. PROBS. 214, 218 (1978) (of 73 studies surveying the effects of desegregation on education a positive effect was found in 40; no effect was measured in 21; and a negative effect was discovered in only 12) [hereinafter cited as Hawley]. See generally St. John, Desegregation and Minority Group Performance, 40 REV. EDUC. RESEARCH 111 (1972) (judicially mandated desegregation imposed before empirical research on effect of segregation on educational achievement existed).


58. See COLEMAN, supra note 8, at 325. But see HARRISON, supra note 45, at 186-92 (discussion of the available research on the effects of schooling concluding that education has a disproportionate positive effect on students with fewer social and economic resources).


60. The argument that the concept of equality is essential morally, analytically, and rhetorically is developed in Chemerinsky, In Defense of Equality: A Reply to Professor Westen, 81 Mich. L. REV. 201 (1983).

61. There is a rich volume of literature defending equality as a moral imperative. See, e.g., J. Rousseau, The Social Contract Book II, Ch. IV, in F. Coker, READINGS IN POLITICAL PHILOSOPHY 646-47 (rev. ed. 1938) (under the social compact theory, all citizens are equal and the government cannot burden one citizen over another). For additional discussion of the concept of equality, see NOMOS IX: EQUALITY (R. Pennock, ed. 1967); J. Rawls, A THEORY OF JUSTICE (1971); R. Tawney, EQUALITY (1931).
officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that the laws be equal in operation.  

Yet, the white majority treats racial minorities far differently than it treats itself. Whites have created a system whereby much more is spent on their education than is spent on education for blacks or hispanics. Whites, through state governments which they historically have controlled, have designed school districts which parallel political boundary lines and have systematically excluded minorities from suburban schools. Because the majority provides for minorities differently than it provides for itself, separate and unequal education is morally objectionable. 

Additionally, the notion of equality is analytically necessary because it creates a presumption that people should be treated alike, and places the burden of proof on those who wish to discriminate. A presumption in favor of treating people alike requires that there be a compelling reason for treating people differently. In other words, those who advocate equal educational opportunity do not have the burden to prove that it will make a difference. Rather, those who oppose it should be required to offer a strong justification against equality of education. Few today, however, would argue that racial minorities deserve to be treated in a manner inferior to whites. 

Furthermore, the principle of equality is rhetorically important because it is a powerful symbol that helps to safeguard rights that would be otherwise unprotected. The inequalities in educational resources and the segregation of minorities transmit a message that stigmatizes black schools as being inadequate. Even if expenditures on education do not have much effect, the fact that white suburbs spend so much on education is an indication, at least rhetorically, that expenditures on education are important. Thus, inner

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63. See supra notes 36-55 and accompanying text.
64. See supra notes 16-35 and accompanying text.
65. One commentator recognized that:

[There is that enduring something which causes us to ask the state to make its
case for distinguishing two humans, if it is to treat them differently; the state may
make its case in a thousand ways and it may be assisted in this by presumptions
galore, but make it it must.]
Coons, supra note 42, at 302.
66. Dimond, School Segregation in the North: There Is But One Constitution, 7 HARV.
C.R.-C.L. L. REV. 1, 32 (1972) (there should be a presumption against segregated schools and
they should be permitted to exist only if they serve a compelling interest that cannot be attain-
ed in other ways).
67. One commentator noted that "[w]hatever it is that money may be thought to contribute
to the education of children, that commodity is something highly prized by those who enjoy
the greatest measure of it." Coons, supra note 42, at 30.
city schools that possess far fewer educational resources will be perceived by whites and blacks as being inferior. Similarly, the strong opposition of whites to being bused into black schools6 conveys a message that these schools are not equal to those in the suburbs. The result is that notwithstanding reality, whites are perceived as having something that blacks and hispanics do not. Inevitably, this message imposes a stigma on minority members; they are confined to inferior schools. Even if desegregation and greater expenditures will not improve learning, minorities have the right to equal educational opportunities to assure this stigma is eliminated.49

In sum, the denial of equal education is a reason why change is imperative, regardless of whether reforms will improve schooling or society. Even if more money does not ensure a better education, blacks and hispanics should have an equal opportunity to be disappointed by its failure.70

Second, inequality in schooling might be tolerable if all schools were minimally adequate. No one denies that there is value to some formal schooling or that some expenditures are a prerequisite to providing a basic education.71 The studies purporting to question the value of increased expenditures for education merely demonstrate that beyond a certain point the benefits of additional funds for education diminish.72 The assumption is that American society has reached this threshold and provides a minimally sufficient education to all its citizens. Yet, by any measure, inner city schools are simply inadequate.73 They do not have the resources necessary to provide even a minimally sufficient education to all students. As such,


69. The importance of avoiding the stigma of separate, unequal schools was integral to the Court’s decision in Brown: “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” Brown I, 347 U.S. at 494. For development of the argument that segregated schools stigmatize minority students, see Black, The Lawfulness of the Segregation Decisions, 69 YALE L.J. 421, 426-27 (1960) (effect of segregation is to place blacks in a position of “walled-off inferiority”); Brest, Forward: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 8-10 (1976) (in Brown the Supreme Court gave recognition that segregated schools stigmatize minority students); Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 HARV. L. REV. 564, 568-69 (1965) (given the importance of public education in our society the racial stigma imposed by segregation must be deemed significant); Goodman, supra note 56, at 295 (stigma placed on black schools will not dissipate until those schools lose their racial identity).


72. None of the studies purport to conclude that education or expenditures are irrelevant. Rather, they simply question the strength of the correlations between education and achievement and expenditures and learning. See supra note 57.

73. Benson, supra note 51, at 156-57.
it is meaningless to argue over what is the point of diminishing returns for additional expenditures; inner city schools clearly are nowhere close.\textsuperscript{74}

Finally, at best, studies attacking the value of desegregation, of greater educational expenditures, or of the importance of education simply create uncertainty. On balance, research literature demonstrates a strong correlation between desegregation and educational achievement and improved interracial attitudes.\textsuperscript{75} Likewise, most studies show a positive relationship between expenditures and educational attainment.\textsuperscript{76} If these studies are called into question, the issue becomes, how should the conflicting evidence be construed? That is, if society is unsure of the value of desegregation or greater expenditures, how should it act until research is more certain? Should nothing be done until there is a definitive resolution of the unanswered empirical questions?

