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School Desegregation Doctrine: The Interaction between Violation and Remedy

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SCHOOL DESEGREGATION DOCTRINE: THE INTERACTION BETWEEN VIOLATION AND REMEDY

Since 1954, when Brown v. Board of Education was decided, the Supreme Court has followed a path of "result-oriented" segregation remedies. The most recent step along this path was announced in the 1979 Columbus and Dayton segregation cases. In this Note, the author traces the evolution of current desegregation doctrine from Brown to the present, and analyses these decisions in terms of the scope of the remedy contemplated by each and the modifications in the plaintiff's burden of proof which were necessary to provide such remedies. The author concludes that although the Supreme Court has from time to time wandered from the path of result-orientation, the Columbus and Dayton decisions reaffirm its commitment to actual desegregation.

INTRODUCTION

On May 17, 1954, the United States Supreme Court decided in favor of schoolchild Linda Brown, holding that the statutorily mandated segregation of white and black children in public schools was unconstitutional. The unanimous decision in Brown v. Board of Education (Brown I) marked the first step along a circuitous path in the interpretation of the rights of minority children under the equal protection clause of the fourteenth amendment. The doctrinal simplicity of 1954 has become in 1980 a constitutional conundrum. This Note addresses a fundamental reason for the present confusion—the Supreme Court's alteration of the level of proof required to establish a constitutional violation, in order to control the scope of the remedial plan to be imposed.

The facts of Brown I were as simple as the doctrine they spawned. Pursuant to a Kansas statute which permitted but did not require segregation in public schools, the Topeka school board had chosen to operate segregated elementary schools. The Supreme Court ruled that separation of children in public schools solely on the basis of race deprived minority children of equal

protection of the laws; the broad constitutional doctrine which emerged was deceptively simple: segregation in public schools caused by intentional state action was unconstitutional.

The doctrine required plaintiffs to prove three elements: (1) intentionally segregative behavior, (2) by a state or local government body, (3) which caused the present segregated condition. Under this formula, where a state statute or constitutional provision permitted or required segregation, plaintiffs could easily establish a violation. Consequently, all of the early litigation focused on the formulation of an appropriate remedy. The remedial rule which eventually emerged required these "statutory dual school systems"—in which there was no racial intermingling at all—to convert to unitary systems "in which racial discrimination would be eliminated root and branch." In meeting this standard, the Court often sought to achieve a racial mixture in each school which statistically approximated the racial composition of the school district as a whole.

In 1971 the Supreme Court faced a new problem—segregation in a major southern city apparently caused by a variety of factors. Although there had been a statutory dual school system in the city's recent past, school attendance at the time of the suit was determined by geographic zoning—a racially neutral system under which students attended the schools nearest their homes. Accordingly, school officials argued that residential segregation, not intentional state action, had caused the present segregation. The Court responded by creating a rebuttable presumption that intentional school board action caused the present school segregation. This shifted onto defendant school officials the burden of proving that residential segregation or any factor other than

4. 347 U.S. at 495.
5. The Court never expressly stated the elements of a constitutional violation in Brown; they were, however, articulated in later cases. See, e.g., Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 205-06 (1973).
6. See notes 28-72 infra and accompanying text.
7. For the purposes of this Note, the term "statutory dual school system" refers to those school systems where segregation of school children by race was permitted or required by state constitutional or statutory provisions. These school systems were called "dual" because there were, in fact, two school systems within a single district, one for white children and the other for black children.
9. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (allowing racial percentages to be used only as a starting point in the process of shaping a remedy).
10. Id.
11. See id. at 20-21.
school board action had, in fact, caused the segregation.12

Two years later another problem arose in a school district which had never had a statutory dual school system. Plaintiffs alleged that school officials, acting alone rather than under color of state statute or constitutional provision, had caused the present segregated school system.13 In other words, plaintiffs sought to prove that a "nonstatutory dual school system" existed.14 Proving the existence of such a school system was much more difficult, as plaintiffs had to demonstrate that the cumulative effect of intentionally segregative school board decisions caused or maintained the present segregation.15 The Supreme Court again responded with a presumption: if it could be shown that intentional school board decisions had caused segregation in a meaningful portion of the school district, then it would be presumed that the school board had acted with segregative intent toward other schools in the district as well.16 The defendant school officials then had the burden of proving that they had not acted with discriminatory intent.

Through the application of these presumptions, the Supreme Court shifted the burden of proving difficult issues of fact onto the defendant school officials. Consequently, the plaintiff's burden of showing a constitutional violation was relaxed, and remedies were easier to obtain. If remedies became more readily available, however, their imposition on an entire school system was a different matter. Several members of the Court, notably Justice Powell, were troubled by the social disruption that resulted when a systemwide remedy was imposed in response to segregation in isolated areas within a school system.17 This concern led first to a refusal by the Court to take the view of violations necessary to impose an expansive remedy under Brown.18 It then led to the introduction of an alternative remedial formula that would be

12. Id. at 26.
14. The term "nonstatutory dual school system" refers to school districts which became segregated because of the intentional acts or omissions of state or local school officials, who acted without the benefit of a statutory or constitutional mandate. When a nonstatutory dual system is found to exist, the remedy imposed is identical to what it would have been had the dual system been statutorily required or permitted. See text accompanying notes 101–44 infra.
15. 413 U.S. at 198.
16. Id. at 208.
17. See notes 129–42 infra and accompanying text.
18. See notes 147–61 infra and accompanying text.
more deferential to local control of public education. In sum, the Court seemed to be moving toward limiting the power of lower courts to order systemwide remedies by requiring more exacting proof of a constitutional violation.

This reversal in the Court's school desegregation doctrine was short-lived. Two recent decisions, *Columbus Board of Education v. Penick* and *Dayton Board of Education v. Brinkman (Dayton II)*, appear to reaffirm the Court's commitment to desegregation of the nation's public schools. The opinions in these cases preserve the presumption, developed in earlier decisions, which posits a causal nexus between past intentional school board action and present school segregation. The Court went further, however, and created yet another presumption which bears on both causation and intent: once a dual school system evolved, there arose an affirmative duty on school officials to dismantle that system. If in the intervening years segregation persisted and school officials took no further action, they had the burden of proving that their past segregative decisions were not the cause of the present segregation, and that their failure to act was not motivated by intent to segregate. By reaffirming the causal nexus formula for establishing a constitutional violation, and by creating an additional presumption of school board intent to segregate, the *Columbus* and *Dayton II* decisions continue to make a systemwide desegregation order easier to obtain.

This Note traces the development of school desegregation doctrine from *Brown I* to *Columbus* and *Dayton II*, and explores the manner in which the Court's fluctuating doctrinal standards have generated tension between the scope of the remedy imposed and the plaintiff's burden of proving a constitutional violation. This Note first describes the difficulties which occurred in the course of formulating appropriate remedies for a statutory dual school system. It then traces the doctrinal developments which resulted when federal courts began to implement desegregation plans in both the South and the North, and which shifted the burden of proof to the defendant school officials on the issues of present cau-

19. See notes 162-78 infra and accompanying text.
22. See notes 180-256 infra and accompanying text.
23. See notes 29-72 infra and accompanying text.
24. See notes 76-100 infra and accompanying text.
25. See notes 100-43 infra and accompanying text.
sation and segregative intent. This Note also explores the Supreme Court's reaction to the social disruption which accompanies desegregation decrees. In an attempt to alleviate this disruption, the Court tentatively raised the level of proof required before an effective remedy would be imposed. Finally, this Note concludes that in two recent opinions the Court again reversed direction and extended the doctrine of school desegregation beyond earlier boundaries.

I. FROM BROWN TO GREEN: FORMULATING A REMEDY

In Brown v. Board of Education (Brown I) the Supreme Court, faced with straightforward facts, responded in direct, definite language: "[T]he plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws . . . ." The condition repugnant to the Constitution was clear—total racial separation directly caused by the state. Specifically, local school officials had been authorized by statutory or constitutional provisions to segregate children by race in public schools; the statutory dual school system which resulted determined the attendance pattern of every school in the district. After Brown, plaintiffs from school systems where racially separate attendance was statutorily based had no difficulty establishing a constitutional violation.

Formulating a remedy for such a violation was not as simple. In Brown, consideration of the appropriate remedy was postponed until after reargument because "the formulation of decrees in these cases presents problems of considerable complexity." The delay of over a year that preceded Brown v. Board of Education (Brown II) was indicative of the difficulties the Court was to have with this issue; for the next fourteen years, the federal courts would struggle to formulate an adequate remedy for a statutory dual school system.

