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Robert Allen Sedler
*Wayne State University*

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I read with great interest the papers presented by Professor Polsby and Mr. Jones. I did so from the perspective of an academic commentator on the subject.[1] from the perspective of a lawyer involved in metropolitan desegregation litigation,[2] and from the perspective of a new resident of the Detroit metropolitan area, who is vitally concerned that his own children attend racially integrated schools. Although the papers approach the subject with different orientations, they are complementary. Professor Polsby's paper focuses on the constitutional doctrine developed by the Supreme Court in this area to general principles of equal protection. Mr. Jones' paper focuses on the practical consequences of the *Milliken* decision, as they relate to the struggle of black-Americans for equality of educational opportunity. He also emphasizes the significance of the political context in which legal questions such as this arise, and notes that the position of the federal government–which opposed metropolitan desegregation in *Milliken*–may well influence the Supreme Court's ultimate resolution of these questions.[3]

Robert A. Sedler, Professor, School of Law, Wayne State University, was chief counsel for the plaintiffs in the suit to desegregate the Louisville metropolitan area, the first district in the country to implement court-ordered metropolitan desegregation. He is presently co-counsel in a suit to desegregate the Atlanta metropolitan area and was counsel for the plaintiffs in the Fayette County (Lexington) Kentucky desegregation case.

Professor Polsby raises the question of what is the precise nature of the substantive right that was recognized in *Brown*.[4] Is it the right of black children to attend desegregated schools? As he points out, if racial segregation is "inherently unequal," as the Supreme Court said in *Brown*, and is damaging to black children, it would make no difference for constitutional purposes how the segregation has come about.[5] The Supreme Court, however, has held that the constitutional result does indeed depend on how the segregation has come about. It has drawn a distinction between *de jure* and *de facto* segregation. It has held that the Constitution only prohibits *de jure* segregation. *De jure* segregation is that required by state law, as in the southern and border states prior to *Brown*, or segregation in any school district that was brought about by an "intent to segregate."[6] Because the Court has drawn such a distinction there may be "racial isolation" which is not "segregation,"[7] or more accurately, which is not *de jure* segregation, and thus which is not unconstitutional. In addition, the Court has held that even where a school system has been found guilty of practicing *de jure* segregation, it is not necessarily required to desegregate by eliminating all racially-identifiable schools,[8] but is only required to present a desegregation plan that achieves the "greatest

degree of actual desegregation, taking into account the practicalities of the situation."[9] This means that even after the school system has been desegregated and declared to be "unitary," there may still be some all-black schools where "practical" considerations, such as distance and transportation problems, have prevented their desegregation.[10] Finally, in *Milliken,* the Court held that in the absence of a constitutional violation calling for inter-district relief, desegregation plans cannot cross the boundaries of the school district where *de jure* segregation was found to exist, although effective desegregation cannot realistically be achieved within the boundaries of that district.[11]

It is clear, therefore, that the substantive constitutional right recognized in *Brown* is not the right of black children to attend a desegregated school and to have an integrated educational experience–notwithstanding that in *Brown* the Supreme Court said that segregated education was "inherently unequal"[12] but only the right not to be compelled to attend school in a *school system* that is practicing *de jure* segregation. This definition of the substantive right of black children with respect to school segregation is related, as Professor Polsby notes, to the broader principal of equal protection that the Supreme Court has recently emphasized so strongly: the Constitution only prohibits intentional racial discrimination, so that although governmental action may have a racially discriminatory effect, it is not unconstitutional unless a racially discriminatory *purpose* can be shown.[13]

The substantive right of black children then is only the right not to be compelled to attend school in a school system that is practicing *de jure* segregation. This is the framework within which legal efforts to bring about equality of educational opportunity for black children must now operate. If the Supreme Court were to abandon the *de jure-de facto* distinction and hold that all racially segregated education, regardless of cause, offends the Constitution,[14] and that black children have a constitutional right to attend a desegregated school, then the legal posture would be very, very different. But given the Court's present interpretation of the equal protection clause as prohibiting only intentional racial discrimination, this is not likely to occur, and we will have to continue to operate within the framework of the *de jure-de facto* distinction.