Even if there is uncertainty, action to create equal educational opportunities is essential.\textsuperscript{77} If society provides desegregated, equal education, and the results of these efforts prove insignificant, at most society misspent some money in pursuit of equality. On the other hand, if society does not eliminate its dual school system, and segregated, poorly funded schools are harmful, then generations of minority children will be irreparably injured. Minority children will have been robbed of their right to fully participate in society; they will have been denied their chance to realize their full potential as human beings. This is a risk society cannot afford to take. Until it is conclusively proven otherwise, unequal schools must be presumed harmful and must be eliminated.

\textbf{THE NEED FOR METROPOLITAN SCHOOL DISTRICTS: TOWARDS A UNITARY SYSTEM OF AMERICAN PUBLIC EDUCATION}

\textit{The Futility of Intradistrict Remedies}

Attempts to eliminate the dual system of education have focused almost

\textsuperscript{74} Finger, \textit{supra} note 6, at 58.

\textsuperscript{75} See, \textit{e.g.}, Amir, \textit{The Role of Intergroup Contact in Change of Prejudice and Ethnic Relations}, in \textit{TOWARDS THE ELIMINATION OF RACISM} 288 (P. Katz ed. 1976) (research shows positive relation when contact is with persons of equal or higher status in a non-competitive environment); Hawley, \textit{supra} note 53, at 218 (use of input-output statistical studies reveal a positive effect on black achievement if desegregation is accomplished in the primary grades); McConahay, \textit{The Effects of School Desegregation Upon Students Racial Attitudes and Behavior: A Critical Review of the Literature and a Protagomenon to Future Research}, 42 \textit{LAW \& CONTEMP. PROBS.} 73, 101 (Summer, 1978) (literature shows improved interracial interaction and friendship patterns in desegregated schools); Rossell, \textit{School Desegregation and Community Social Change}, 42 \textit{LAW \& CONTEMP. PROBS.} 133, 147, 177 (Summer, 1978) (research on community attitudes shows that desegregation of schools results in a decrease in racial intolerance in both the North and the South).

\textsuperscript{76} See, \textit{e.g.}, C. Benson, \textit{The Cheerful Prospect: A Statement on the Future of Public Education} 22-26 (1965) (comparison of high-expenditure versus low-expenditure districts and the resulting effect on educational quality); McDermott \& Klein, \textit{supra} note 57 (discussion of statistical analysis used to show correlation between expenditures and educational attainment).

\textsuperscript{77} See Dworkin, \textit{Social Sciences and Constitutional Rights—The Consequences of Uncer-
exclusively on *intradistrict* remedies. Courts have concentrated on ordering school districts to develop plans to eliminate all vestiges of segregation resulting from district policies.\(^7\) For example, courts frequently have ordered busing of pupils within districts to achieve desegregation.\(^8\) The Supreme Court, however, has strongly resisted attempts to develop judicially imposed *interdistrict* remedies to equalize expenditures or achieve integration.\(^9\)

Unfortunately, the focus on intradistrict solutions is misplaced; intradistrict remedies can never achieve desegregation or equalize educational resources. The existence of separate school districts, paralleling political boundary lines, creates the dual system of education. Equal educational opportunity only can be achieved by breaking down the barriers between city and suburban school districts.\(^10\) Simple demographics insure the failure of remedies limited to central city areas; specifically, if reforms only include inner cities, over seventy percent of whites earning more than $10,000 a year would not be included in the program.\(^11\)

Effective desegregation cannot occur if the remedy is confined to the inner cities. There are not enough white students in most major cities to achieve desegregation.\(^12\) In most large urban areas, central cities' public schools are over two-thirds black.\(^13\) As such, there are not enough white students to permit integration of inner city schools.\(^14\) For example, in Atlanta, Georgia,
over eighty-five percent of the students in the public school system are black. 66 Thus, the Fifth Circuit was compelled to conclude that the Atlanta school system was desegregated, even though 92 out of 148 schools had more than ninety percent black enrollment, because it was impossible to achieve a greater degree of integration in light of the relative absence of white students. 67 Unless interdistrict remedies are employed, there is no way to effectively desegregate cities such as Atlanta. As Professor Smedley explains:

Regardless of the cause, the result of this movement [of whites to suburban areas] is that the remaining city public school population becomes predominately black. When this process has occurred, no amount of attendance zone revision, pairing and clustering of schools, and busing of students within the city school district could achieve substantially integrated student bodies in the school, because there simply are not enough white students left in the city system. 68

Likewise, suburban school districts cannot be desegregated via intradistrict remedies because there are few, if any, minority students in the suburbs. Furthermore, efforts to desegregate inner cities are often counterproductive. Desegregation of central city schools frequently causes massive "white-flight" to suburban areas, making desegregation efforts even more difficult. 69 It is simply impossible to desegregate urban schools by relying solely on intradistrict remedies.

Similarly, expenditures for education never can be equalized so long as cities and suburbs maintain separate school systems. The disparity in the resource bases of cities and suburbs is such that inner cities cannot possibly match suburban expenditures for education. 69 Nor will suburban areas permit adequate state aid to alleviate the revenue disparities. Under the current system, the suburbs are unwilling to allow their tax dollars to be used to provide adequate grants for inner city areas. 70

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412 (1973) (Richmond, Virginia and Detroit, Michigan are cited as examples) [hereinafter cited as Smedley].


87. Calhoun v. Cook, 522 F.2d 717 (5th Cir. 1975).

88. Smedley, supra note 85, at 412.


90. BENSON, supra note 51, at 156-57.

91. BERKE, supra note 45 at 14; J. Pincus, SCHOOL FINANCE IN TRANSITION 1-2 (1974); Thomas, supra note 37, at 261. In general, it is unlikely that the rich will ever provide adequate support for social programs for the poor unless they also will somehow benefit. See generally Zarefsky, Book Review, 53 TEX. L. REV. 636, 637-39, 651-52 (1975) (discussing the
Some might contend that the above analysis is not an objection to intradistrict remedies; rather, it is an argument for integrating cities and suburbs. If housing patterns were desegregated so that rich and poor, whites and minorities, lived in the same places, the entire problem would be solved. While this is certainly true, society cannot wait for housing desegregation to occur before solving the crisis in education. The degree of residential separation is decreasing so slowly that, absent a sudden change in the rate, it will be four to five centuries before cities and suburbs are integrated. Ending the dual system of education clearly requires an abandonment of intradistrict strategies.