26. See notes 147-77 infra and accompanying text.
27. See notes 162-81 infra and accompanying text.
28. See notes 182-256 infra and accompanying text.
30. Id. at 495.
31. Id.
33. 347 U.S. at 495.
34. Brown I, 347 U.S. 483, was decided on May 17, 1954, and Brown II, 349 U.S. 294, was decided on May 31, 1955.
Brown II articulated in broad, general language the remedial duties of school boards operating these unconstitutional school systems. School officials were required to "effectuate a transition to a racially nondiscriminatory school system." The Court assigned to local school boards and district courts the responsibility of formulating the details of this transition. Before a district court could prescribe a remedy for an unconstitutional condition, however, it was necessary for the judge to know the exact nature of that condition. Neither Brown opinion clarified whether the object of a district court's remedy was to be the practice of racial discrimination by a governmental body or the resulting condition of racial segregation. While Brown I announced that "segregation in public education" was unconstitutional, Brown II declared that "racial discrimination in public education" was the constitutional violation. The distinction between these two characterizations was crucial in delineating the scope of the remedy required. If the condition of segregated schools was the constitutional violation, then the remedial objective would be to dissolve the racially separate pattern and to reconstruct an integrated school system. A remedial order which followed this objective would result in a school system which was unitary in substance. Alternatively, if the practice of racial discrimination was the constitutional viola-

36. Id. at 299-301.
37. Id. at 301.
38. Id. at 299. Although the Brown II decision directed lower federal courts to act with "all deliberate speed," 349 U.S. at 301, the entire opinion actually was an open invitation to southern intransigence. Its two most critical aspects were the deference given to administrative difficulties and the discretion given to local district court judges to control the remedy. Id. at 299-300.

One commentator has asserted that the Court's deference to administrative problems legitimized the maintenance of the unconstitutional status quo. In the belief that a more aggressive court order might result in civil strife and open defiance by local officials, the Court permitted delay in the implementation of a remedial decree. The Court justified the delay by pointing to administrative problems attendant upon the communities affected. Wilkinson, The Supreme Court and Southern School Desegregation 1955-1970: A History and Analysis, 64 Va. L. Rev. 485, 488-505 (1978). However, given the importance of education to disadvantaged minorities recognized in Brown I, the justification for yielding to potential administrative difficulties is not readily apparent. Id. at 489-90. Professor Wilkinson concludes that "Brown II can be justified, but just barely." Id. at 504.

In addition, Professor Wilkinson cites a number of authorities critical of the Brown II opinion, including Loren Miller, a former NAACP vice president, who contended that the "second Brown decision was a great mistake." Id. at 492 (quoting L. MILLER, THE PETITIONERS 351 (1966)). See also Black, The Unfinished Business of the Warren Court, 46 Wash. L. Rev. 3, 22 (1970).

39. 347 U.S. at 495 (emphasis added).
40. 349 U.S. at 298 (emphasis added).
tion, the remedial objective would properly be limited to race-
neutral measures. A remedial order which followed this objective
would not necessarily result in actual integration; so long as
school officials did not assign students to schools on the basis of
race, the remedial objective would be met. The Supreme Court
has never expressly held which of these objectives is appropriate,
but the model which a given court adopts can be inferred from the
type of remedy ordered.\footnote{41}

Although both objectives were textually supported by the
Brown decisions, in retrospect it seems inevitable that the reme-
dial model of race-neutrality would be the one to predominate.
Less than two months after Brown II, a district court held that the
Supreme Court required only race-neutrality. In Briggs v. Elliott\footnote{42}
the court stated:

Nothing in the Constitution or in the decision of the Supreme
Court takes away from the people the freedom to choose the
schools they attend. The Constitution, in other words, does not
require integration. It merely forbids discrimination. It does
not forbid such segregation as occurs as the result of voluntary
action.\footnote{43}

Since the race-neutral duty, as interpreted, did not require ac-
tual integration, racial separation was maintained and the process
of converting to unitary systems was delayed for almost nine
years.\footnote{44} Federal courts played a passive role, accepting or re-
jecting the desegregation plans proposed by state and local offi-


42. 132 F. Supp. 776 (E.D.S.C. 1955) \textit{(per curiam)}. The parties in this case were par-
ties in the original Brown suit. See note 1 supra.

43. 132 F. Supp. at 777.

44. One delaying tactic involved legislative action which closed public schools or
which enacted fund cutoff laws. Wilkinson, \textit{supra} note 38, at 509-10. By this device, the
state (or local) government body could choose not to operate public schools at all when the
alternative was integrated schools. \textit{Id}. Under the fund cutoff laws, any school system
which attempted to integrate its schools was subject to a denial of state funds. \textit{Id}. The
federal courts quickly struck down these laws as violative of the equal protection clause; a
state could not close some schools and allow others to remain open. The courts reasoned
that if a state provided public education to some children, it had to provide education for
(1959).

Another, more subtle, legislative response was the enactment of pupil placement stat-
utes. Note, \textit{State Efforts to Circumvent Desegregation: Private Schools, Pupil Placement,
and Geographic Segregation}, 54 \textit{Northwestern University Law Review}, 354, 363 (1959). Superficially, these stat-
tutes conformed with Brown II by assigning students to public schools on the basis of non-
racial criteria. \textit{Id}. at 363-65. These statutes created a series of administrative proceedings,
through which individual blacks had to pass in order to challenge a placement decision,
thereby eliminating any chance of mass integration and leaving the initiation of desegrega-
The Supreme Court was even more passive, couching its infrequent remedial orders in the negative, as if trying to guide by veto alone. Only in the rare instances where its authority was directly challenged did the Supreme Court take any real affirmative measures.

The Court's reluctance to move forward may be explained in part by the absence of executive or legislative support. In 1964, however, congressional support did arrive. As school desegregation began its second decade, Congress passed the Civil Rights Act of 1964. The Act granted the Department of Justice power to initiate school desegregation suits and gave the Department of Health, Education and Welfare (HEW) power to promulgate guidelines for achieving desegregation and to terminate federal funds if those guidelines were not followed. The Fifth Circuit adopted the HEW guidelines as a remedial model and thereby


In some instances, statutes of this type were invalidated. E.g., Bush v. Orleans Parish School Bd., 242 F.2d 156 (5th Cir.), cert. denied, 354 U.S. 921 (1957). In others, however, the Supreme Court gave tacit approval. E.g., Carson v. Warlick, 238 F.2d 156 (4th Cir. 1956), cert. denied, 353 U.S. 910 (1957). Even where these statutes were approved, their integrative effect was minimal. For example, in Charlotte, North Carolina, after three years of operation under a pupil placement statute, only one black child was in a white school. Wilkinson, supra note 38, at 512.


46. A typical example of the Supreme Court's action during this period was its decision in Goss v. Board of Educ., 373 U.S. 683 (1963). In Goss, a minority-to-majority transfer provision in the Knoxville, Tennessee, school desegregation plan was invalidated. Id. at 687. The plan involved residential zoning, but allowed pupils to transfer from schools where they would be in the racial minority to a school where they would be in the racial majority. Id. at 685-86. In the brief opinion which invalidated the plan, the appropriate affirmative steps which could have been taken were not set out. Id. at 688-89.

47. E.g., Cooper v. Aaron, 358 U.S. 1 (1958). For details of the crisis in Little Rock, Arkansas, which spawned Cooper, see Wilkinson, supra note 38, at 515-22. A far more serious case occurred in Prince Edward County, Virginia, where, in reaction to desegregation orders, the public schools had been closed for five years. The state had subsidized private schools for white children, and had left black children virtually without education. The Supreme Court ordered the schools reopened in Griffin v. County School Bd., 377 U.S. 218 (1964). After ten years, an original Brown defendant was finally ordered to comply.

48. See E. WARREN, THE MEMOIRS OF EARL WARREN, 291-92 (1977). Professor Bickel has asserted that the inherent antimajoritarian nature of the judiciary required the Court to move in measured steps until public opinion caught up. Bickel, supra note 45.


brought some degree of uniformity to remedial orders.\textsuperscript{52} Moreover, the three decisions which formally adopted the HEW standards were significant for another, more important reason—they transformed the Fifth Circuit's remedial model to one which would more effectively achieve actual integration.\textsuperscript{53}

The new formula incorporated the premise that the remedial duty was affirmative: school boards must integrate, not merely cease segregating.\textsuperscript{54} School officials were required to undertake the "liquidation of the state's system of \textit{de jure} segregation and the organized undoing of the effects of past segregation."\textsuperscript{55} The Constitution, in other words, required integration.\textsuperscript{56} Accordingly, since the states had created the systems which produced the segregated attendance patterns, the states had the duty to dissolve them.\textsuperscript{57} The adequacy of a desegregation plan would be determined by its potential for producing racially diverse school populations. If a particular plan, using nondiscriminatory attendance patterns, failed to achieve racial intermingling, it was unacceptable.\textsuperscript{58}

The first widely used desegregation plan to be measured against this standard was the "freedom of choice" formula, under which students were allowed to attend the schools of their choice.\textsuperscript{59} The freedom of choice concept was initially approved by the Fifth Circuit\textsuperscript{60} and also by HEW.\textsuperscript{61} In theory these plans

\begin{itemize}
\item \textsuperscript{54} \textit{See} Read, \textit{supra} note 52, at 24-25 n.80.
\item \textsuperscript{55} 372 F.2d 836, 866 (5th Cir. 1966).
\item \textsuperscript{56} Notably, the initial interpretation of \textit{Brown}, Briggs v. Elliot, 132 F. Supp. 776 (E.D.S.C. 1955), did not require integration. \textit{See} notes 42-43 \textit{supra} and accompanying text. Judge Wisdom attacked the \textit{Briggs} dictum in each of his three opinions for the Fifth Circuit (Singleton v. Jackson Mun. Separate School Dist. I, 348 F.2d at 730 n.5; Singleton v. Jackson Mun. Separate School Dist. II, 355 F.2d at 869; United States v. Jefferson County Bd. of Educ., 372 F.2d at 846 n.5). The continued attractiveness of the \textit{Briggs} dictum was evidenced by the reappearance in 1973 of its basic concept in Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 258 (1973) (Rehnquist, J., dissenting) (Justice Rehnquist felt that \textit{Brown} had merely prohibited discrimination and that \textit{Green}'s requirement of integration was, therefore, a significant expansion).
\item \textsuperscript{57} 372 F.2d 836, 866 (5th Cir. 1966).
\item \textsuperscript{58} \textit{Id.} at 895-96.
\item \textsuperscript{59} \textit{See} Levin \& Moise, \textit{supra} note 32, at 58.
\item \textsuperscript{60} Singleton v. Jackson Mun. Separate School Dist. II, 355 F.2d 865, 871 (5th Cir. 1966). The Fifth Circuit's acceptance of freedom of choice was somewhat of an anomaly given its new remedial formula. \textit{See} text accompanying notes 54-58 \textit{supra}. It appeared
seemed adequate, but in practice they accomplished only minimal integration. Choices for black children proved to be less than totally free, as overt and covert pressure was applied to maintain the segregated status quo.\(^{62}\)