As a practical matter, the *de jure-de facto* distinction has *not* proved to be a significant barrier *where* meaningful desegregation can be achieved within the boundaries of a single school district. In the states where segregation was formerly required by law–the "southern situation"–the existence of *de jure* segregation is predicated on a finding that the school boards have not eliminated all vestiges of state-imposed segregation.[15] Since these school systems originally operated pursuant to the requirements of state-imposed segregation, the continued maintenance of a large number of one-race schools will demonstrate that all vestiges of state-imposed segregation have not been eliminated, and these school systems are required to desegregate fully by means of cross-busing. Outside of the South, it is not difficult in practice to prove "intent to segregate." Such intent has almost always been found to exist, because the school boards over the years have made a series of discretionary decisions with respect to attendance zones, site selection school construction, school closings, teacher assignment and the like, which just "coincidentally" have maximized the degree of actual segregation.[16] The Supreme Court has also

held that where segregatory intent has been proved with respect to a "substantial portion" of the system, it is presumed to exist throughout the system, so that unless the school board can rebut this presumption—which, in practice, it cannot do—system-wide relief is mandated.[17] Within a school district, then, once that district has been found guilty of practicing *de jure* segregation, the requirement that it achieve the "greatest degree of actual desegregation, taking into account the practicalities of the situation," will insure an integrated educational experience for most black children.[18]

The problem, of course, is that in many urban areas today meaningful desegregation *cannot* be achieved within the confines of the urban district alone.[19] In *Milliken*, as Mr. Jones discusses in detail, the Supreme Court rejected the contention that since education was a state function, the state's responsibility for education justified the imposition of a desegregation decree that cut across school district lines. If it had accepted that contention—as four justices were willing to do—meaningful desegregation would now have been achieved in the Detroit area, and in virtually all of the other metropolitan areas in the Nation, given the fact that the urban school systems in those areas, one after the other, have been found to be guilty of practicing *de jure* segregation.[20] But this was not to be, and the question today is, "where do we go from here?"

It is my submission, which I have developed more fully elsewhere,[21] that *Milliken* is not an insuperable obstacle to crossing school district lines and achieving metropolitan desegregation. *Milliken* notwithstanding, we succeeded in doing so in Louisville-Jefferson County, Kentucky.[22] Metropolitan desegregation was also ordered in Wilmington-New Castle County, Delaware,[23] and school district lines were crossed to merge a small black district with two larger white districts in St. Louis County, Missouri.[24] Although the Court in *Milliken* noted that black children residing in the Detroit school district had no constitutional right to attend school outside of the district, the case itself did not involve a constitutional violation question, but what may be called a remedies question: in what circumstances could a federal court, in order to effectively remedy desegregation found to exist in an urban school district, order relief that crossed school district lines.[25] While rejecting the contention that a federal court could do so in all cases because of the state's primary responsibility for education, the Court also expressly stated that, "Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief."[26] The question then is in what circumstances has there been a "constitutional violation calling for inter-district relief," and that question has been resolved in favor of an *interdistrict remedy* in the few post-*Milliken* cases in which it has directly arisen.[27]

Let me outline very briefly here what I think are the two major circumstances in which an interdistrict remedy will be found to be appropriate. The clearest circumstance is where the suburban district or districts sought to be included in the desegregation plan are themselves in constitutional violation. In the Louisville case, the suburban Jefferson County district was unconstitutionally segregating its 4% black elementary students in a few elementary schools and had continued to retain its one pre-*Brown* black elementary school as an all-black school.

The existence of *de jure* segregation in the Jefferson County district was

an important—I believe the most important factor—in the Sixth Circuit's decision distinguishing *Milliken* and ordering inter-district relief in that case.[28] Similarly, in Atlanta we should be able to show that some of the districts sought to be included in the metropolitan desegregation plan are still in constitutional violation. I continue to believe that when all the districts sought to be included in the desegregation plan are in constitutional violation, the courts will uphold a desegregation plan that covers the "violation area."[29]

The second major circumstance—and Mr. Jones' paper shows that this circumstance may exist in the Detroit metropolitan area—is that of an "historic and continuing relationship" between the urban and suburban districts in the metropolitan area. In Louisville-Jefferson County, for example, in pre-*Brown* days black high school students in Jefferson County were bused to Louisville's black high school. The same was true in the Wilmington-New Castle County and in metropolitan Atlanta. But totally apart from cooperation for segregatory purposes, there are many present instances of cooperation between urban and suburban districts, including student transfers, special educational centers, and other joint ventures. Most significant here is the structure of the state's educational system and state law, which recognizes inter-district cooperation and which authorizes the crossing of school district lines for a variety of purposes. In Georgia, for example, transfers of students from one district to another are specifically authorized, and it is expressly provided that state funds follow the student to the transferee district. The theory here is that since state law recognizes that school district lines can be crossed and that since school district lines have been crossed by the school districts themselves, a federal court, in order to effectively remedy the *de jure* segregation found to exist in the urban district, can cross school district lines too. The "historic and continuing relationship" factor was also important in the Louisville-Jefferson County case and will be an alternative argument in the Atlanta case.