Ending the Dual System of Education: Metropolitan School Districts

The above analysis demonstrates that separation of school districts along political boundary lines divides rich from poor, whites from minorities, and insures the existence of a dual system of education. Therefore, the solution to these problems must involve the elimination of the numerous separate school districts within each metropolitan area. The remedy must be to create one public school system for all residents—city and suburban dwellers alike—of an urban area. Such metropolitan school districts would create a unitary system of education: the school district would include whites and blacks, the wealthy, and the impoverished.

Specifically, such metropolitan districts would permit effective desegregation of the public school system. As Professor Sedler noted, "desegregation on a metropolitan basis can often eliminate most, if not all, predominantly black schools. . . . [I]f metropolitan desegregation were required many of the country's metropolitan areas could be desegregated effectively." Whites and minorities would be part of the same district and could be assigned to schools so as to insure a racial balance. Administration of separate city and suburban school systems often precludes integration of neighboring districts that have different racial compositions and could be easily desegregated.

Further, metropolitan school districts are the best way to desegregate urban...
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schools because they provide the only solution to the problem of "white flight." Programs to desegregate inner cities permit whites to flee to the suburbs and escape inclusion. If the suburbs were included in the desegregation program, however, whites would have no incentive to leave the central cities. As Judge J. Skelly Wright explains:

[white flight can be slowed, and eventually reversed, only by incorporating the suburbs and the central city into a single political community, capable of removing the incentives to mass segregation. . . . Only with metropolitan government can we begin to replace fear and hate with the development of a sense that each citizen's fate is necessarily linked to that of every other citizen.]

Reducing white flight will not only make effective school integration possible, it also will help desegregate inner city areas. Metropolitan school districts will provide one less reason for whites to leave the city and one less obstacle to whites settling in the city.

In addition, metropolitan districts will eliminate the inequities in school financing. A single tax base for the entire school district will exist. No longer will wealthy sections of an urban area easily raise large sums of money while poorer areas struggle to raise less. Metropolitan districts will insure that the same amount is spent on the education of all students in an urban area, rich and poor, white and black. In fact, there is a widespread belief among educators that metropolitan districts would be more economically feasible. Large, single districts would be better equipped to provide ser-

99. Lawrence, Segregation Misunderstood: The Milliken Decision Revisited, 12 U.S.F.L. Rev. 15, 15 (1977) (given the increasingly segregated urban/suburban demography metropolitan desegregation is the last hope for an effective remedy) [hereinafter cited as Lawrence].


101. Wright, supra note 13, at 225.

102. Some might argue that white flight would continue, albeit in a different form. White parents would simply send their children to private or parochial schools and thereby frustrate effective desegregation. There is, however, no evidence that this shift to private or parochial schools would be so significant as to limit desegregation. Sedler, supra note 17, at 539 n.12. In fact, the experience of cities which have attempted metropolitan desegregation is that such white flight to private and parochial schools is minimal and short-lived. For example, in Charlotte, North Carolina; Tampa, Florida; and Nashville, Tennessee, all cities where metropolitan desegregation occurred, whites eventually returned to the public schools. Statement, supra note 3, at 57.

103. Sedler, supra note 17, at 554 (metropolitan desegregation would necessarily result in a sharing of educational resources by wealthy suburban districts). See Foster, supra note 100, at 135-36 (metropolitan desegregation would improve the delivery of services in schools and would reduce the inequalities of educational conditions); Harrison, supra note 45, at 19-23 (expand financial resource base through consolidation of existing school districts).


105. Sedler, supra note 17, at 554; Foster, supra note 100, at 135-36.

vices for the handicapped and gifted, counseling programs, sophisticated educational tools, and improved teacher training.\textsuperscript{107}

Metropolitan school districts are not merely a theoretical ideal. Although metropolitan school districts exist in very few major cities, where such systems have been implemented they have substantially reduced segregation and have equalized educational resources.\textsuperscript{108} For example, a metropolitan district created in Indianapolis, Indiana, decreased black inner city enrollment from forty to fifteen percent.\textsuperscript{109} When rich and poor are part of the same school system, the rich will adequately support the system financially, thus, insuring sufficient resources for poor students as well.\textsuperscript{110}

In sum, only metropolitan school districts can end the injustices of segregated, unequal schools. Nothing short of breaking down the barriers between city and suburban schools can eliminate the dual system of education.

\textit{Possible Objections to the Creation of Metropolitan School Districts}

Metropolitan school districts are politically, economically, and administratively feasible.\textsuperscript{111} To support this conclusion it is necessary to examine the potential objections to metropolitan districts.

Opponents of metropolitan districts might initially argue that such an approach is undesirable because it would increase the busing of students.\textsuperscript{112} At the very least, more busing would make metropolitan districts politically undesirable since few politicians would support a proposal that would increase busing. However, whites and blacks live in sufficient proximity in urban areas so as to make extensive busing unnecessary in metropolitan districts.\textsuperscript{113} As University of Chicago Professor Gary Orfield recognizes:

\textsuperscript{107} Id.
\textsuperscript{109} See United States v. Board of School Comm’rs, 503 F.2d 68, 76 (7th Cir. 1974), cert. denied, 421 U.S. 929 (1975); Manley, \textit{Litigation and Metropolitan Integration}, 10 URB. LAW. 73, 95-102 (1978).
\textsuperscript{110} This is the core of the concept of the unitary system: if rich whites have their education provided by the same system as poor blacks, the whites in providing for themselves will, at the same time, be providing for minorities. Harrison, \textit{supra} note 45, at 185 n.3. One author noted that:

\begin{quote}
Social Security and Medicare . . . both are popular because of their unitary nature, offering a single system of assistance from which virtually everyone benefits. Since blacks and whites, rich and poor, receive benefits under the auspices of the same program, the interests of all Americans are inextricably linked. No one wishes to impede the program’s operation because to do so would threaten his self-interest. One stands to gain by expanding the program, to lose by its contraction.
\end{quote}

\textit{Book Review, \textit{supra} note 91, at 648.}

\textsuperscript{112} Hain, \textit{supra} note 108, at 808.
\textsuperscript{113} \textit{Must We Bus?}, \textit{supra} note 15, at 148-49 (reorganization of existing busing systems to effectuate desegregation could result in both decreased travel time and decreased expenditure).
A metropolitan plan often requires little more busing than one confined to the city. One reason this is so is that operation of separate city and suburban systems often prevents easy desegregation of adjacent schools of different racial composition that happen to be on opposite sides of the city-suburban boundary line.\textsuperscript{114}