The Supreme Court struck down a freedom of choice plan as unconstitutional by officially adopting the Fifth Circuit's remedial model in *Green v. County School Board*.\(^{63}\) In *Green*, the Court faced a rural community with little residential segregation, relatively equal numbers of black and white school children, and two schools\(^{64}\) which had been established under a state constitutional provision requiring racial segregation in public schools.\(^{65}\) Ten years after *Brown*, the schools remained totally segregated. A freedom of choice plan had produced negligible integration; no whites had chosen to attend the black school where eighty-five percent of the blacks remained segregated.\(^{66}\)

The defendant school board argued that *Brown II* required only that students be assigned to schools according to nonracial criteria, and that racially mixed schools were not mandatory.\(^{67}\) The Supreme Court disagreed, ruling that the school officials were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."\(^{68}\) The remedial duty imposed by the *Brown II* decision, therefore, was one of achieving actual integration, and the test of a school desegregation plan was its effectiveness in producing this result.\(^{69}\)

*Green* ended the era of "all deliberate speed" and began a result-oriented era. The mandate was clear: after the existence of a


\(^{62}\) See *Wilkinson, supra* note 38, at 539-40.

\(^{63}\) 391 U.S. 430 (1968).

\(^{64}\) *Id.* at 432.

\(^{65}\) *Id.*

\(^{66}\) *Id.* at 441.

\(^{67}\) *Id.* at 437.

\(^{68}\) *Id.* at 437-38.

\(^{69}\) *Id.* at 439.
dual school system was proven, the only constitutionally valid remedy was one which eliminated segregation.\textsuperscript{70} Furthermore, the responsibility for achieving this result was placed definitively on the local school officials.\textsuperscript{71}

The Court drew a broad remedial principle from simple facts—a rural southern school district with insubstantial residential segregation, only two schools, and a statutory dual school system which, by definition, required total racial segregation at each school. The rural, residentially integrated nature of the school district made it easy to effectuate a remedy;\textsuperscript{72} a valid desegregation plan would have resulted in changes in only two schools. The remedial mandate of \textit{Green} was not difficult to follow in small, relatively uncomplicated rural school districts. Urban school systems, however, were another matter.

II. SWANN: THE BRIDGE BETWEEN SOUTH AND NORTH

In June 1970, the Supreme Court granted certiorari to review the desegregation plan for the Charlotte-Mecklenburg school district in North Carolina.\textsuperscript{73} In contrast to rural school systems like the one in \textit{Green—which} had only two school buildings—the urban school system in Charlotte had a number of schools at both the elementary and secondary levels variously situated throughout its large school district.\textsuperscript{74} Moreover, unlike the \textit{Green} system, it was possible that factors other than intentional state action had caused the school segregation. For example, the children in this system were assigned to schools nearest their homes (a racially neutral criterion), but because of substantial residential segregat-

\textsuperscript{70.} \textit{Id.} The Court stated that there was a "burden on a school board today to come forward with a plan that promises realistically to work, and promises realistically to work now." \textit{Id.} (emphasis in original).

\textsuperscript{71.} \textit{Id.} at 441-42.

\textsuperscript{72.} \textit{Id.} at 441. Because there was so little residential segregation in New Kent County, the only remedy needed was geographic zoning of school attendance areas. \textit{Id.} at 442 n.6. For the same reason, freedom of choice in this community had been terribly inefficient; extensive cross-county busing had been needed to maintain the essentially segregated nature of the schools. With geographic zoning, virtually no busing was required. See Wilkinson, supra note 38, at 546-49. Given the later opposition to busing, this fact seems to imply that white parents were willing to have their children bused to school so long as the purpose was to segregate.


\textsuperscript{74.} Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). The district was the forty-third largest in the country covering 550 square miles with more than 84,000 pupils in 107 schools. Approximately 29% of the pupils were black and as of June 1969 two-thirds of them (about 14,000) attended schools which were 99% black. \textit{Id.} at 6-7.
tion the schools were largely segregated. The issue, therefore, was whether intentional state action had caused the school segregation or whether it was caused by independent factors such as residential segregation. If the systemwide remedy contemplated by Green was to be ordered for such a school system, plaintiffs would have to prove that the school authorities had caused the systemwide segregation, notwithstanding the independently segregative conditions.

The lengthy litigation surrounding the Charlotte-Mecklenburg school system shows the difficulty of such proof. The litigation which ultimately reached the Supreme Court was a second attempt at an effective remedy; the first desegregation plan, which had not produced integration, was found to be inadequate by the same court which had designed it. In its second attempt to formulate a remedy, the court found that the segregation in the schools was caused not only by the acts of school officials, but also by residential patterns unrelated to school board decisions. In short, not all of the segregation was a product of intentional state action. Nevertheless, the district court ordered a systemwide remedy involving groupings of outlying white schools with urban black schools and busing in both directions. The Fourth Circuit, however, reversed the portion of the decree which ordered busing of elementary school children.

The Supreme Court reinstated the district court order. Citing Green, the Court held that school officials were required to "eliminate from the public schools all vestiges of state-imposed segregation." Yet, under prior doctrine, before a systemwide remedy could be ordered, the existence of a state-created dual

75. Id. at 7.
76. See Fiss, The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation, 38 U. CHI. L. REV. 697, 699-701 (1971). By formulating the issue in this way the Court avoided the issue of whether the segregated pattern, without official conduct as a cause, was a constitutional violation. Id.
77. The original desegregation plan designed by the district court had ordered geographic zoning, along with a free transfer provision which allowed children assigned to schools nearest their homes to transfer to any other school in the district. Swann v. Charlotte-Mecklenburg Bd. of Educ., 243 F. Supp. 667 (W.D.N.C. 1965), aff'd, 369 F.2d 29 (4th Cir. 1966).
79. Id. at 1365-66.
83. Id. at 15.
school system had to be established; hence, the Court had to face the lower court finding that some of the present segregation had been caused by residential segregation.

The Court could have held that the plaintiffs were required to show the proportion of segregation caused either by the former statutory dual school system or by subsequent discriminatory acts of school officials. The remedy would then have been limited to correcting that increment caused by school authorities. In a large urban setting such as Charlotte, this would have been a difficult and complex causation issue, and the plaintiffs' chances of receiving a systemwide remedy would have been substantially diminished.

To avoid such an onerous requirement, the Court instead chose to shift the burden of proof to the defendant school officials by creating a presumption: "[w]here the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are . . . predominately of one-race . . . a presumption [arises] against schools that are substantially disproportionate in their racial composition."84 Thus, the defendant school officials had the burden of proving that residential segregation, or some other independent factor, had caused the school segregation. If they did not meet this burden, the existence of a dual school system was proven, and a systemwide remedy was in order.85

To justify the imposition of a presumption, the Court posited a reciprocal relationship between residential segregation and school segregation.86 It noted that "the location of schools may influence the pattern of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods."87 Therefore, school segregation, formerly required by statute, had contributed to the segregated residential patterns. By this reasoning, the Court maintained that residential segregation was not an "independent" factor unless proven to be so by the school board.

The importance of this presumption cannot be overstated. One element of the constitutional violation—past discriminatory

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84. Id. at 26.
85. Id. at 26-28.
86. "People gravitate toward school facilities, just as schools are located in response to the needs of the people." Id. at 20.
87. Id. at 20-21.
behavior which has caused the present segregation\(^88\)—was more easily proved with the assistance of the presumption. Especially in complex urban school systems, where causation was almost impossible to prove, placing the burden of proof on defendant school officials was a clear advantage for plaintiffs.

The presumption has been criticized\(^89\), and much of the criticism has focused on the fact that there was no clear evidence that the posited relationship between residential and school segregation truly existed.\(^90\) Criticisms of this type, however, misconstrue the function and nature of presumptions. The *Swann* presumption did not conclusively determine the issue of causation. It merely shifted to the defendant school officials the burden of proving, for instance, that random residential segregation had caused school segregation. Also, such criticism ignores the fact that there are two kinds of presumptions: those based on probability, and those based on policy.\(^91\) Although the burden of proof is generally placed on the party who “seeks to change the present state of affairs,”\(^92\) there are occasions when it is appropriate to shift the burden to the other party.\(^93\) Accordingly, the shift in the burden of proof announced in *Swann* could have been based on the probability that the posited relationship between residential and school segregation existed. Commentators, however, have quite vigorously disputed this basis for the presumption.\(^94\)

Nevertheless, a second, independent basis could have existed for

\(^88\) See notes 3–5 *supra* and accompanying text.

