Against Localism

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“Fellow citizens, of everywhere in particular, and nowhere in general...”

—A Glance At New York in 1848

“If there were a prevailing idolatry of smallness, irrespective of subject or purpose, one would have to try and exercise influence in the opposite direction.”

—E. F. Schumacher, Small is Beautiful

“Away ye spirits of discord! ye narrow views! ye local policies! ye selfish patriots, who would damn your country for a sixpenny duty! In the present state of America, local views are general ruin!”

—Pennsylvania Packet, September 22, 1787
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Detroit, Michigan. 1970. The city’s schools are segregated by race. Black children go to schools that are predominately black and white children go to schools that are predominately white. Not because they are required to do so by law, as they once were in the Jim Crow South, but because Detroit’s neighborhoods are segregated by race, and students, naturally enough, attend neighborhood schools. Seventy-five percent of Black schoolchildren attend schools that are more than ninety percent Black. Ten years ago it was sixty-six percent.

Detroit’s demographics are changing rapidly. In 1946, Detroit schools were eighty-three percent white; by 1964, they were only forty-six percent white. These demographic changes make addressing segregation harder, not easier, as we’ll see in a moment.

Enter Ronald Bradley, representing “all school children in the City of Detroit, Michigan, and all Detroit resident parents who have children of school age.” On August 24, 1970, Bradley (the plaintiff) filed suit, with the help of the NAACP, against William G. Milliken, the governor of Michigan, Frank Kelly, Michigan’s attorney general, John W. Porter, the state’s school superintendent, the Michigan Board of Education, the Detroit Board of Education, and Norman Drachler, Detroit’s superintendent of schools (the defendants). A group of white parents from Detroit later intervened in the case, joining the defendants. Bradley’s lawyers argued that school segre-

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regation in Detroit was the product of state action, and therefore violated the Fourteenth Amendment’s guarantee of “equal protection of the laws.”

At the trial phase of a long and complicated case in the U.S. District Court, Eastern District of Michigan, Southern Division, which began on April 6, 1971, Alexander Ritchie, a lawyer for the white parents, mentioned the phenomena of white flight, all too common in that era, and asked Martin Sloane, an expert witness who had worked for the U.S. Civil Rights Commission and the Department of Housing and Urban Development, “whether a desegregation plan limited to Detroit would be at all effective.”

Judge Roth, extending Richie’s line of questioning, asked Sloane whether a desegregation plan for Detroit would lead “to an abandonment in large numbers of white folks so that when you ended up...you’d have a city that was no more integrated when you started.” Sloane used the Washington, D.C. metropolitan area as an example in his answer. He said that in the metropolitan area as a whole the distribution of the population by race (75% white, 25% black) had not changed in recent years, but the suburbs were becoming increasingly white while Washington, the city, was becoming increasingly black, to the point where “Washington Public Schools are now in excess of 90 per cent black.”

“It’s very difficult to talk about achieving integration with that kind of percentage,” he added. Schools in a fully integrated school district that is 90% black and 10% white would be predominantly black, even in a metropolitan area that was 75% white and 25% black. “Integrated” schools in a predominantly black school district are still segregated by race, as we all know now. However, “if you think in terms of the metropolitan area as a whole,” Sloane suggested, “the problem becomes a good deal less difficult because then

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3Quoted in Ibid.
4Quoted in Ibid., 100.
5Quoted in Ibid.
we’re dealing with a school population as well as a residential population which is roughly 75 per cent white and 25 percent black.”6 In 1970, Detroit was not much different from Washington: 65% of Detroit’s school children were black, and that number was expected to continue to grow. As of the 2017-2018 school year, Detroit schools were 82% black, 2% white.7

A moment later, Judge Roth, who had earlier expressed skepticism about the plaintiff’s case, interrupted Sloane: “I don’t know whether fortunately or unfortunately this lawsuit is limited to the City of Detroit and the school system, so that we’re only concerned with the city itself and we’re not talking about the metropolitan area.”8 He was right, of course, legally speaking. The suburbs were not being sued. But the state was, as Nick Flannery, council for the plaintiffs, reminded Judge Roth. It matters here that under Michigan law, and in the American constitutional order, school districts are “creatures of the state.” Michigan could, if it wanted to, eliminate, consolidate, or divide its school districts. The state had “plenary power,” as the lawyers and judges liked to repeat.