In contrast to the general view, busing school children under a metropolitan desegregation program is not extensive compared with busing for intradistrict desegregation.\textsuperscript{115} In fact, there is strong evidence that metropolitan districts often would reduce the amount of busing necessary to achieve desegregation.\textsuperscript{116} Currently, there are so few whites in inner cities that extensive busing is necessary to integrate schools. By contrast, the large number of students in metropolitan districts would make it possible to achieve desegregation with less busing. Suburban schools are often close enough to city boundaries to permit integration with a minimum of travel time.\textsuperscript{117} For example, in Charlotte, North Carolina, a metropolitan desegregation plan reduced the average bus ride from one hour to thirty-five minutes.\textsuperscript{118} Similarly, in Detroit, a proposed metropolitan plan estimated a maximum travel time of forty minutes, compared with previous trips of up to an hour and a half.\textsuperscript{119} In short, metropolitan plans make it possible to achieve greater desegregation with the same, if not less transportation.\textsuperscript{120}

This is not to say that metropolitan districts can effectively desegregate schools without any busing. Rather, the point is that busing need be no greater than what already occurs in intradistrict plans, and that, generally, it even can be less. Furthermore, metropolitan plans can design busing programs to insure that no trips are unreasonably long in light of the age of the students and the distance to be travelled.\textsuperscript{121}

A second possible objection to metropolitan school districts is that a loss

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{STATEMENT, supra} note 3, at 42.

\textsuperscript{116} \textit{Id.} at 52. Generally, busing for desegregation does not substantially add to the travel time needed to get to and from school. In a study of eleven cities that used busing for desegregation, the average trip increased by more than fifteen minutes in only two cities; in six cities the time for travel remained the same. \textit{UNITED STATES COMM’N ON CIVIL RIGHTS, YOUR CHILD AND BUSING} 21-22 (1972).

\textsuperscript{117} \textit{STATEMENT, supra} note 3, at 53-54.


\textsuperscript{120} \textit{Foster, supra} note 100, at 135-36. While most students in both cities and suburbs can be part of desegregated schools with metropolitan districts, it is true that there may be some students for whom integration is not possible. However, these students will also benefit from metropolitan districts because they will be assured educational expenditures equal to that of all students in the district.

\textsuperscript{121} In \textit{Swann}, the Supreme Court said that busing plans should be reasonable so as to prevent trips where "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." 402 U.S. 1, at 30-31. The same criteria of reasonability should be followed in designing busing plans for metropolitan school districts.
of local control over educational decision-making would result.\textsuperscript{122} Opponents might argue that separate school districts permit maximum local involvement in administering the schools. However, decentralized decision-making within metropolitan districts, would prevent loss of local control.\textsuperscript{123} As the United States Commission on Civil Rights report notes: "[d]ecentralization of decision-making in reorganized districts can avert a loss of local control or parental influence and, indeed, may even furnish parents with far more participation."\textsuperscript{124} Metropolitan districts are designed to centralize the assignment of pupils and the raising of revenue; virtually everything else can be handled by community subdistricts.\textsuperscript{125} In New York City, for example, community subdistricts have authority to hire and fire faculty, allocate the budget, and make curriculum decisions.\textsuperscript{126} As such, "[a] metropolitan system can result in a centralized-decentralized form of governance with the best of both worlds—central efficiency of operation and a considerable amount of decentralized control."\textsuperscript{127} Metropolitan districts will mean that some children might not attend neighborhood schools; nevertheless, this should not prevent parental involvement or local control. Control by a community of parents is possible as long as their children attend the same school, whether or not they all live in the school's immediate neighborhood.\textsuperscript{128} Parents' councils can be formed for each subdistrict, permitting substantial community involvement in the schools' operations.\textsuperscript{129}

Concerns about local control should be placed in perspective. Although local control is laudable, it is not more important than eliminating the dual system of education. In fact, the current educational structure hardly offers inner city parents a realistic prospect for local control. A "system in which for some citizens even high taxes produced low educational expenditures could hardly be justified as offering scope for local choice and 'participation in the decision-making process.'"\textsuperscript{130} While some black educators favor concentrating reforms on improving inner city schools through community control,\textsuperscript{131} such actions cannot succeed without more revenues for educa-

\begin{enumerate}
\item \textsuperscript{122} See Milliken v. Bradley, 418 U.S. 717, 741-44 (1974); POLITICAL LIMITS, supra note 18, at 121-23 (1973); Interdistrict Remedies, supra note 2, at 1188-89.
\item \textsuperscript{123} Statement, supra note 3, at 41-42.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id. at 49-50.
\item \textsuperscript{126} See N.Y. EDUC. LAW § 2590 (McKinney 1968). Although there is no metropolitan district in New York City, given its size, its use of community subdistricts is a precedent for governance of even very large metropolitan districts.
\item \textsuperscript{127} Foster, supra note 100, at 135-36.
\item \textsuperscript{129} Interdistrict Remedies, supra note 2, at 1189.
\item \textsuperscript{130} Taylor, Avoiding the "Thicket," 2 J. L. & EDUC. 482, 483 (1973).
\item \textsuperscript{131} See, e.g., Bell, School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools, 1970 Wis. L. REV. 257, 290-92; Serving Two Masters, supra note 5, at 482, 488-93.
\end{enumerate}
tion; resources that only will be available with metropolitan districts.\textsuperscript{132}

A third possible objection to metropolitan districts is that their size would render them administratively unfeasible. However, the experience in many areas, especially the South and the West, where large county-wide districts exist, demonstrates that metropolitan districts are practical.\textsuperscript{133} The average school district in Florida or Louisiana is ten times the geographical size of the average district in Illinois, New York, or New Jersey.\textsuperscript{134} Moreover, if subdistricts are created to provide local control, metropolitan districts should present no administrative obstacles. A central school board can be selected representing all parts of the metropolitan area,\textsuperscript{135} with community boards existing to make local decisions.

Finally, some might object to metropolitan districts on the ground that they will harm the education of white students. The evidence is overwhelming, however, that desegregation does not decrease the educational achievement of whites.\textsuperscript{136} Nor would spending for the education of the wealthy necessarily be reduced. Experience demonstrates that expenditures in poorer districts will be raised without a decrease in spending in the richer areas.\textsuperscript{137} There is absolutely no reason to believe that whites would be harmed by metropolitan school districts. Metropolitan districts are a practical, effective way to provide equal educational opportunity. In fact, they are the only way.