\(^89\) See, e.g., Comment, Keyes v. School District No. 1: *Unlocking the Northern Schoolhouse Doors*, 9 HARV. C.R.–C.L. L. REV. 124, 130–33 (1974). The author suggests that other factors have been more substantial causes of residential segregation, and that even when school policy has had some effect on residential patterns in one area, it was not necessarily a districtwide effect. *Id.* See also A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS, 136–37 (1970); Taueber, Residential Segregation, SCIENTIFIC AMERICAN, Aug., 1965, at 14.

\(^90\) See, e.g., Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 34 (1976). Professor Brest doubts the existence of the relationship, and asserts that the Court was avoiding the question of whether a school desegregation order could be based on segregation caused by governmental bodies other than the school board. *Id.* He concludes: “It is doubtful that the processes described by the Chief Justice account for much of the segregation in Charlotte and other metropolitan areas.” *Id.*

\(^91\) E. CLEARY, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 342 (2d ed. 1972). Most presumptions are based on both probability and policy. For example, the doctrine of *res ipsa loquitur* may be based on the inference that the accident would not have happened without someone being negligent (probability) or that the defendant had better access to the proof (policy). *Id.* at 804–05.

\(^92\) *Id.* § 337.

\(^93\) *Id.*

\(^94\) See notes 89–90 *supra* and accompanying text.
the creation of the presumption—social policy. Minority school children had been denied access to equal education for too long. The only adequate remedy available in the Court's eyes may have been one which altered the segregated structure and ameliorated unequal conditions. If plaintiffs were required to prove a complicated factual issue such as causation, then the likelihood of such a systemwide remedy would have been significantly diminished. By creating a presumption that shifted the burden of proving this issue to the defendant school officials, the Court may have been seeking to provide the opportunity for children to receive equal education.

*Swann* thus continued the movement of school desegregation doctrine toward a result-oriented approach.\(^{95}\) The *Green* remedial standard required that desegregation plans achieve integration.\(^ {96}\) The Supreme Court in *Swann* applied this remedial standard in a case where it was unclear whether past discriminatory behavior had been the sole cause of the current segregation in public schools. The Court created a presumption that intentional state action was in fact the cause of segregated conditions, and cast the burden of rebuttal on the defendant school officials.

One commentator has suggested that the presumption was created so as to attribute responsibility for segregated school systems.\(^ {97}\) Yet, this attribution of responsibility was not universal;\(^ {98}\) it was limited to those school systems where segregation was at

\(^{95}\) There were two other noteworthy aspects of *Swann*. First, the Court noted four problem areas in the issue of student assignment. The Court held that: (1) racial quotas might be used as a flexible starting point in shaping a remedy; (2) the continued existence of one-race schools had to be scrutinized carefully; (3) an assignment plan was not acceptable merely because it was race-neutral, and that district courts had the equitable power to alter attendance zones; (4) school busing was an appropriate remedial tool. 402 U.S. at 22-31. Second, the Court warned that when school officials had achieved full compliance, further intervention by district courts would not be necessary unless further intentionally segregative conduct by school officials had caused segregation. *Id.* at 31-32.

This dictum became law in Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). The Court there held that once a school board had complied with a desegregation decree, a district court could not modify the decree to compensate for resegregation which occurred through random migration. *Id.* at 435-37.

\(^{96}\) See notes 63-76 *supra* and accompanying text.

\(^{97}\) See Fiss, *supra* note 76, at 704-05. Professor Fiss regarded the connection to past discrimination as a contrivance, since the Court had really focused on segregated patterns. *Id.* at 705. He also predicted that the Court would gradually abandon its requirement that school officials be responsible for segregated conditions, and would then lessen the remedial burden. *Id.* at 705-06. This theory was borne out in Justice Powell's concurrence and dissent in Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 217 (Powell, J., concurring in part and dissenting in part), discussed at notes 129-42 *infra* and accompanying text.

\(^{98}\) See Fiss, *supra* note 76, at 703-07.
least partially due to statutory provisions. Most northern school systems had either never had statutory dual school systems, or had had them only in the distant past. Consequently, the purely historical nature of explicit discrimination in the North made any attempt to attribute responsibility on the basis of a statutory dual school system extremely weak. School desegregation doctrine had to be expanded so that northern school systems, which were indeed segregated, could be subject to remedial orders. For seventeen years after Brown the Supreme Court had not reviewed segregation in northern school systems. This state of affairs would soon change.

III. KEYES: SCHOOL DESSEGREGATION MOVES NORTH

Through experience, the Supreme Court had determined that the only effective desegregation remedy was one which required racial mixture in the student population of each school. In southern districts, where the dual school system was required by state statute, proof of a systemwide violation was easily met. If the dual school system was not presently required by law, but had been in the recent past, the Court had created a presumption that the present school segregation was caused by the former statutory dual school system. In northern school districts, not only were the segregated schools not presently required by law, but also a statutory dual school system had either never existed, or had existed only in the remote past. Therefore, in order to be awarded a Green-type, systemwide remedy, plaintiffs from northern school districts had to amass proof of a nonstatutory dual school system. In order to implement school desegregation in northern school districts, it was clear that the doctrinal proof requirements had to be modified.

99. For example, the Ohio Supreme Court ruled in 1888 that state law prohibited the segregation of school children. Board of Educ. v. State, 45 Ohio St. 555, 16 N.E. 373 (1888).

100. The expansion of school desegregation doctrine in Swann may have created a tension on the Court as to how far school desegregation was to be carried—tension which was reflected in the dissolution of the Court's unanimity in school desegregation cases. See Wright v. Council of Emporia, 407 U.S. 451 (1972). Four Justices, all Nixon appointees, dissented from a denial of Emporia's attempt to form a separate school district after a desegregation decree for the original county-wide district had been issued. Id. Professor Wilkinson suggests that the majority had denied the separation because of their "longer experience with southern resistance and evasion." See Wilkinson, supra note 38, at 557.

101. See notes 29–71 supra and accompanying text.

102. See note 4 supra and accompanying text.

103. See notes 95–97 supra and accompanying text.
The first northern school case to be decided by the Supreme Court was *Keyes v. School District No. 1, Denver, Colorado.*\(^{104}\) The Denver School system had never been operated under statutorily or constitutionally mandated racial segregation, yet plaintiffs alleged that local school officials had created and maintained segregated schools in the Park Hill areas of the school district.\(^{105}\) The district court agreed and ordered the Park Hill area schools desegregated.\(^{106}\) Plaintiffs then sought an order requiring integration of all the schools in the district, especially those in the core city area.\(^{107}\) In response, the district court ruled that the plaintiffs had to make a new showing of intentional segregation in each area of the city for which they sought relief, essentially ruling that a showing of intentional segregation in one area of the city was not probative of segregative intent in other areas of the city.\(^{108}\) Since the court did not find intentional segregation in the core area, but did find that the core area schools were racially unequal, it ordered that measures be taken to equalize facilities, not to integrate students.\(^{109}\) The Tenth Circuit affirmed the decree as to the Park Hill schools but reversed as to the core area, concluding that evidence was insufficient to prove a "constitutional deprivation."\(^{110}\)

The Supreme Court ruled that both lower courts applied incorrect legal standards.\(^{111}\) Since no statutory dual system had ever existed, plaintiffs conceded that they had to prove that some other form of intentional state action had caused or maintained the segregated schools.\(^{112}\) The Court clarified the plaintiffs' burden by noting that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation is purpose or intent to segregate."\(^{113}\) The Court held that the plaintiffs had met this burden as

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105. *Id.* at 191-92.
108. *Id.* at 76-77.
109. *Id.* at 77.
112. *Id.* Since the Court had never officially decided that intentional segregation was a necessary antecedent of unconstitutionality, the plaintiff's concession of the issue may have been unwarranted. See Note, *Finding Intent in School Segregation Constitutional Violations,* 28 CASE W. RES. L. REV. 119, 126 (1977).
113. 413 U.S. at 208 (emphasis in original). *De jure* segregation is defined as that segregation caused by intentional state action. In contrast, *de facto* segregation is that which arises independently of any behavior by state or local government.
to the Park Hill schools—a substantial portion of the school district.\textsuperscript{114} The defendant school officials argued that this finding of segregative intent in one area of the district should be viewed in isolation from the rest of the district. The Court rejected this argument, pointing out that plaintiffs had never been required to prove \textit{de jure} elements as to every school or every student.\textsuperscript{115} This response, however, was merely the statement of a truism, for prior to \textit{Keyes}, the Court had reviewed only statutory dual school systems where the segregation of every student in every school was required by law. By definition then, \textit{de jure} elements had existed as to every student in every school. Denver, however, had never had a statutory dual system which affected the entire student population. Thus, the Court’s rejection of this argument was based on inapposite precedent. Nonetheless, the Court proceeded to note a "predicate for the finding of the existence of a dual system."\textsuperscript{116}

Since previous awards of a systemwide remedy had been conditioned on proof of a systemwide violation, the Court had to provide an analytical method of proving a \textit{nonstatutory} dual school system in the northern school districts. The Court began by holding that a finding of segregative intent in one area of a school district was highly probative as to the intent of school officials in other areas of the district,\textsuperscript{117} essentially determining that discriminatory conduct directed at certain schools affected the racial composition of other schools in the district.