Perhaps as a result of Flannery’s reminder, Judge Roth allowed Bradley’s lawyers to present evidence of segregation in Detroit’s suburbs, though he warned that he would “separate the wheat from the chaff” later.9 When Assistant Attorney General Eugene Kraskicky, representing the State of Michigan, abandoned the trial midway through, claiming that the State of Michigan had nothing to do with it, Judge Roth denied the State’s motion to be dismissed from the case, wondering aloud, “How do you desegregate a black city or a black school system….Now State Defendants…ought to be thinking in these terms indeed if that’s what develops,” hinting at a remedy that would extend beyond Detroit.10

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6Quoted in Ibid.
7Quoted in Ibid., 102.
8Quoted in Ibid., 109.
9Quoted in Ibid., 102.
10Quoted in Ibid., 109.

On September 27, 1971, over a year after the suit was filed, Judge Roth ruled that Detroit’s schools had been illegally segregated by the Detroit School Board and the State of Michigan. A week later, he ordered the Detroit School Board to submit a “Detroit-only” desegregation plan within 60 days. He also ordered the State of Michigan to submit a metropolitan desegregation plan within 120 days. Roth said would evaluate the plans to determine which would be most effective.

Judge Roth was on firm legal ground in doing so. Back in 1955, in the remedial stage of Brown v. Board of Education (typically referred to as Brown II), the Supreme Court ruled that in fashioning remedies for constitutional violations, lower “courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.”

On April 20, 1971, in the middle of the district court trial in Detroit, the Supreme Court issued its ruling in Swann v. Charlotte-Mecklenburg Board of Education, upholding busing as part of a desegregation plan. Chief Justice Warren Burger, writing for the majority, summarized and strengthened the Court’s contention in Brown II: “Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”

Taking his cue from Swann, Judge Roth rejected the Detroit-only desegregation plans and called the plaintiff’s proposal, which included 54 of 86 school districts in the metropolitan area, “practicable, feasible, and sound.” The best of the Detroit-only plans would, he said, “make the Detroit school system more identifiably Black ... thereby increasing the flight of Whites from the city and the system.”

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13 Quoted in Baugh, The Detroit School Busing Case, 128.
The Supreme Court had insisted, only three years earlier in *Green v. County School Board of New Kent County* (1968), that school boards were “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.”14

Judge Roth chided defendants for the State of Michigan for “their stubborn insistence that under their self-serving, and therefore self-limiting, view of their powers they were free to ignore the clear order of this court.”15 Judge Roth therefore rejected the State of Michigan’s contention that it was not responsible for remedying segregation in the Detroit schools. The State violated the Constitution, so the State could not shirk its “affirmative duty” to desegregate Detroit’s schools.

The defendants took the case to the Court of Appeals for the Sixth Circuit, naturally enough. A three-judge panel affirmed the District Court’s judgment, that Detroit and the State of Michigan were guilty of *de jure* segregation, and affirmed Judge Roth’s decision to reject a Detroit-only remedy.

The decision was appealed yet again, to the entire Sixth Circuit, sitting *en banc*. Chief Judge Phillips, in his opinion for the Court, wrote that the “record reflects a present and expanding pattern of all black schools in Detroit (resulting in part from State action) separated only by school district boundaries from nearby all white schools. We cannot see how such segregation can be any less harmful to the minority students than if the same result were accomplished within one school district.”16 As Chief Justice Earl Warren had written in *Brown*, “separate educational facilities are inherently unequal.”17

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14 *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) at 437-38.
Chief Judge Phillips added, again affirming Judge Roth’s approach, that “the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines.”

If the story had ended there, schools in America would have looked much different than they now do. But the story did not end there. The defendants appealed to the Supreme Court. For technical reasons, the name of the case changed from Bradley v. Milliken, as it was called in the lower courts, to Milliken v. Bradley.

Interestingly, the Detroit School District changed sides in the case, joining the NAACP to defend Judge Roth’s metropolitan remedy. Detroit admitted it was guilty of unconstitutional segregation, but wanted to share blame, and responsibility for the remedy, with the State of Michigan. Because no one contested the fact that Detroit’s public schools were unconstitutionally segregated, the case came down to “the scope of the remedy” for the constitutional violation.