THE NEED FOR LEGISLATIVE ACTION TO CREATE METROPOLITAN SCHOOL DISTRICTS

The Futility of Litigation

From the beginning of the movement to desegregate schools, reformers turned to the federal courts for relief. Long before the Supreme Court's decision in \textit{Brown v. Board of Education},\textsuperscript{138} there was extensive litigation in federal courts aimed at ending the inequities in public education.\textsuperscript{139} The

\begin{itemize}
  \item \textsuperscript{133} Statement, \textit{supra} note 3, at 43.
  \item \textsuperscript{134} Hain, \textit{supra} note 108, at 809-10 n.125.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{137} Professor Harrison recognized that:
    In our research we have documented that public school finance reform consistently results in relatively greater expenditures by poor school systems. However, we have never found that any specific public school finance reform strongly reduces absolute expenditures by the rich. Thus the reason that public school finance reform results in both greater expenditures, and more equal expenditures, is because it helps poor school systems more than the rich, not because it hurts rich school systems more than the poor.
  \item \textsuperscript{138} 347 U.S. 483 (1954).
  \item \textsuperscript{139} See, \textit{e.g.}, Sweatt \textit{v. Painter}, 339 U.S. 629 (1950) (because of gross disparity between
landmark decision in Brown produced a tremendous increase in cases as plaintiffs filed suits challenging segregated school systems existing throughout the country.\textsuperscript{140} Massive resistance by state and local officials\textsuperscript{141} meant that the only hope for effective desegregation was through judicial action.\textsuperscript{142} Although progress towards desegregation was slow, as whites opposing integration tried every imaginable ground for delay,\textsuperscript{143} the judiciary remained aggressive in attempting to carry out Brown's mandate.\textsuperscript{144}

state supported University of Texas Law School and newly established black law school, legal education offered black petitioner is not substantially equal and the equal protection clause requires that he be admitted to the University of Texas Law School); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (because appellant black student was entitled to receive same treatment as any other properly admitted student in state supported university, segregated library, dining room and classroom facilities constituted a violation of equal protection); Missouri \textit{ex rel.} Gaines v. Canada, 305 U.S. 337 (1958) (Missouri's plan to prevent black applicant's enrollment in only state law school violative of equal protection despite fact that state was prepared to pay tuition at out-of-state school); Berea College v. Kentucky, 211 U.S. 45 (1908) (state statute which permits education of both whites and blacks by the same corporation in separate localities does not defeat the object of a grant to maintain a college for all persons); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899) (state court's refusal of injunction to prevent unequal school board distribution of funds not state action within meaning of fourteenth amendment). There also were repeated efforts to secure relief from state courts. See, e.g., Williams v. Board of Educ., 79 Kan. 202, 99 P. 216 (1908) (black, pre-high school students cannot be compelled to attend a separate school when such attendance involves unavoidable hazard of travel through dangerous industrial area); State \textit{ex rel.} Clark v. Maryland Inst. for Promotion of Mechanical Arts, 87 Md. 643, 41 A. 126 (1898) (refusal of private school to admit black students not violative of fourteenth amendment). See also Larson, \textit{The New Law of Race Relations}, 1969 Wis. L. REV. 470, 482-83 (citing over 60 law suits challenging inadequate physical facilities, teacher qualifications, and curriculum of all black schools).

140. For a discussion of this litigation, see J. BASS, \textit{UNLIKELY HEROES} (1981); GRAGLIA, \textit{supra} note 12; WILKINSON, \textit{supra} note 12.


142. See, e.g., Cooper v. Aaron, 358 U.S. 1 (1958). The Supreme Court, in an unprecedented opinion signed by all nine justices, affirmed its holding in Brown and ordered desegregation of the Little Rock, Arkansas schools after the Governor of Arkansas had dispatched troops to prevent black students from entering the white high school. The Supreme Court declared: "[T]he federal judiciary is supreme in the exposition of the law of the Constitution. . . . No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." \textit{Id.} at 18. See also Bush v. New Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960) (refusing to give effect to "interposition acts" passed by southern legislatures to prevent desegregation), \textit{aff'd}, 365 U.S. 569 (1961).

143. Opposition to desegregation in the South was illustrated by the fact that ten years after Brown, "eleven states of the old Confederacy had a mere 1.17 percent of their black students attending schools with white students." Carter, \textit{supra} note 141, at 55-56. For a description of the various techniques used by Southern states to avoid the mandate of Brown, see \textit{supra} note 141.

144. See, e.g., Bradley v. School Bd. of Richmond, 382 U.S. 103, 105 (1965) (per curiam) (lower court's approval of proposed school desegregation plan improper without full hearing
Unfortunately, this aggressive posture did not extend to the judicial creation of metropolitan school districts. In *Milliken v. Bradley*, the Supreme Court sharply limited the authority of federal courts to create interdistrict remedies. *Milliken* was the Supreme Court's first reversal of an affirmative desegregation order since *Brown*. In *Milliken*, the federal district court ordered fifty-three suburban school districts to participate in the desegregation of the Detroit schools. On appeal, the Sixth Circuit recognized that "any less comprehensive a solution than a metropolitan plan would result in an all-black system immediately surrounded by practically all-white suburban school systems." The court held that since "school district lines are simply matters of political convenience . . . they may not be used to deny constitutional rights."

The Supreme Court, in a 5-4 decision, reversed the lower court's imposition of a metropolitan-wide remedy. The Court reasoned that suburban districts could not be included in the desegregation plan absent proof that they committed a constitutional violation. The Court, in an opinion by Chief Justice Burger, held that the metropolitan-wide remedy violated the equitable principle that "the scope of the remedy is determined by the nature and extent of the constitutional violation." Thus, the Court declared that "[t]o approve the remedy ordered would . . . impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy."

Although the Court did not rule out the possibility of judicially created metropolitan relief in all cases, the Court made it clear that such relief was to be viewed as an extraordinary remedy. The Court emphasized the importance of local control over schools, something that the Court believed was unjustifiably sacrificed by the lower court's order in *Milliken*. Moreover, the Court implied that it regarded creation of metropolitan districts to be a political decision and not one to be implemented judicially.

The ultimate effect of the *Milliken* decision is to prevent judicial creation
of metropolitan school districts except in the most unusual cases. As one commentator noted:

By fixing limits to the remedial powers available to the federal courts in desegregation cases, the Supreme Court, has, however, thwarted this evolution in its earliest stages, and effectively removed from the realm of possibilities any constitutional attack on inter-district school segregation arising from residential patterns.