The Court then noted a number of actions taken by school officials which had created this effect. For instance, the concentration of black students in certain schools, resulting either from gerrymandering attendance zones or from designating “feeder” schools, had the reciprocal effect of keeping other nearby schools largely white.\textsuperscript{118} The same result occurred when schools were constructed “with the conscious knowledge that they would be segregated,”\textsuperscript{119} and when the use of mobile classrooms, transfer policies, and assignment of faculty and staff served to segregate.\textsuperscript{120} The Court concluded that these actions tended to increase residential segregation, which, in turn, increased school segrega-

\textsuperscript{114} Id. at 198–99.
\textsuperscript{115} Id. at 200.
\textsuperscript{116} Id. at 201.
\textsuperscript{117} Id. at 207–08.
\textsuperscript{118} Id. at 201.
\textsuperscript{119} Id. at 201–02.
\textsuperscript{120} Id. at 202.
tion. In light of these effects the Court created a presumption that:

a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . establishes . . . a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.

Moreover, the Court held that this burden would not be discharged by the school officials’ reliance on a “racially neutral explanation such as a neighborhood school policy.”

This presumption of segregative intent, in conjunction with the Swann presumption as to causation, constituted the method for proving the existence of a nonstatutory dual school system. The typical northern urban school district consisted of a neighborhood system of schools, which because of substantial residential segregation, tended to be largely one-race. A plaintiff who sought a desegregation decree had to prove that “intentionally segregative school actions” had caused segregation in a meaningful number of these schools; application of the Keyes presumption then shifted to the defendant school officials the burden of proving a lack of segregative intent in other areas of the district. School officials would generally rely on a race-neutral policy (the neighborhood school system) to prove lack of discriminatory purpose, implicitly asserting that residential segregation had caused the school segregation. Yet, the existence of one-race schools would invoke the Swann presumption, thus placing the risk of nonpersuasion on the defendant school officials.

If neither presumption was adequately rebutted, the existence of a nonstatutory dual school system would be proven and a systemwide remedy would be imposed.

The potency of the combined Keyes and Swann presumptions has been criticized. Most of the criticism has questioned whether school board actions directed toward one part of a school district actually affected every school in the district. However, such inquiry again ignores the nature and function of a presumption.

121. Id.
122. Id. at 208.
123. Id. at 210. The Court noted that although there may be instances of separable units within a school district where discrete segregative effects occurred, “such cases must be rare.” Id. at 203.
124. See notes 84–88 supra and accompanying text.
125. See, e.g., Comment, supra note 89, at 131–33.
The elements of intent, causation, and underlying systemwide impact, were still in issue; the Court merely had shifted the risk of nonpersuasion. Moreover, presumptions can be based on both probability and policy.\textsuperscript{126} Certainly, proof of segregative intent in one part of a school district makes it more probable than not that there was segregative intent in other areas of the district.\textsuperscript{127} Furthermore, social policy supports the creation of the presumptions,\textsuperscript{128} particularly the policy of treating the similar problems of segregation in northern and southern school systems similarly. Since the remedy (elimination of segregation) was to be identical for both northern and southern school districts and since elements of violation are more complicated and difficult to prove in northern school districts, the Court relaxed the proof requirements for northern plaintiffs. As one commentator has suggested, this policy avoided the appearance that the Supreme Court was "picking on" the South.\textsuperscript{129}

Another response to the Court's application of the presumptions and the result-oriented approach came from Justice Powell in dissent, who offered an alternative model for school desegregation doctrine—a model which would have reduced the remedial burden on northern school officials.\textsuperscript{130} Justice Powell first asserted that although \textit{Brown} merely prohibited states from requiring children to attend segregated schools,\textsuperscript{131} the result-oriented approach developed in \textit{Green} and \textit{Swann} required school officials to alleviate segregated conditions which had been caused by independent factors.\textsuperscript{132} Since intentional state action was no longer a prerequi-

\begin{itemize}
\item[126.] E. Cleary, supra note 91, at § 343. \textit{See} notes 91–94 supra and accompanying text.
\item[127.] 413 U.S. at 207-08.
\item[128.] \textit{See} notes 91–95 supra and accompanying text.
\item[129.] Fiss, supra note 76, at 705. In a later article, Professor Fiss also suggested that the Court's underlying motive was to eliminate the segregated pattern and that the presumptions were simply a method of attributing responsibility to school officials for the present segregation. Fiss, supra note 41, at 26. Another commentator, however, has argued that this process legitimized racial discrimination, asserting that the Court's promise of resolution through a remedial focus on segregation was rendered illusory by its requirement that discrimination be proven before a violation could be found. Freeman, \textit{Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine}, 62 MINN. L. REV. 1049, 1052–57 (1978). \textit{But see} Brest, supra note 90 at 44–48 (where it is argued that without proof of discriminatory conduct, there is no constitutional basis for judicial intervention).
\item[130.] 413 U.S. at 217 (Powell, J., concurring in part and dissenting in part).
\item[131.] \textit{Id.} at 220.
\item[132.] \textit{Id.} at 222. Justice Powell believed that random residential segregation was the more significant cause of segregated schools. \textit{Id.} at 223.
\end{itemize}
site to a remedy, Justice Powell was prepared to abolish the *de jure/de facto* distinction;\(^{133}\) the condition of segregated schools itself would be a prima facie violation of the Constitution. Under these circumstances, the constitutional right was the expectation that "once the state has assumed responsibility for education, local school boards will operate *integrated school systems* within their respective districts."\(^{134}\)

Notwithstanding his broad concept of constitutional violation, Justice Powell would not have required every school in the district to be integrated,\(^{135}\) and he reasoned that federal courts "in requiring so far-reaching a remedy . . . risk setting in motion unpredictable and unmanageable social consequences."\(^{136}\) To avoid this risk, Justice Powell would have given more weight to the tradition of locally controlled education and structured his remedy within the framework of the neighborhood education system.\(^{137}\) Unlike the majority, Justice Powell believed that the greater degree of actual integration achieved by such means as busing were outweighed by important "community aspirations and personal rights."\(^{138}\) Among these interests were a desire that children attend schools near home,\(^{139}\) a "desire of citizens for a sense of community in their public education,"\(^{140}\) the possible detrimental effect of busing on children,\(^{141}\) and the economic burdens of busing.\(^{142}\)

A comparison of Justice Powell's formulation with that of the majority shows the divergent directions the Court could have taken. Justice Powell clearly was more concerned with the local interest in autonomous educational systems than with the national interest in integrated schools. Rather than require racial mixture in every school in a district, he would have balanced the value of

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\(^{133}\) *Id.* at 224–25.
\(^{134}\) *Id.* at 225–26 (emphasis by Justice Powell).
\(^{135}\) *Id.* at 226–27.
\(^{136}\) *Id.* at 250.
\(^{137}\) *Id.* at 240.
\(^{138}\) *Id.* at 242. *See also* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 435–37 (1972) (where the author, focusing on harmful educational effects of segregated public schools, concludes that the evidence was strong enough to support a constitutional requirement that blacks be given voluntary access to biracial or white schools (plus free transportation), but not strong enough to support a requirement of mandatory desegregation for all).
\(^{139}\) 413 U.S. at 245.
\(^{140}\) *Id.* at 246.
\(^{141}\) *Id.* at 247–48.
\(^{142}\) *Id.* at 248.
integration with other educational values; rather than modify the plaintiffs' burden of proof so as to insure that a systemwide remedy was ordered, he would have allowed the remedial formula to conform to the exigencies of different, more complicated fact situations. In contrast, the majority created a presumption as to the element of segregative intent, applied it in conjunction with the Swann presumption of causation, and arrived at a method of proving the existence of a nonstatutory dual school system. Therefore, a systemwide remedy of the type established in Green was in order. Justice Powell's concern for the socially disruptive effects of school desegregation plans was not frivolous, however, and soon would be echoed by other members of the Court.

IV. THE COURT CUTS BACK

A. Milliken: The Rejection of an Interdistrict Remedy

Before 1973, the Supreme Court had reviewed only lower court decisions which had found constitutional violations within a single school district and had ordered desegregation plans which were confined to those single districts. Yet, in some situations, remedies affecting only one school district had proven to be inadequate because of a demographic situation common to northern urban areas—a predominantly black central city surrounded by predominantly white suburbs, each with separate school districts. This resulted in an imbalanced concentration of blacks in one school district which could not be remedied by a desegregation plan confined to that district. If the metropolitan area were viewed as a whole, however, and a desegregation plan tailored so as to incorporate suburban school districts, then the remedial objective of integration could be achieved. In order for the school desegregation doctrine to deal effectively with metropolitan segregation a further modification of the proof requirements for the establishment of a constitutional violation would have to be made.

