Fordham Law Review

Volume 61 | Issue 1 Article 8

1992

Symposium: Brown v. Board of Education and Its Legacy: A Tribute to Justice Thurgood Marshall, Milliken v. Bradley: Brown's Troubled Journey North

Nathaniel R. Jones

MILLIKEN v. BRADLEY: *BROWN*'S TROUBLED JOURNEY NORTH

*THE HONORABLE NATHANIEL R. JONES**

Milliken v. Bradley *represents the impact that* Brown v. Board of Education *had on Northern schools. In this discussion, Judge Jones describes the social changes that led to the Detroit school case and the plaintiffs' path up and down the judicial system to ultimate desegregation of Detroit schools.*

THE focus of my remarks is the case of *Milliken v. Bradley*.[1] In focusing on this case, we analyze the problems of applying *Brown v. Board of Education*[2] to the North, particularly in states where the Constitution and the statutes disfavored segregation.

To many, the *Brown* decision only impacted the eleven states of the old Confederacy and the District of Columbia. The popular notion was that it did not apply to the North. But, unlike *Brown* in the South, *Milliken I* and *II* is a case that did not arise out of a grand strategy to attack segregation in the North. It more or less evolved. It evolved out of the frustrations and the disappointments of Black parents in Detroit. They were troubled by the quality of education that was being offered to their children—or, more precisely, the miseducation to which their children were being exposed—and the halting, tentative steps that were being taken by school officials to address their concerns.

It was certainly true that segregation in the North at that time was galloping. In virtually every major metropolitan area, racial isolation and racially identifiable schools were increasing. But eliminating the problem of segregation was not the priority demand of Black parents; their primary concern was education.

It was not until the school district took steps to reassign a few of the students for educational purposes that the "fur began to fly" and that the political resistance from Whites began to mount. The reassignment had a desegregative effect which resulted in the assignment of White students, for the first time, to previously all-Black or racially identifiable Black schools. That reassignment made it clear to persons who had not thought much about the idea that race and inferior education were twins, and that both race and inferior education had to be addressed simultaneously. The resistance did not become fierce until the status quo was disturbed and White students were going to be placed in the inferior schools to which Black children were already assigned.

Thus comes *Milliken v. Bradley*. The case reached the U.S. Supreme

* A.B., Youngstown State University; J.D., Youngstown State University. Judge, United States Court of Appeals for the Sixth Circuit.

1. Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*); Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*).

2. Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*); Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*).

Court in 1974.[3] The majority decision, a five-to-four ruling, ranks as an instance in which the United States Supreme Court suffered a failure of courage. In handing down its decision, the majority was guilty of the indictment rendered by the dissenting Justices—Justice Marshall, Justice Douglas, Justice White, and Justice Brennan.[4]

That majority decision was clearly a watershed. It was a result-oriented decision that rejected the wealth of evidence convincingly demonstrating, at least to the Court of Appeals for the Sixth Circuit sitting en banc,[5] that the State of Michigan and the Detroit school board, operating in lockstep, had deliberately created and perpetuated public school segregation on a massive scale. It was, in part, the massiveness of the permitted constitutional wrong that caused the Court majority to so grossly distort the evidentiary record and shirk its responsibility.

It is futile for legal scholars to continue to try to make sense out of the majority holding without taking into account that the Court departed from precedent and avoided logic and reason. To harness or to limit the remedial power of the district court, after it had already found violations of the Constitution, was simply to elevate political concerns over those of the Constitution.

Prior cases had directed that, once a constitutional violation was found, all-out desegregation was required. The reigning cases instructed that, where a constitutional violation was found, the segregation should be eliminated root and branch.

The majority in *Milliken I*, in an opinion authored by the Chief Justice, took the *Swann v. Charlotte-Mecklenburg Board of Education*[6] doctrine on remedy, that held the nature of a racial violation determines the scope of the desegregation remedy, and gave it a twist. Rather than deal with the all-out mandate to eliminate segregation that the Supreme Court had required in prior cases, the district courts were then virtually required to first apply a micrometer to any proposed remedy to ensure that not one whit too much desegregation would occur.