Milliken only permits interdistrict remedies if there is proof that the suburban districts committed a constitutional violation. Occasionally, this can be demonstrated. For example, a metropolitan remedy was imposed for Wilmington, Delaware, because of the state's involvement in creating segregated schools. Unlike Michigan in the Milliken case, Delaware once required segregation of all schools within the state. At one point, Delaware even subsidized interdistrict transport to private schools for white students to deter them from attending Wilmington schools. Furthermore, Delaware had enacted a law con-


158. See Milliken, 418 U.S. at 738-48. See also Kanner, Interdistrict Remedies for School Segregation after Milliken v. Bradley and Hills v. Gaetreaux, 48 MISS. L.J. 33 (1977) (interdistrict relief appropriate where boundary lines have been manipulated to maintain segregation, where more than one district has committed violations, or where a violation in one district has a significant segregative effect in other districts); Manley, School Desegregation in the North: A Post-Milliken Strategy for Obtaining Metropolitan Relief, 20 ST. LOUIS U.L. REV. 585, 600 (1976) (discussing evidence presented in United States v. Missouri, 63 F. Supp. 739 (E.D. Mo. 1973), 388 F. Supp. 1058 (E.D. Mo. 1975), aff'd in part, rev'd in part, 515 F.2d 1365 (8th Cir. 1975) (en banc), cert. denied, 423 U.S. 951 (1975)).

159. Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976) (metropolitan plan implementation ordered). The intradistrict remedy imposed in Evans was the culmination of a series of lawsuits. The United States District Court for the District of Delaware originally determined that a dual school system existed in Wilmington. It ordered the Wilmington School District to submit to the court a desegregation plan. Evans v. Buchanan, 379 F. Supp. 1218 (D. Del. 1974). At a subsequent hearing, the court permitted plaintiffs to introduce evidence concerning interdistrict constitutional violations. The court determined that an historic arrangement for interdistrict segregation existed within New Castle County. In addition, the court concluded that state housing policy contributed to the racial isolation of the city from the suburbs, resulting in racially segregated schools. Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975), aff'd, 423 U.S. 963 (1976). Because of this significant governmental involvement in interdistrict segregation, an interdistrict remedy was appropriate. Accordingly, the court ordered the parties to submit a desegregation plan incorporating the areas surrounding Wilmington. Id. at 447. The court eventually approved a plan requiring the exchange of some 2000 black students from the Wilmington School District with an equal number of white students from suburban school districts. Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976).

160. Evans v. Buchanan, 393 F. Supp. 428, 436 (D. Del. 1975), aff'd, 423 U.S. 963 (1976). In 1968, the Delaware General Assembly authorized a subsidy for transportation of pupils enrolled in non-public, non-profit elementary and secondary schools. Although the statutes provided only for intradistrict transportation, the Board of Education adopted policies providing for subsidy of interdistrict transportation. In 1973, the General Assembly passed legislation expressly authorizing a subsidy for interdistrict transportation of private and parochial students. Id.
solidating school districts in the Wilmington area, but excluded the predominantly black schools of Wilmington. 66 These state actions were deemed to be sufficient to justify the creation of a metropolitan-wide remedy. Similarly, metropolitan relief was permitted for Louisville, Kentucky because the state and the school districts in the area participated in creating segregated schools. 62

Nonetheless, these instances in which metropolitan relief was permitted, are clearly the exception. In case after case, the federal courts, following the dictates of Milliken, have refused to order metropolitan-wide desegregation. 63 It is usually impossible to prove that the suburbs or state governments are directly responsible for the existence of segregated schools in the cities. 64 Generally, segregated inner city schools are a product of the many factors that have lead to the racial separation of blacks and whites, most of which are entirely unrelated to school policy. 65 As a result, after Milliken it is futile to hope for judicial action creating metropolitan school districts to eliminate the dual system of urban public education. 66

Furthermore, the Supreme Court has made it clear that the federal courts will not act to equalize educational expenditures. In San Antonio Independent School District v. Rodriguez, 67 the Supreme Court refused to find that financing schools through local property taxes violated the equal protection clause of the fourteenth amendment. In Rodriguez, the plaintiffs challenged Texas' system of financing public schools largely through the property tax,

161. 393 F. Supp. at 438-39. The Educational Advancement Act of 1968, 14 Del. C. §§ 1001-05 (1968), provided for the reorganization of all school districts in the state of Delaware. The key reorganization provision of the Act provided an exemption of approximately one year from the long standing requirement in Delaware law that consolidation of contiguous school districts must be approved by a referendum in each of the districts affected. The State Board of Education was authorized to consolidate school districts according to the dictates of sound educational administration. The Wilmington School District, however, was specifically excluded from the Board's reorganization powers. Wilmington was also implicitly excluded from any consolidation plan by section 1004(c) (2), which limited the size of the district to 12,000 students. 393 F. Supp. at 438-39.

162. Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974), cert. denied, 421 U.S. 931 (1975). The court pointed to a number of factors justifying a metropolitan remedy in Louisville: all districts had operated segregated districts; Kentucky law made the county, and not the school district, the basic educational unit; all of the school districts had ignored school district lines in maintaining segregated schools. Id. at 1359-61.

163. See, e.g., Lee v. Lee County Bd. of Educ., 639 F.2d 1243 (5th Cir. 1981) (no evidence that interdistrict program had significant interdistrict segregative effect); Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978) (exclusion of suburban school districts from metropolitan segregation plan affirmed); Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1974) (district court judge has equitable power to reject proposed desegregation plans, including interdistrict remedy, absent showing of prior de jure segregation); Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974) (district court did not err in determining that segregation was consequence of housing patterns and not purposeful acts by the school board).


165. See supra notes 16-35 and accompanying text.

166. Sedler, supra note 17, at 538-43; Historical Perspective, supra note 16, at 801.

which enabled wealthy school districts to tax at a low rate and spend a great
deal on education, whereas poor districts taxing at high rates still had little
revenue for schools.\textsuperscript{168} The Court held that strict scrutiny of the Texas system
was inappropriate because neither a fundamental right nor a suspect classifica-
tion was involved; the majority concluded that education is not a fundamental
right and that poverty is not a suspect classification.\textsuperscript{169} As such, the Court
said that Texas' system needed only to meet a rational basis test, a test the
Court found to be easily satisfied.\textsuperscript{170} The effect of \textit{Rodriguez} "was to
foreclose a federal attack on inequitable school financing programs."\textsuperscript{171} State
courts have proven equally unwilling to remedy disparate educational
financing.\textsuperscript{172}

The combined effect of the Supreme Court's decisions in \textit{Milliken} and
\textit{Rodriguez} is to preclude effective judicial solutions to the problems of
separate, unequal education. Justice Douglas, dissenting in \textit{Milliken}, recog-
nized that "[t]oday's decision given \textit{Rodriguez} means that there is no viola-
tion of the Equal Protection Clause though the schools are segregated by
race and though the black schools are not only 'separate' but inferior."\textsuperscript{173}
Only metropolitan-wide solutions can end the dual system of education.
Because the Supreme Court has prevented the judiciary from creating such
remedies, litigation will never succeed in providing equal educational
opportunity.