The district court in Bradley v. Milliken recognized the inadequacy of a remedy limited to a single school district when dealing with metropolitan segregation. The court found that Detroit school officials, by means of intentionally segregative conduct,

143. See notes 115-23 supra and accompanying text.
144. See notes 82-88 supra and accompanying text.
had caused the segregation which existed in the Detroit public schools.\textsuperscript{148} The court also found that the state of Michigan was responsible for the segregated conditions, citing the state's own intentionally segregative conduct,\textsuperscript{149} and applying agency principles which made the state responsible for the conduct of the Detroit school board.\textsuperscript{150} The district court concluded that a desegregation plan limited to the Detroit school district was inadequate,\textsuperscript{151} and ordered the formulation of a metropolitan remedy.\textsuperscript{152} The suburban school districts appealed this order, which the Sixth Circuit affirmed.\textsuperscript{153} In \textit{Milliken v. Bradley}, the Supreme Court reversed,\textsuperscript{154} holding that the district court could not order a multidistrict remedy unless the plaintiffs proved that the suburban school districts had operated \textit{de jure} school systems and that there was an interdistrict segregative effect.\textsuperscript{155} Since the plaintiffs had not met these conditions, the remedy had to be confined to the Detroit school district.\textsuperscript{156} Thus, the Court refused to extend the result-oriented approach which had been developed in \textit{Green}, \textit{Swann}, and \textit{Keyes}.\textsuperscript{157} In light of the lower court findings of state responsibility, the Court could have extended the remedy beyond district lines\textsuperscript{158} by creating a presumption that interdistrict segre-

\begin{thebibliography}{99}

\bibitem{149} Id. at 588–89.
\bibitem{150} Id. at 593–94.
\bibitem{152} Id.
\bibitem{153} Bradley v. Milliken, 484 F.2d 215 (6th Cir. 1973).
\bibitem{154} 418 U.S. 717 (1973). This case was not the first metropolitan remedy that the Supreme Court had reviewed. One year earlier in \textit{School Bd. v. State Bd. of Educ.}, 412 U.S. 92 (1973), by a 4-4 vote (Justice Powell did not participate) the Supreme Court affirmed the court of appeals decision in \textit{Bradley v. School Bd.}, 462 F.2d 1058 (4th Cir. 1972). The Fourth Circuit had reversed a district court order consolidating the Richmond, Virginia, school district with two suburban school districts in a desegregation plan. \textit{Id.}
\bibitem{155} 418 U.S. at 744. The Court did not discuss the finding of a violation for the Detroit school district, but stated in a footnote that “under our decision last term in \textit{Keyes} ... , the findings [of a constitutional violation] appear to be correct.” Id. at 738 n.18.
\bibitem{156} \textit{Id.} at 746. In \textit{Milliken v. Bradley} (\textit{Milliken II}), 433 U.S. 267 (1977), because the intradistrict remedy did not achieve actual integration, the Court ordered additional programs to enhance the quality of education which black children would receive.
\bibitem{157} 418 U.S. at 742–45.
\bibitem{158} Indeed, the district court had held that the lines delineating a school district were mere “administrative conveniences.” 338 F. Supp. at 589. Professor Freeman supports this notion. He points out the basic inconsistency of regarding school district lines as inviolate while reforming neighborhood school assignments. He refers to local autonomy as “a codeword for rationalizing and protecting the prior appropriation of financial resources, environmental amenities, and in this case, racial homogeneity. In short, it is a principle of vested rights.” Freeman, \textit{supra} note 128, at 1109.
\end{thebibliography}
negative effects existed in metropolitan areas. Under such a presumption, the defendant school officials would have had to prove that the effects of discrimination in the Detroit school district were confined within district lines. By thus altering the proof requirements of a constitutional violation, the Court could have ensured a metropolitan remedy, and hence actual integration.

Yet, the Court refused to do so. Rather than focusing on the achievement of actual integration, the majority focused on another aspect of desegregation remedies—the extent to which they cause social disruption. Furthermore, Chief Justice Burger's majority opinion showed great concern for local control of public education and the administrative difficulties attendant to a desegregation decree. Because of the social consequences which followed from the ordering of a multidistrict remedy, the Court was apparently not willing to lighten the plaintiff's proof burden any further. Although the Court continued its remedy-focused approach to school desegregation cases, it refused to extend the doctrine to provide a desegregation remedy beyond the school district line.

B. Dayton I: A New Remedial Model?

The Court in *Milliken* did not lessen the remedial obligations of school officials found to be operating a dual school system. Rather, it recognized that desegregation remedies implicated two competing interests—the interest in an integrated educational system and the interest in local control of public education. *Milliken* determined that the latter interest outweighed the former when the question of a multidistrict remedy was presented.

159. Such a presumption is analogous to the *Swann* presumption based on the reciprocal relationship between residential segregation and school segregation. *See* notes 84–100 *supra* and accompanying text.

160. One commentator has asserted that the *Milliken* decision was a retreat from the "integrationist stance in education" which had evolved, Goldstein, *A Swann Song For Remedies: Equitable Relief in the Burger Court*, 13 *HARV. C.R.-C.L.L. REV.* 1, 28–29 (1978), but such an assertion is not entirely accurate. The plaintiffs had sought to prove *de jure* segregation in the Detroit school district alone. 418 U.S. at 745. If the theory of their case had been that there was an interdistrict segregative effect (and they had been able to prove it) and the Court had still refused to order an interdistrict remedy, then it could have been called a "retreat." However, since the suburban school districts were not parties to the action nor were they allowed to assert any defenses, *id.* at 730–32, such a characterization is probably unfair to the Court.

161. 418 U.S. at 739.


163. *See* notes 148–61 *supra* and accompanying text.
Moreover, one member of the Court noted that the interest in local control could outweigh the interest in integration even when the remedy was confined to a single school district,164 because the systemwide remedy which followed the finding of a dual school system often resulted in an almost complete alteration of a neighborhood school policy.165 Thus, in *Milliken*, a majority of the Court reacted to a potential disruption of local control by making the standard for proving segregative intent more strict when an effective remedy seemed to require a crossing of school district lines.166 The logical consequence of this development would seem to have been a change in the "root and branch" remedial model formulated in *Green*.167

The Supreme Court appeared to offer an alternative remedial model in *Dayton Board of Education v. Brinkman (Dayton I).*168 In *Dayton I*, the district court had found a "cumulative violation" of the equal protection clause from three findings of fact.169 Since the Sixth Circuit had held that this violation proved the existence of a dual school system, it ordered a systemwide remedy.170 The Supreme Court disagreed, holding that the district court's findings of fact were insufficient to support a finding of a dual school system. It was not clear to the Court that the constitutional violation had had systemwide impact.171 Therefore, a systemwide remedy was not justified.172 Nevertheless, since the plaintiffs had argued on appeal that further findings of fact could have been made from the record, the Court remanded the case to the court of appeals for review of the record.173

Justice Rehnquist delivered the opinion of the Court,174 and discussed the analysis which lower courts should follow in formulating a remedial decree:175 desegregation orders which affected

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164. For a discussion of Justice Powell's concurrence and dissent in *Keyes*, see notes 130-42 *supra* and accompanying text.
165. See notes 62-72 *supra* and accompanying text.
166. See generally Note, *supra* note 111.
167. See notes 63-72 *supra* and accompanying text.
169. *Id.* at 410-14. The three findings were: (1) substantial racial imbalance in the school system, (2) the use of optional attendance zones, and (3) the recision of school board resolutions which had acknowledged the responsibility for the present imbalance. *Id.*
170. *Id.* at 414.
171. *Id.* at 413-14.
172. *Id.*
173. *Id.* at 419.
174. Six other Justices joined in the majority opinion, Justice Brennan filed an opinion concurring in the judgment, and Justice Marshall did not participate. *Id.* at 407.
175. *Id.* at 420-21.
pupil assignments should attempt to achieve only the racial mixture that would have existed had the constitutional violation not occurred. 176 This limitation appeared to override the "root and branch" remedial formula; once a constitutional violation was found, the lower court was to determine exactly how much segregation had been caused by the intentional state action before a remedy could be ordered. According to the Court, the district court "must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." 177 Although Swann and Keyes mandated that the elements of segregative intent and present causation were to be presumed (after an initial proof burden was carried), 178 this language suggested that future plaintiffs would have to present more convincing proof.

Even though Keyes and Swann were cited with approval, 179 Dayton I appeared to call into question the continued validity of their presumptions. If the presumptions were no longer valid, and plaintiffs therefore had to prove a causal nexus between past discriminatory conduct and present segregation, then systemwide remedies would be much more difficult to obtain. To so interpret Dayton I would be to reverse school desegregation doctrine altogether. The uncertainty that arose from Dayton I was clear: whether this new formulation would apply in a case where the operation of the presumptions would prove a nonstatutory dual school system.