Judge Roth, the NAACP, and Detroit argued that because the State was guilty of unconstitutional segregation, and because the State had “plenary authority” over its own school districts, the State could be ordered to implement a metropolitan or “inter-district” remedy. It could be ordered to send black children in Detroit to schools in the suburbs and white children in the suburbs to schools in Detroit. Anything less would leave schools in the metropolitan area segregated, not because of segregation within school districts, but because of segregation between school districts.

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18Bradley v. Milliken, 484 F.2d 215 at 249.
The Supreme Court disagreed. Not because it contested the fact that Detroit had unconstitutionally segregated its schools. Not because it contested the fact that the State of Michigan had violated the Constitution’s equal protection clause. And not even because the suburban school districts were innocent. No determination had been made, one way or the other, with respect to the suburbs’ role in segregating Detroit.

Chief Justice Burger, writing for the Court, rejected the metropolitan remedy because, he said, it exceeded the scope of the constitutional violation. Because the suburban school districts had not been found guilty of unconstitutionally segregating Detroit’s schools, they could not be asked to participate in the remedy with those who had.

It was a remarkable decision, not least because Chief Justice Burger insisted that the suburban school districts had not been found guilty of segregating schools in Detroit, while dismissing the fact that the State of Michigan had, as well as the fact, established in the record, “that local school districts are instrumentalities of the State created for administrative convenience.”

The State of Michigan had the legal authority to do whatever it wanted with its school districts, including exactly what Judge Roth had ordered. It could have consolidated all 86 districts in the counties of Wayne, Macomb, and Oakland (the Detroit metropolitan area) into one super-district. It could have kept separate districts while removing their authority over school assignments. It could have denied funds or frozen assets of districts that refused to participate in Judge Roth’s remedy. And since the State of Michigan had violated the Fourteenth Amendment, you can be forgiven for thinking that Michigan had the duty to, and could be ordered to, impose Judge Roth’s metropolitan area remedy.

Why, then, did Chief Justice Burger and the Supreme Court of the United States deny Detroit’s schoolchildren the only remedy available to them? Why did the highest court in the land refuse Detroit’s schoolchildren “equal protection of the laws?” Because “no single tradition in public education is more deeply rooted than local

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19 Bradley v. Miliken, 484 F.2d 215 at 246.
control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”

Because “the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.”

Because “local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages ‘experimentation, innovation, and a healthy competition for educational excellence.’”

To add insult to injury, the Supreme Court ruled against the metropolitan remedy—any metropolitan remedy—without asking the lower courts to determine whether the suburban school districts had in fact committed acts of de jure desegregation affecting the Detroit schools. It rejected Judge Roth’s plan without attempting to gather all the facts.

The dissents, as one might expect, were caustic, exasperated, and despondent. Justice Douglas suggested that by ruling “against the metropolitan area remedy we take a step that will likely put the problems of the blacks and our society back to the period that antedated the ‘separate but equal’ regime of Plessy v. Ferguson.”

Justice White noted “that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts.”

Justice Marshall, who had argued Brown v. Board of Education before the Supreme Court in 1954, called the majority’s decision an “emascula-
tion of our constitutional guarantee of equal protection of the laws” and a “solemn mockery” of Brown’s “holding that separate educational facilities are inherently unequal.”

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21 Ibid.
23 Milliken v. Bradley, 759.
24 Ibid., 763.
25 Ibid., 782.
The majority’s decision in *Milliken v. Bradley*, which would mark the beginning of the end of proactive school desegregation in the United States, turned on a simple but powerful idea: local control, local autonomy; in a word, *localism*. Judge Roth’s metropolitan remedy, the only remedy that would have restored equal protection of the laws for Detroit’s schoolchildren, was rejected because it would have been an affront to localism. Nothing more.

Everyone involved in the case, by the end, admitted that Detroit’s schoolchildren had been denied equal protection of the laws. They were entitled, legally and morally, to a remedy. Somehow, however, the “tradition...of local control” managed to trump children’s moral and constitutional rights. The Court said that it could not rectify a terrible injustice—racial segregation—because doing so would interfere with a deeply rooted tradition, local control. Forgetting, it seems, that sixteen years earlier *Brown* had done exactly that: interfere with by repudiating another deeply rooted American tradition—segregation on the basis of race.