\textit{Legislative Creation of Metropolitan School Districts}

Despite the restrictive decisions in \textit{Milliken} and \textit{Rodriguez}, attention has
remained focused on obtaining judicial solutions to the problems of urban
schools.\textsuperscript{174} Courts, however, are unable to create the needed metropolitan
school districts; therefore, efforts should turn to enacting legislation im-

\begin{itemize}
\item \textsuperscript{168} \textit{Id.} at 12-13.
\item \textsuperscript{169} \textit{Id.} at 28, 33-37.
\item \textsuperscript{170} \textit{Id.} at 25, 36-39 (considerations such as local control over education and the need
to defer to the political process were deemed to be sufficient to meet the rational basis test).
\item \textsuperscript{171} \textsc{Roos}, \textit{The Potential Impact of \textit{Rodriquez} on Other School Reform Litigation}, \textit{38 Law \& Contemp. Probs.} \textit{566}, \textit{566} (1974).
\item \textsuperscript{172} \textit{See Lawyers Comm. for Civil Rights Under Law, Update on State-Wide School
Finance Cases} (1980) (describing litigation in 30 states). A recent article recognized that "[t]he
hope that state litigation would constitutionalize educational entitlements unavailable at the
federal level has proved illusory." Comment, \textit{Developments in the Law: The Interpretation
of State Constitutional Rights}, \textit{95 Harv. L. Rev.} \textit{1324}, \textit{1447} (1982). See, \textit{e.g.}, \textsc{Shofstall v.
Hollings}, \textit{110 Ariz.} \textit{88}, \textit{515 P.2d} \textit{590} (1973) (state court refusal to equalize funding of educa-
tion); \textsc{Thompson v. Engelking}, \textit{96 Idaho} \textit{793}, \textit{537 P.2d} \textit{635} (1975) (disparate tax base resulting
in unequal school funding not violative of state constitutional requirement of uniform system
of public schools); \textsc{Olsen v. State}, \textit{276 Or.} \textit{9}, \textit{554 P.2d} \textit{139} (1976) (financing system not in-
validated by existence of equitable alternatives). \textit{But see, e.g.}, \textsc{Seattle School Dist. No. 1 v.
State}, \textit{90 Wash 2d.} \textit{476}, \textit{585 P.2d} \textit{71} (1978) (state constitutional mandate imposes a duty on
the state to provide fully sufficient funds for general and uniform system of public schools).
\item \textsuperscript{173} \textit{418 U.S.} at 761 (Douglas, J., dissenting).
\item \textsuperscript{174} \textit{Must We Bus?}, \textit{supra} \textit{note 15}, at \textit{441-42}, \textit{454-55}.
\end{itemize}
implementing metropolitan educational plans. Laws should be enacted, at either
the federal or state level, requiring that education in urban areas be pro-
vided in school districts encompassing both the central city and the suburbs.
Legislative action should not be perceived as an unfortunate alternative
to judicial solutions. To the contrary, the legislature should be regarded as
the preferred forum for ending the dual system of education. The legislature
is most able to provide the administrative structure needed to make
metropolitan districts an effective reality. Additionally, action by popularly
elected legislatures will have the greatest legitimacy and the best chance for
success.

Either Congress or state legislatures can enact laws requiring creation of
metropolitan school districts. Although education traditionally has been con-
trolled by state and local governments, Congress has authority to require
metropolitan districts pursuant to its powers under the fourteenth amend-
ment. Section five of the fourteenth amendment provides that "Congress
shall have the power to enforce by appropriate legislation, the provisions
of this article." Historically, congressional authority under section five
of the fourteenth amendment was limited to enacting legislation invalidating
state laws deemed to violate section one of the fourteenth amendment or
providing remedies for state infringements of section one. In Katzenbach
v. Morgan, however, the Supreme Court upheld broad congressional
authority to expand the protections of the post-Civil War Amendments.
Katzenbach involved a challenge to a federal statute which effectively over-
turned a Supreme Court decision. Previously, in Lassister v. Northampton
County Board of Elections, the Court ruled that literacy tests as a voting
qualification did not violate the fourteenth amendment. A few years after
the Lassister decision, Congress, in the Voting Rights Act of 1965, pro-

175. Professor Finger recognized that:
The courts may not be the most effective agency for carrying out such broad social
remedies as desegregation. . . . Characteristics of cities are so different that a judge
providing remedial procedures consistent with what has been approved by higher
courts may have difficulty selecting procedures that are both appropriate and
equitable.
Finger, supra note 6, at 65.
176. Wright, supra note 13, at 224 ("[E]ffective solutions to most urban problems are best
initiated through the legislatures, both state and federal, and best implemented by agencies
of the executive branches with the expertise necessary to supervise and enforce compliance.").
177. MUST WE Bus?, supra note 15, at 454-55.
179. Gordon, The Nature and Uses of Congressional Power Under Section Five of the Four-
teenth Amendment to Overcome Decisions of the Supreme Court, 72 NW. U.L. REV. 656 (1977).
See, e.g., Civil Rights Cases, 109 U.S. 3 (1883); Ex Parte Virginia, 100 U.S. 339 (1879).
182. The Voting Rights Act of 1965 placed stringent restriction on the use of literacy tests
as a determinant of voter qualification. The Act, in relevant part, provided:
(2) No person acting under color of law shall—
vided that no person who has successfully completed the sixth grade in an accredited Spanish-language Puerto Rican school may be denied the right to vote because of an inability to read or write English. A group of New York voters brought suit to challenge the congressional invalidation of that state's literacy test. The plaintiffs contended that Congress had no authority to act under the fourteenth amendment because the Court already had decided that no constitutional violation existed.