V. COLUMBUS AND DAYTON II: BEYOND SWANN AND KEYES

If the Dayton I remedial formula were applied to a case where a dual school system would have been proven with the use of the Swann and Keyes presumptions, the desegregation plan ordered would have to be less sweeping than past plans. Instead of ordering racial balance in every school in the district, courts would have to determine what the racial balance of the schools would

176. Justice Powell's concurring opinion in Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (Powell, J., concurring) presaged this remedial formula: "Thus, large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past." Id. at 995.
177. 433 U.S. at 420. For a critique of this formula, see Goldstein, supra note 158, at 40–42.
179. 433 U.S. at 410.
have been in the absence of discriminatory conduct, and the remedy would have been limited to that difference. Only if each school would otherwise have been racially balanced could the remedial plan order that degree of integration. In contrast to the result-oriented approach which the Court had developed before _Dayton I_, this remedial formula would produce little integration. This possibility created doubts about the Court’s commitment to achieving integration in public schools.\footnote{On July 2, 1979, the Supreme Court quieted these doubts by reaffirming its commitment to the “root and branch” remedial principle. In the companion cases of _Columbus Board of Education v. Penick_ and _Dayton Board of Education v. Brinkman (Dayton II)_ the Court affirmed lower court decisions which had found dual school systems and imposed systemwide remedies.}

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The Columbus, Ohio, public school system was large and highly segregated by race.\footnote{The Columbus, Ohio, public school system was large and highly segregated by race. The district court found that the Columbus schools were intentionally segregated by race at the time of _Brown_, and that the school officials had never dismantled this dual school system; since _Brown_, teachers and administrators had been assigned without regard to the racial composition of the schools. Furthermore, the school board had approved optional attendance zones, discontiguous attendance areas, and boundary changes which either enhanced or maintained the racial imbalance, and the board had rejected suggestions that would have reduced that imbalance. The district court concluded that it was “fair and reasonable to draw an inference of segregative intent from the board’s actions and omissions,” and that the present segregation was directly caused by these intentional acts and omissions. Since the violation had a systemwide effect, the court entered a systemwide remedy. The Sixth Circuit affirmed.}

\footnote{See notes 63–144 supra and accompanying text.}

\footnote{See _Goldstein_, supra note 160, at 26–43.}

\footnote{443 U.S. 449 (1979).}

\footnote{443 U.S. 526 (1979).}

\footnote{443 U.S. at 452. The system had over 96,000 students, more than 32% of whom were black. Some 70% of all students attended schools which were at least 80% one-race and half of the 172 schools were either 90% black or 90% white. _Id._}

\footnote{Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 260 (S.D. Ohio 1977).}

\footnote{Id.}

\footnote{Id. at 261.}

\footnote{Id.}

\footnote{Id. at 267.}

\footnote{Columbus Bd. of Educ. v. Penick, 583 F.2d 787, 814 (6th Cir. 1978).}
The public school system in Dayton, Ohio, was similar to the Columbus school system in size and racial characteristics. Following the remand from *Dayton I*, the district court held that the plaintiffs had failed to prove that acts of *de jure* segregation over twenty years old had any current incremental segregative effect. Specifically, the court ruled that the plaintiffs had shown neither segregative intent nor segregative effect with respect to the challenged practices of faculty assignments, optional attendance zones, transfers, and location and construction of new schools. The Sixth Circuit reversed, finding that at the time of *Brown* the Dayton school officials were operating a dual school system, and that they had failed to discharge their constitutional duty to disestablish this system. The court further found that the consequences of the dual school system, in conjunction with the intentionally segregative practices since 1954, were of systemwide impact and justified a systemwide remedy.

The Supreme Court, in tandem decisions by Justice White, affirmed both of these decisions. In both cases, the Court used a three-stage analysis to demonstrate that school board conduct, performed with segregative intent, had caused the segregation in the two public school systems. First, the Court held that when *Brown I* was decided, both the Columbus and Dayton school officials had been operating nonstatutory dual school systems. For example, the district court found that in Columbus there was a cluster of separate black schools which resulted from intentionally segregative acts and omissions of school board members. Since this area constituted a substantial part of the school district, the Court applied the *Keyes* presumption and found that a nonstat-

191. *443 U.S.* at 529. Although 40% of the students were black, 51 of the 69 schools in the system were virtually all-white or all-black. *Id.*


194. *Id.* at 1232–36.


196. *Id.* at 258.


198. Since the analytical framework of the decisions was virtually identical, they will be treated as one.

199. Justices Brennan, Marshall, Blackmun, and Stevens joined Justice White’s opinions. Chief Justice Burger wrote an opinion concurring in *Columbus*, and joined Justice Stewart’s concurrence in *Columbus* and his dissent in *Dayton II*. Justice Powell dissented in both cases, and joined with Justice Rehnquist who dissented in both cases.


utory dual school system existed. Thus, the Court found intentional state action which had caused segregation in public schools.

Second, the Court held that Brown II imposed a duty on local school boards to establish a racially neutral school system, and that this affirmative duty had not been discharged in either Columbus or Dayton. School officials had knowingly failed to eliminate the effects of past de jure segregation, which therefore "continues the violation of the Fourteenth Amendment." Third, the Court ruled that since 1954, Columbus and Dayton school officials had maintained or increased the racial segregation, through both specific discriminatory actions and the failure to act with conscious knowledge of segregative consequences. Since "[s]chool board policies of systemwide application necessarily have systemwide impact" and the Court indeed found such systemwide effect in Columbus and Dayton—the remedies mandated were also systemwide.

In addition to affirming systemwide desegregation plans, the Court expressly limited the application of the Dayton I remedial principle to fact situations where a systemwide violation had not been established. Even then, plaintiffs were not required to "prove with respect to each individual act of discrimination precisely what effect it had on current patterns of segregation." Thus, the majority's essential premise was that a dual school system, whether statutory or nonstatutory, had the same constitutional implications—namely that the only adequate remedy was one which racially balanced each school in a district. The only difference was that plaintiffs had a heavier burden of proof when the dual school system was nonstatutory. Once that burden was met, however, each type of dual school system received the same remedy. At this analytical level, Columbus and Dayton II return school desegregation doctrine to the standards of Swann and Keyes, preserving the validity of their presumptions. Yet, on a

203. Columbus, 443 U.S. at 456-58.
204. Id. at 458; Dayton II, 443 U.S. at 537.
205. Columbus, 443 U.S. at 459.
206. Id. at 461-63; Dayton II, 443 U.S. at 538-40.
207. Columbus, 443 U.S. at 466-67.
208. Id. at 467.
209. Dayton II, 443 U.S. at 541.
210. See notes 162-77 supra and accompanying text.
212. Dayton II, 443 U.S. at 540-42.
213. See notes 82-100 supra and accompanying text.
214. See notes 104-24 supra and accompanying text.
different level, these decisions extend the doctrine beyond earlier standards.

Justice White's three-stage analysis extends the doctrine in two ways, affecting both the element of causation and of intent. Stage one fixes the inquiry into relevant segregative conduct farther back in time: in Columbus and Dayton II the inquiry was into the status of the school districts in 1954, when Brown was decided.\footnote{Columbus, 443 U.S. at 455-57; Dayton II, 443 U.S. at 537-38.} Once a causal relationship has been proven, stage two recognizes an affirmative duty to disestablish the dual school system. In conjunction, these two stages effectively presume a causal connection between past discriminatory conduct and the school segregation which exists at the time of suit. This linkage is crucial for plaintiffs, for the causal connection between past discrimination and present segregation attenuates with time.\footnote{Fiss, supra note 76, at 703. Professor Fiss further suggests that the causation requirement was adopted because of a need to attribute responsibility, but that after a certain point such an attribution becomes unrealistic. Id. Another writer has argued that the "fault concept" eventually gives rise to a class of innocents who feel no responsibility, and consequently show resentment when burdened with the responsibility of remedying past discrimination in which they played no part. Freeman, supra note 129, at 1055. See also, Brest, supra note 90, at 37-38.} It is important to note, however, that plaintiffs must still prove the existence of a state-imposed dual school system at some point in time.\footnote{It is possible that the 1954 date used in Columbus and Dayton II is not the critical measuring point. For instance, the affirmative duty principle which was developed would also cover the following situation: An hypothetical school district in 1965 has a small number of minority students, but also an intentionally caused dual school system. Second, assume demographic trends which intensified the segregated conditions between 1965 and 1980. Third, assume evidence that the defendant school officials have done nothing to correct the situation since 1965. The point is clear: the significance of the year 1954 is that it signaled a warning to all future defendants that they might have a duty to act.} In other words, the school officials must have had a duty to act before stage two can be implemented. If a court required strict showings of intentionally segregative behavior which produced a dual school system, plaintiffs would not benefit at all from the three-stage analysis; they would still have to satisfy the standards of segregative intent as to the past conduct, but at a point further back in time. Nevertheless, the establishment of segregative intent as to this past conduct under Justice White's analysis is accomplished more easily since racial discrimination was, for the most part, more blatant in 1954.

The third stage of the analysis affects the element of segregative intent. Given the affirmative duty to disestablish a dual sys-
tem (stage two), stage three creates a presumption of segregative intent from the failure of the school officials to act. The importance of this presumption is obvious: it reinforces the establishment of intent from inaction.

Once a segregated school system exists, very little must be done to maintain the racially separate character. Because there are endless reasons for failing to act, an inference of segregative intent from omissions is necessarily tenuous. Consequently, in defending allegations of an intentional maintenance of a dual school system, school officials could defend against allegations of intentional maintenance of a dual school system by simply asserting that they had taken no discriminatory action. Once there exists an affirmative duty to act, however, the inference of segregative intent from inaction becomes more appealing. In effect, stage three places upon the defendant school officials the burden of demonstrating other reasons for their inaction. This three-stage analysis reduces the amount of proof needed to establish a constitutional violation and makes it easier to obtain a systemwide desegregation plan.