There are other circumstances, which I will not discuss here, that may also justify crossing school district lines in appropriate cases.[30] If I am correct in my analysis of *Milliken*, then, it may still be possible to obtain inter-district relief, at least in some situations, based on considerations going to the proper exercise of the remedial powers of a federal court.

What I want to discuss now, however, is something entirely different, and that is the question of whether black children residing in an urban school district have a *substantive constitutional right* to attend school on a desegregated basis in the metropolitan area. To put it another way, it is my contention that black children have a substantive constitutional right to attend school with white children residing in the same metropolitan area. My thesis is as follows. The government at all levels—federal, state, and local—as other papers presented at this conference have so cogently demonstrated, bears a *substantial responsibility* for the pattern of racial residential segregation that exists between the cities and the suburbs today.[31] This being so, blacks, *as a group*, have been excluded from access to housing in the suburbs as result of intentional racial discrimination on the part of the government. Apart from the responsibility of the government to remedy this constitutional violation by providing access to housing in the suburbs for blacks,[32] the argument would be that the government—here the state and the local school boards exercising

responsibility for education under state law—cannot compound the constitutional violation by requiring black students to attend racially segregated schools within the confines of the urban school district. In other words, since blacks as a group have been unconstitutionally excluded from the suburbs, black children as a group have a substantive constitutional right to attend school on a metropolitan-wide basis with white children residing in the suburban school districts.[33]

In this connection, I do not see the *imputation* problem that Professor Polsby raises.[34] Local school districts exercise their powers only pursuant to state law, and it is state law that provides for the existence of particular school districts and delineates their boundaries. Since the state itself and its units of local government are responsible for the constitutional violation, the state cannot, through its laws providing for the existence of separate school districts and delineating their boundaries, compound its constitutional violation by excluding black children from attendance at schools with white children who happen to reside in the suburban school districts. In addition, since one governmental unit exercising its powers within a particular area, such as a municipal council or a local zoning board, is responsible for the constitutional violation, another governmental unit representing the people residing in the same area, *i.e.*, the school district, cannot claim immunity when the constitutional violation committed by the first governmental unit is sought to be remedied. And insofar as state laws providing for separate school districts must be disregarded in order to remedy a constitutional violation committed by the federal government, the principle of federal supremacy[35] would presumably operate in reverse to require this result.

The matter of state responsibility for racial residential segregation between the city and the suburbs as justifying the imposition of an inter-district remedy was recognized in Mr. Justice Stewart's concurring opinion in *Milliken*. As he there stated, "Were it shown, for example, that state officials had contributed to the segregation of the races . . . by purposeful racially discriminatory use of housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring district lines might well be appropriate."[36] Governmental responsibility for urban-suburban racial residential segregation was a factor relied on in the Wilmington-New Castle County case to justify the imposition of an inter-district remedy.[37]

But the thesis I am advancing goes beyond the remedy aspect of *Milliken* and beyond the question of the power of a federal court to cross school district lines in order to remedy effectively the *de jure* segregation existing in the urban school district. It involves the substantive constitutional right of black children to attend school on a desegregated basis in the metropolitan area and has nothing to do with whether the urban district was guilty of practicing *de jure* segregation. It relates to governmental responsibility for the racial residential segregation that exists between the city and the suburbs, and to the fact that the attendance of black children at racially segregated schools within the urban district is a consequence of intentional racial discrimination on the part of the government at all levels. Since it is well-settled that the government has the affirmative responsibility to eliminate the present consequences of its past racial discrimination,[38] it would have the affirmative responsibility to provide desegregated education for black children on a metropolitan-wide

basis. If it had not been for the government's racial discrimination–which established the *structure* of urban-suburban racial residential segregation–such segregation and the resulting segregation of the schools would not exist. The continued segregation of the black students in the schools of the urban district, therefore, is unconstitutional, and it must be remedied by a metropolitan-wide desegregation plan.