The Supreme Court rejected the plaintiffs' claim and sustained the federal statute. The Court held that Congress could justify striking down the literacy requirement in order to aid the Puerto Rican community in gaining sufficient political power to obtain non-discriminatory treatment in the provision of public services. Additionally, the Court concluded that Congress, on its own, could find that literacy tests violated the fourteenth and fifteenth amendments and ban such tests under the grants of legislative authority con-

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In addition the Act automatically suspended, for a five year period, the use of literacy tests in all states or subdivisions where a literacy test or other similar device was in effect on November 1, 1964 and where less than 50% of voting age persons were registered for or voted in the presidential election of November 1964. 42 U.S.C. § 1973b (1965) (amended 1970).

In the Voting Rights Act Amendments of 1970, Congress extended the suspension for an additional five year period. In addition, the scope of the suspension was expanded to include all state and national elections. 42 U.S.C. § 1973aa (1970) (amended 1976).

Originally the nationwide suspension was to expire in August of 1975. Congress, however, subsequently reconsidered the issue of literacy requirements and permanently prohibited the use of literacy tests as a means of determining voter eligibility. The current version of the Voting Rights Act Amendments of 1970, in relevant part, provides:

(a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

(b) As used in this Section, the term "test or device" means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.


According to legislative history, literacy tests have notoriously been used to deny minorities the franchise. Congress deemed it patently unfair for the states to require citizens to achieve a certain level of education prior to voting when the state educational systems often denied minority citizens an opportunity to achieve this level of education. In addition, Congress considered literacy tests to be invalid under the fourteenth amendment because they were not justified by a compelling state interest. S. Rep. No. 295, 94th Cong., 1st Sess. 23, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 774, 789-90.

This latter holding gives Congress broad authority to interpret the fourteenth amendment and to implement that interpretation via legislation.

*Katzenbach* provides clear authority for Congress to enact legislation requiring education to be provided in metropolitan school systems. Congress can find that the segregation of blacks in inferior schools is a violation of the fourteenth amendment. Furthermore, Congress can provide the remedy for this constitutional violation: metropolitan school districts. Congress is not bound by the Supreme Court's refusal to find constitutional violations in *Milliken* and *Rodriguez*. In *Katzenbach*, the Supreme Court allowed Congress to find and remedy a constitutional violation where the Court previously, in *Lassister*, had refused to find one. Accordingly, Congress will be able to determine that separate, unequal schools are impermissible and provide a statutory solution in the form of metropolitan districts.

Congress need not involve itself in the actual operation of urban schools. Rather, Congress could simply enact a statute requiring all states with urban areas of greater than a specified size to eliminate the boundaries separating city from suburban school districts. The states would be directed to create districts which include all residents of the urban area. In this way, Congress would leave education to state and local governments. Congressional action would be limited to requiring the creation of metropolitan districts. Although Congress would be compelling the states to act, there would be no basis for an objection based on federalism concerns. The Supreme Court has

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184. 384 U.S. at 653-56. The *Katzenbach* Court considered the constitutionality of § 4(e) of the Voting Rights Act of 1965 which provides:

1. Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the State from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

2. No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school, or a private school accredited by any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.


186. See supra notes 180-82 and accompanying text.

187. See National League of Cities v. Usery, 426 U.S. 833 (1976). The National League of Cities Court held unconstitutional a federal statute requiring states to pay their employees
held that federalism is not a barrier to congressional action pursuant to section five of the fourteenth amendment.\textsuperscript{188}

Alternatively, Congress could use its spending powers to encourage the creation of metropolitan districts. Congress could provide grants to school districts which form metropolitan-wide school systems and deny federal money to states which permit separate school systems for city and suburban areas.\textsuperscript{189} Those who object to Congress compelling the states to create metropolitan districts might prefer this latter, "carrot and stick" approach, which ostensibly allows state and local governments a choice.

There is no reason why the legislation must be federal; state governments could enact laws consolidating city and suburban school districts. The federal government does have the advantage of being able to provide interdistrict remedies in the few places where metropolitan areas cross state lines. For example, a metropolitan district might include Washington, D.C. and its Maryland and Virginia suburbs. Only Congress could create a single school district for this entire region. Similarly, a district including New York and New Jersey would require some form of federal legislative action.\textsuperscript{190} Also, because segregated, unequal schools are common in urban areas throughout the country, a federal remedy, national in scope, seems appropriate.

Nonetheless, state legislatures need not wait for congressional action. School districts, like all local governments, are creatures of the state. As such, states may enact laws requiring consolidation of districts and specify all of the procedures for their operation.

\textsuperscript{188} See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Fitzpatrick Court held that state sovereignty did not bar state employees from filing civil rights actions against the state to challenge the denial of retirement benefits. According to the Court, the prohibitions of the fourteenth amendment were directed toward the states, and were restrictions of state power. \textit{Id.} at 454. Accordingly, the principle of state sovereignty is limited by §5 of the fourteenth amendment, which grants Congress the authority to enforce, by appropriate legislation, the amendment's substantive provisions. \textit{Id.} at 452-56. In other words, the principle of \textit{National League of Cities} does not limit Congress when it is acting, as is proposed in this Article, pursuant to section five of the fourteenth amendment.


\textsuperscript{190} Interstate compacts to create metropolitan districts crossing state lines would require congressional approval. U.S. CONST. art. I, §10, cl. 3. See Engdahl, Characterization of Interstate Arrangements: When Is a Compact Not a Compact?, 64 MICH. L. REV. 63 (1965); Frankfurter & Landis, The Compact Clause of the Constitution—A Study In Interstate Adjustments, 34 YALE L.J. 685 (1925).
Ultimately, of course, it is of secondary concern whether the legislation is enacted at the federal or state level. What is crucial is that efforts to enact legislation creating metropolitan school districts begin. No other solution can succeed in eliminating the dual system of American public education. There is, today, no other way to establish metropolitan districts except through legislative action.

**CONCLUSION**

In September, 1982, United States Secretary of Education, T. H. Bell, suggested that state legislatures consider reorganizing school districts to desegregate schools. Secretary Bell recognized that without metropolitan districts it will be impossible to ever achieve equal educational opportunity. That a cabinet secretary in the conservative Reagan administration would offer such a suggestion, is an indication that legislation for metropolitan districts should not be dismissed as an impossibility. It is the responsibility of civil rights groups, educators, and all who care about urban America, to begin lobbying for such legislation. As *Brown* approaches its thirtieth birthday, is it not finally time that equal educational opportunity be provided with all deliberate speed?

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