It is interesting to note that in Justice White’s opinions in Columbus and Dayton II there was no mention of the socially disruptive effects of a systemwide remedy. In striking a balance between the remedy of a constitutional violation and deference to local interests, the majority seemed more concerned with the former. Not all of the Justices were satisfied with this balance. Chief Justice Burger and Justice Stewart focused on the proper role of a reviewing court in a school desegregation case. They would have deferred to district court findings as to the existence of segregative intent and present causation, principally because of the greater familiarity with local facts and circumstances that these

218. The Court’s new standard for segregative intent bears a remarkable resemblance to the standard that Professor Freeman argues had been announced in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Freeman, supra note 129, at 1096-98. What makes this resemblance even more remarkable is that Griggs was decided under Title VII of the Civil Rights Act of 1964. The Griggs standard of segregative intent has been held not to apply as the constitutional standard. Washington v. Davis, 426 U.S. 229, 236-39 (1977). In Professor Freeman’s words, “[O]ne is intentionally discriminating if one continues to use a practice or maintain a condition that disadvantages a minority group without being able to justify the rationality of the practice or condition.” Freeman, supra note 129, at 1098.

219. The Chief Justice concurred in the Columbus judgment. 443 U.S. at 468-69.

220. Justice Stewart concurred in the Columbus judgment and dissented from the Dayton judgment. The Chief Justice joined in both opinions. Id. at 469-79.

221. Id. at 469-70 (Stewart, J., concurring and dissenting).
courts have. Under such a view, the Court would abdicate its role in directing school desegregation and return to the formula of *Brown II* which was a notable failure.

The principal dissenters were Justices Powell and Rehnquist, who argued that the majority's analytical technique for finding a nonstatutory dual school system was misconceived. Justice Powell's dissent emphasized that the majority had failed to appreciate the value of local control of public education and the social costs of systemwide remedies, while Justice Rehnquist focused on what he perceived to be the doctrinal emasculation of the traditional requirements of segregative intent and present causation.

The key to Justice Powell's dissent was his assertion that after twenty-five years of school desegregation litigation, "the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country." Justice Powell then presented two points in support of a more limited role for federal courts. First, he maintained that school segregation was caused by residential segregation, which in turn resulted from factors "for which no school board is responsible." Consequently, he reasoned, remedial orders would be only temporarily effective and resegregation would inevitably follow. Implicit in this argument was a rejection of the *Swann* presumption which had recognized a reciprocal effect between residential and school segregation. The *Swann* presumption required school officials to prove both that residential segregation had caused the school segregation and that this residential segregation had been caused by factors other than school segregation; the mere assertion that residential segregation had caused the school segregation would not be an adequate rebuttal. In his dissent, Justice Powell assumed that factors other than school segregation had, in fact, caused the residential segregation, without any proof of this by the school officials. Thus, Justice Powell ap-

223. For a discussion of the failure of the *Brown II* approach, see Wilkinson, * supra* note 38, at 485–505.
224. *Columbus*, 443 U.S. at 479 (Powell, J., dissenting).
225. *Id.* at 489; *Dayton II*, 443 U.S. at 542 (Rehnquist, J., dissenting).
226. 443 U.S. at 480 (Powell, J., dissenting).
227. *Id.*
228. *Id.* at 483–84.
229. See notes 82–88 * supra* and accompanying text.
peared to believe the exact opposite of the *Swann* presumption—that residential segregation caused school segregation and that the plaintiffs had to prove otherwise.

The second point made by Justice Powell was that systemwide remedies caused social upheaval by means of the usurpation of local control and the displacement of neighborhood schools. Justice Powell noted "economic and educational" reasons for the preservation of neighborhood schools, and he rejected "a judicial approach that ignores other relevant factors in favor of an exclusive focus on racial balance in every school." He also predicted that the result of the majority's doctrine would be the abandonment of public schools by those with the means to do so.

Justice Powell's deference to local control is unsound. Local control did not desegregate southern school systems. Indeed, the fact that school officials are still being haled into court suggests that local control will not produce a unitary school system; if the threat of court-ordered desegregation plans has not moved local officials to action, it is doubtful that their good faith—upon which Justice Powell would rely—will prove more efficacious. Furthermore, since such school officials have not taken steps to improve the condition of minority children in the past, there is little reason to believe they will do so in the future.

While Justice Powell focused on the social consequences of a systemwide remedial order, Justice Rehnquist directly attacked the majority's three-stage analysis. He asserted that the Court had emasculated two of the elements of the constitutional violation: segregative intent and present causation. As he viewed it, the majority's inquiry into the condition of school systems in 1954, along with their imposition of an affirmative duty to establish a unitary school system, meant the virtual elimination of these elements. His reasoning was straightforward. In 1954, school systems could not have had notice of what *Brown* required. Furthermore, the relevance of past conduct by school officials de-

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232. *Id.* at 484.
233. *Id.*
235. *See* notes 35–61 *supra* and accompanying text.
237. *Id.* at 500.
238. *Id.*
pended entirely on whether segregation caused by that conduct still existed, and an affirmative duty to desegregate arose only after a court found that a constitutional violation existed. Echoing his *Dayton I* opinion, Justice Rehnquist would have required proof of the precise extent to which past discriminatory conduct had current segregative effect and he would have tailored the desegregation plan to remedy only that increment.

Justice Rehnquist's dissent implicitly draws a distinction between the constitutional effects of statutory, as opposed to nonstatutory, dual school systems. This distinction was rejected in *Keyes* because its adoption would have resulted in different remedial standards for the identical segregative effects of southern and northern school systems. Such a result would run contrary to the fundamental implication of *Brown* that regardless of how a dual school system arose, its existence violated the Constitution. A unanimous Supreme Court had recognized this principle in *Green v. County School Board* when it held:

*Brown II* was a call for the dismantling of well-entrenched dual systems . . . [S]chool boards such as the respondent then operating state-compelled dual systems were nevertheless charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Although *Green* involved a statutory dual school system, the Court in *Keyes* applied the same remedy to a nonstatutory dual school system; the only difference was in the proof required to establish a constitutional violation.

In Part II of his dissent, Justice Rehnquist disputed the validity of inferring segregative intent from post-1954 school board conduct. Although Justice Rehnquist acknowledged that the inference of segregative intent was one factor to be considered in a finding of segregative intent, he reasoned that the standard adopted by the majority was the test of intent used in tort law:

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239. *Id.* at 501.
240. *Id.* at 503-04.
241. *See* notes 163-82 *supra* and accompanying text.
242. 443 U.S. at 520-21.
243. *Id.* at 497-500.
246. *Id.* at 437-38 (emphasis added).
247. *See* note 65 *supra* and accompanying text.
248. *See* notes 111-24 *supra* and accompanying text.
that one intends the natural, probable, and foreseeable effects of one's decisions. \textsuperscript{250} He noted that the Court had previously rejected the application of this test in equal protection cases. \textsuperscript{251} More fundamentally, he questioned the validity of an inference of segregative intent from the omissions of school officials. His contention on this point seems to be without a sound basis on either evidentiary or precedential grounds. Although the inference of segregative intent from affirmative action is stronger if school officials have had an opportunity to facilitate or produce integration, the inference of intent from failure to act is also valid. This inference was recognized in Justice Powell's concurring opinion in \textit{Austin Independent School District v. United States}, \textsuperscript{252} an opinion joined in by Justice Rehnquist.

Contrary to Justice Rehnquist's contentions, the majority removed neither the element of discriminatory purpose nor the element of causation. They did, however, implement a result-oriented approach which lowered the level of proof required to establish a constitutional violation and thereby made an effective desegregation remedy easier to obtain. Although Justice Rehnquist cited his \textit{Dayton I} opinion as the "basic line of inquiry which should govern school desegregation litigation,"\textsuperscript{253} the majority properly limited the \textit{Dayton I} remedial formula to cases where the proven violation was not systemwide.\textsuperscript{254} In cases like \textit{Columbus} and \textit{Dayton II} a systemwide violation had been proven, and, therefore, the \textit{Dayton I} formula was inappropriate.

In the face of doubts created by \textit{Dayton I}, the Supreme Court reaffirmed its commitment to integrated schools. The possibility thus remains that school officials will create a "system without a 'White school' and a 'Negro school', but just schools."\textsuperscript{255}

\section*{VI. CONCLUSION}

Although the Supreme Court has wavered from time to time, it has apparently developed a school desegregation doctrine which is

\textsuperscript{250} Id. at 510-12.
\textsuperscript{252} 429 U.S. 990 (1976). Justice Powell wrote: "Whether the Austin school authorities intentionally discriminated against minorities or simply failed to fulfill affirmative obligations to eliminate segregation, the remedy appears to exceed that necessary to eliminate the effect of any official acts or omissions." \textit{Id.} at 99 (emphasis added).
\textsuperscript{253} 443 U.S. at 520 (Rehnquist, J., dissenting).
\textsuperscript{254} \textit{See} notes 101-43 \textit{supra} and accompany text.
\textsuperscript{255} \textit{Green v. County School Bd.}, 391 U.S. 430, 442 (1968).
committed to the achievement of actual integration in public schools. This has been accomplished despite a growing concern over the extent of intervention by federal courts and the social disruption attendant to the remedial decrees. In the fall of 1979, an eloquent rebuttal was offered to the assertion that twenty-five years of federal judicial oversight of public schools is enough: Linda Brown Smith, the titular plaintiff in the landmark school desegregation case, moved to reopen Brown v. Board of Education because her daughter attends a segregated school. After twenty-five years, the public schools of Topeka, Kansas, remain segregated. Seemingly, the problem is not that the Supreme Court has required too much of local school officials; rather, it has never required enough.

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