Let me review rather quickly what had been happening in Detroit and describe briefly the finding of the district court as affirmed by an en banc court of appeals. I earlier noted that some had contended that *Brown*[7] had no meaning in the North because the extent to which children were racially segregated was mere happenstance. It was the fortuity of this segregation, it was said, that should excuse Northern school districts from constitutional scrutiny.

In the cases of *Bell v. School City of Gary*[8] and *Deal v. Cincinnati*

3. 418 U.S. 717 (1974) (*Milliken I*).
4. *Id.* at 782.
5. Bradley v. Milliken, 484 F.2d 215, 242 (1973) (en banc) *rev'd*, 418 U.S. 717 (1974).
6. 402 U.S. 1 (1971).
7. 349 U.S. 294 (1955) (*Brown II*); 347 U.S. 483 (1954) (*Brown I*).
8. 324 F.2d 209, 213 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

Board of Education,[9] the courts held that segregation was de facto and, therefore, the federal courts were without jurisdiction to impose desegregation remedies. However, the *Milliken*[10] case, as had *Davis v. School District*[11] (a case decided by Judge Damon Keith), *Berry v. School District*,[12] and the *Keyes v. School District No. 1*[13] case in Denver, demonstrated that by digging beneath the veneer it was possible to show that the causation was not necessarily benign.

After the Sixth Circuit struck down Michigan Act 48[14] on grounds of nullification and interposition, the district court's discovery process developed extensive evidence. Policies and practices, actions and inactions, had combined to establish identifiable one-race schools.[15]

The trial judge, Stephen Roth, with the benefit of a vast array of evidence, drew a compelling picture in his opinion. He identified the various segregative devices, and their effects, engaged in by all levels of government and the private sector. They led to, among other things, the creation of segregated housing patterns on top of which school officials imposed a neighborhood attendance policy with the foreseeable consequence of segregated schools.[16] Judge Roth found that the Detroit board, exercising powers delegated to it by the state, had utilized attendance boundary changes, optional attendance zones, transportation from overcrowded schools, grade structure, building site selection and construction policies, to segregate children.[17] The Court further held that the state had caused segregation in a significant way. Through the enactment of Act 48, the state had imposed lower bonds on Detroit than on other districts. The state had also refused transportation assistance to Detroit. All of these actions added up to de jure segregation. The Sixth Circuit agreed and further concluded that a remedy for these violations which was limited to the political boundaries of Detroit would not suffice.[18]

In their brief to the United States Supreme Court, the plaintiffs directly addressed the reality faced by Judge Roth: Detroit's core of 133 virtually all-Black schools, containing over 130,000 students, was surrounded by virtually all-White school districts. While prior cases had held that, when dealing with a single district, courts could exercise their

9. 369 F.2d 55, 64 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).
10. 433 U.S. 267 (1977) (*Milliken II*); 418 U.S. 717 (1974) (*Milliken I*).
11. 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).
12. 505 F.2d 238 (6th Cir. 1974).
13. 413 U.S. 189 (1973).
14. *See* Bradley v. Milliken, 433 F.2d 897, 904 (6th Cir. 1970), *rev'd*, 418 U.S. 717 (1974). This statute interfered with the Detroit Board of Education's plan to reassign White students into Black schools.
15. *See* Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).
16. *See id.*
17. *See id.* at 588.
18. *See* Bradley v. Milliken, 484 F.2d 215, 249-50 (6th Cir. 1973) (en banc), *rev'd*, 418 U.S. 717 (1974).