This thesis will be tested in the Atlanta case. The lawyers who have been working on this case for over four years now–led by Margie Pitts Hames, the chief counsel–have put together what I consider to be the best possible "legal case" showing governmental responsibility for urban-suburban racial residential segregation. The "policy planners" of all units of government in the Atlanta metropolitan area made the determination that "black expansion" would occur in the western corridor of the city of Atlanta while "white expansion" would occur in the suburbs, and the record will be replete with instances of "discriminatory use of housing or zoning laws" in Atlanta and the surrounding suburbs.[39] As a result, although the black school population of the Atlanta metropolitan area is around 30%, the black school population of the Atlanta school district is over 90%, preventing effective desegregation of that district.[40] If it had not been for intentional racial discrimination practiced by the government at all levels, there would be black children residing in the Atlanta suburbs, and white children residing in the city of Atlanta, and black and white children in the Atlanta metropolitan area would be attending school together. It is this that we are now asking the courts to order.

Again, as the papers presented at this conference have so cogently demonstrated, the same governmental responsibility for urban-suburban racial residential segregation can be shown to exist in all metropolitan areas. Apologists for school segregation say that it exists only because of racial residential segregation. Since, as we now know, it is the government that bears a substantial responsibility for racial residential segregation, it is the government that is affirmatively required to end it, and it must begin with the schools that it operates.

Even though black children may not have a substantive constitutional right to attend desegregated schools, their attendance at segregated schools in urban school districts today is a direct consequence of intentional racial discrimination on the part of the government. Consistent equal protection principles that the Supreme Court has propounded, the state should not be able to compel their attendance at such schools and should be affirmatively required to provide them with desegregated education on a metropolitan-wide basis. If this is recognized by the Supreme Court, we may see a new era in equal educational opportunity, and it may yet be that in our major metropolitan areas black and white children will in fact go to school together, which, "in the final analysis is what desegregation of the public schools is all about."[41]

## FOOTNOTES

[1]See Sedler, Metropolitan Desegregation in the Wake of *Milliken*–On Losing Big Battles and Winning Large Wars: The View Largely from Within, 1975 *Washington Univ. L.Q.* 535. The *Milliken* case is *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

[2]I was chief in the Louisville-Jefferson County case, *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky*, 489 F.2d 925 (6th

Cir. 1973), *vacated and remanded*, 418 U.S. 918 (1974), *reinstated*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975), and am now co-counsel in the Atlanta metropolitan desegregation case, *Armour* v. *Nix*, Civil No. 16708, U.S. Dist. Ct., N.D. Ga.

[3]Subsequent to this conference, the United States came down on the side of metropolitan desegregation in the Wilmington-New Castle County, Delaware case, now pending before the Third Circuit.

[4]*Brown* v. *Board of Education I*, 347 U.S. 483 (1954).

[5]In *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973), Mr. Justice Douglas and Mr. Justice Powell, coming from different directions and reaching ultimately different conclusions, urged the Court to treat all racial segregation in the schools in the same way, regardless of cause. For the expression of a similar view by an "opponent of busing," see L. Graglia, *Disaster by Decree* 86 (1976).

[6]*Keyes* v. *School District No. 1, Denver, supra, note 5.* [T]he differentiating factor between de jure segregation and so-called de facto segregation is purpose or intent to segregate." *Id.* at 208.

[7]To use Professor Polsby's terms.

[8]By a racially identifiable school is meant a school having so few blacks, considering the black-white composition of the school district as a whole, that it will be perceived of as a racially-identifiable white school, or so many blacks, considering the black-white composition, that it will be perceived of as a racially-identifiable black school.

[9]*Davis* v. *Board of School Commissioners*, 402 U.S. 33 (1971).

[10]See *e.g.*, *Medley* v. *School Board of City of Danville*, 482 F.2d 1061 (4th Cir. 1973), *cert. denied*, 414 U.S. 1172 (1974); *Goss* v. *Board of Education of Knoxville*, 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

[11]418 U.S. 754 (1974).

[12]347 U.S. at 495, and deprived black children of "some of the benefits they would receive in a racially integrated school system." *Id.* at 494.

[13]See *e.g.*, *Washington* v. *Davis*, 426 U.S. 299 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, ___U.S.___, 97 S.Ct. 555 (1977).

[14]The California Supreme Court has rejected the *de jure-de facto* distinction and held that all racial segregation is harmful to black children, so that school boards have an obligation to take affirmative action to eliminate actual segregation. See *e.g.*, *Crawford* v. *Board of Education of City of Los Angeles*, 17 Cal. 3d 280, 551 P.2d 28 (1976).

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

[16]See *e.g.*, *United States* v. *School District of Omaha*, 521 F.2d 530 (8th Cir. 1975), and the numerous cases cited by the court at 535, n. 7.

[17]*Keyes* v. *School District No. 1, Denver, supra*, note 5.

[18]Except for those living in parts of the district that it is "impracticable" to desegregate. In my view all the schools should be desegregated unless it can be shown—which is highly unlikely—that the time or distance involved in busing is "so great as to risk either the health of the children or significantly impinge on the educational process." *Swann, supra*, note 14 at 30-31.

[19]In addition to many of the papers presented at this conference, see the discussion in Sedler, *supra*, note 1 at 538-543.

[20]In some urban areas, however, it is still possible to achieve meaningful desegregation within the boundaries of the urban district alone.

[21]See generally Sedler, *supra*, note 1 at 571-584.

[22]*Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky, supra*, note 1.

[23]*Evans* v. *Buchanan*, 393 F. Supp. 428 (D. Del.), *aff'd. mem.*, 423 U.S. 963 (1975).

[24]*United States* v. *Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

[25]See the discussion of this point in *Hills* v. *Gautreaux*, 425 U.S. 284, 297-298 (1976).

[26]418 U.S. at 741.

[27]In the Indianapolis-Marion County, Indiana situation, the Seventh Circuit upheld the imposition of an inter-district remedy on the dual grounds that the exclusion of the schools from the Uni-Gov plan for Indianapolis-Marion County by the state legislature had a racially discriminatory effect, and that the government was responsible for urban-suburban racial residential segregation, although the latter point had not been extensively developed in the record. *United States* v. *Board of School Commissioners of City of Indianapolis*, 541 F.2d 1211 (7th Cir. 1976). The Supreme Court vacated the judgment and remanded the case for a reconsideration of the matter of "intent to discriminate." 97 S. Ct. 801 (1977).

[28]See generally the discussion of this case in Sedler, *supra*, note 1 at 584-600.

[29]See the discussion of this point in Sedler, *supra*, Note 1 at 581-582.

[30]See the discussion in Sedler, *supra*, note 1 at 579-584.

[31]And for the patterns of racial residential segregation that exist within the city itself.

[32]Just as in school desegregation cases, the school board is required to come up with a desegregation plan. Here the involved governments—federal, state and local—should be required to come up with an "access to suburbia" plan, including, for example, the construction of public housing, provision for subsidized low-income housing, suspension of zoning laws that impeded black movement to the suburbs, "affirmative recruiting" of black residents and the like. *C.f.* the discussion in *Hills* v. *Gautreaux*, *supra*, note 24 at 300-306.

[33]Since white children have no constitutional right to avoid going to school with black children, *Brown I*, and no constitutional right to avoid being bused away from a "neighborhood school," *Swann*, busing them to schools located in the urban district raises no constitutional question. And if it had not been for state-imposed discrimination, presumably some of them would be residing in the suburban districts.

[34]In *Swann*, however, the Court did note that, "We do not reach in this case the question of whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." 402 U.S. at 23.

[35]As embodied in Art. VI, Sect. 2.

[36]418 U.S. at 755.

[37]There were other factors as well.

[38]See *e.g.*, *Swann*.

[39]It has already been held that racial discrimination was practiced in regard to public housing and that because of such discrimination, the Atlanta Housing Authority failed to locate public housing in Fulton County, although it had the statutory authority to do so. *Crow* v. *Brown*, 332 F. Supp. 372 (N.D. Ga. 1971), *aff'd.*, 457 F.2d 788 (5th Cir. 1972)

[40]Thus, in *Calhoun* v. *Cook*, 522 F.2d 717 (5th Cir. 1975), the Fifth Circuit affirmed a finding that the Atlanta school system was unitary, although 92 out of its 148 schools had student bodies that were over 90% black. The court noted, however, that the matter of metropolitan desegregation remained to be decided in *Armour* v. *Nix*.

[41]*Milliken* v. *Bradley*, at 802 (Marshall, J., dissenting).