equitable powers to eliminate segregation and were free to reassign students without regard to attendance boundaries within those districts,[19] the boundary lines between Detroit and the other districts in the metropolitan area were drawn by the state—a state that had been adjudged a wrongdoer. As a result, Judge Roth concluded that those boundaries were neither impermeable nor unbreachable and, thus, should no longer constrain the children of Detroit in a segregated manner.[20]

After identifying the segregative acts of Michigan and Detroit in their brief to the Supreme Court, the plaintiffs attempted to justify Judge Roth's decision to extend the remedy across the city boundaries:

> If that boundary line was permitted to stand without breach to perpetuate the basic dual structure, the intentional confinement of Black children in schools separate from whites will continue for the foreseeable future, the violation of constitutional rights will continue without remedy. Such a result would repeal *Brown* and return these children to *Plessy*.[21]

Yet, that is exactly what the Supreme Court majority did. No one was more prophetic than Justice Marshall in his dissent, and his words bear repeating because they continue to resonate all across this country:

> Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is a product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities one white, the other black—but it is a course, I predict, our people will ultimately regret.[22]

In short, the Supreme Court's analysis and holding in this case whipsawed the plaintiffs' case by contorting the recorded evidence. At the district court trial, the plaintiffs had offered substantial proof of the housing discrimination in the Greater Detroit Area and its effect on school segregation. They demonstrated that a school attendance policy based upon segregated neighborhood schools would foreseeably create a segregated school system. Thus, they firmly linked housing segregation with school segregation.[23] But, while the court of appeals affirmed Judge Roth's opinion on causation with respect to housing and the system be-

19. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968); Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); Davis v. School Dist., 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); United States v. Jefferson County Bd. of Ed., 372 F.2d 836 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir. 1967) (en banc).

20. *See* Bradley v. Milliken, 338 F. Supp. 582, 593-94 (E.D. Mich. 1971) *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

21. Paul Dimond, Beyond Busing, Inside the Challenge to Urban Segregation 101 (1985).

22. Milliken v. Bradley, 418 U.S. 717, 814-15 (1974) (*Milliken I*) (Marshall, J., dissenting).

23. *See* Bradley v. Milliken, 338 F. Supp. at 587-88.

ing segregated,[24] it nevertheless felt compelled to state in its en banc opinion that it was not relying upon the proof of housing discrimination.[25]

Upon considering the court of appeals' opinion, the Supreme Court rejected the inter-district reach because there was no inter-district violation with an inter-district effect.[26] Thus, in concluding that there was no constitutional wrong calling for an inter-district remedy, the Supreme Court struck down the Sixth Circuit's affirmance of Judge Roth's decision.[27]

The most curious aspect of this exercise, however, was the rationale of the swing Justice, Potter Stewart, who, unlike the Chief Justice who had authored the majority opinion, would have held for the plaintiffs if they had shown that state officials had used housing or zoning laws in a purposefully racially discriminatory fashion.[28] But there was proof in the record, abundant proof in the record, of purposeful and racially discriminatory housing. Nevertheless, because the court of appeals said it was not relying upon it in affirming Judge Roth, the Supreme Court did not see fit to go back to the record itself and premise an affirmance upon that housing proof. To hold that there was no proof was one thing; to conclude that the court of appeals did not see fit to rely upon it was quite another. That is one of the sad ironies of the *Milliken* case.

So, it was remanded to the district court for implementation of a remedy limited to Detroit. By this time, a new judge had been assigned to the case because of the death of Judge Roth. The judge to whom it was assigned, Robert DeMascio, appointed experts, and out of all that came a plan that included substantial educational components.[29] The state was ordered to contribute to the cost of these educational components. The state resisted and appealed to the Sixth Circuit Court of Appeals which upheld the district court.[30] The matter then went to the Supreme Court and, following briefing and argument, the court of appeals was affirmed.[31]

What was significant about its affirmance, in what we call *Milliken II*, was the principle that a remedy could be justified, and a state required to pay even when the remedy went beyond mere pupil reassignment.[32] The essence of the *Milliken II* decision was that, to the extent that a district court finds these educational components are necessary to eliminate seg-

24. *See* Bradley v. Milliken, 484 F.2d 215, 242 (6th Cir. 1973) (en banc), *rev'd*, 418 U.S. 717 (1974).

25. *See id.* at 264.

26. *See* Milliken v. Bradley, 418 U.S. 717, 745 (1974) (*Milliken I*).

27. *See id.* at 752-53.

28. *See id.* at 755 (Steward, J., concurring).

29. *See* Bradley v. Milliken, 411 F. Supp. 943, 944-45 (E.D. Mich. 1975), *aff'd in part and remanded in part*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

30. Bradley v. Milliken, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

31. Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*).

32. *See id.* at 287-88.

regation—or if not to eliminate segregation, to minimize the effects of segregation—in a district which is overwhelmingly Black, that aspect of the remedial plan will be affirmed.

In conclusion, let me just note that it is interesting how we have come full circle. I noted at the beginning that this case did not arise out of a primary demand by the Black parents to challenge segregation; it arose because of concern over the quality of the educational offerings to which their children were subjected. We reached the point where the Supreme Court was directing the State of Michigan to do by court order what it refused to do as a matter of educational policy, and that was provide resources for the advancement of the educational quality of minority children.

A final irony—I guess I can call it an irony—is that the principle that is embodied in *Milliken II* is back before the U.S. Supreme Court in *United States v. Fordice*,[33] a case out of Mississippi involving the question of the unitariness of the institutions of higher education in Mississippi. The question is whether the state has done enough to eliminate segregation in higher education when it continues to have significant numbers of one-race colleges and junior colleges in the State of Mississippi.

The majority opinion of the Fifth Circuit in upholding the position of the University of Mississippi, or the Mississippi higher educational authority, is that they have achieved unitary status. Judge Patrick Higginbotham's dissenting view is that they had not achieved unitary status because there are too many facets of the educational program in Mississippi that remain one-race and remain segregated. It will be interesting to see how the Supreme Court treats the holding in *Milliken II* in the context of these higher education cases.

I think that our jurisprudence would have been quite different if in *Milliken I* the Court had simply said, "There is a violation, and it is this violation of an expanding core of Black schools and neighborhoods always encircled by a receding ring of White schools. We do not know the extent of it, we do not know what the remedy is, but there is no question that that is a violation of the principles established in *Brown*." What if that is all the Court had done; how would we be different today?

In the first place, I think it would have resulted in a remand to the district court for it to exercise its flexible and equitable powers. The Chancellor has been known to do this in the past and it is the inherent nature of the Chancellor to act equitably in dealing with these intractable problems. Were the court not faced with an absolute prohibition against inter-district assignment, or constraints so severe that an effective remedy becomes prohibitive, schools and courts would be able to deal with segregated education.

I think the landscape of American public education would be totally different today if the Supreme Court had gone so far as to leave the reso-

33. 112 S. Ct. 2727 (1992).

lution to the various district courts. They would have the familiarity with the local problems and could take testimony to decide the most effective way of dealing with each fact or situation that it confronted.

I can think of any number of cases where it would be different. We need only take the Cleveland case that was decided after Detroit, or the Columbus or Dayton cases that Paul Dimond argued in the Supreme Court. Had they been approached on a metropolitan or inter-district basis, and if the district court had been free to approach the problem of remedy without being hemmed in by these artificial political boundaries, then I think that the problems of urban education in those particular districts would be totally different from what they are today.

As it stands now, those systems have virtually resegregated. Dayton has resegregated and the Court has terminated jurisdiction. In Columbus, the Court has likewise terminated jurisdiction and that system is now resegregating by reverting to the neighborhood schools. Resegregation is on the move. If the *Milliken* decision had gone the other way, I think desegregation would still be the order of the day and our metropolitan areas would be moving toward the goal of a single society.