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Local Taxes, Federal Courts, and School Desegregation in the Proposition 13 Era

In the twenty-five years since Brown v. Board of Education,¹ school desegregation has propelled America into its frenetic modern phase in race relations.² With varying success, the federal judiciary has committed itself to terminating that discrimination which affects segregated children's "hearts and minds in a way unlikely ever to be undone."³ That commitment to school integration has carried with it significant social costs, including strong and unbowed community resistance,⁴ inconvenience and hardship for students, substantial public expenditures, and flight by white residents from the desegregated school district, sometimes resulting in an even more pronounced racial imbalance.⁵ Indeed, influential social scientists have questioned whether the benefits of most desegregation methods outweigh these costs.⁶ Other commentators have suggested that, even disregarding costs, the achievement of racial balance in the schools is not the most effective way to improve black children's education.⁷ Nevertheless, propelled by the Supreme Court's mandate to termi-

¹. 347 U.S. 483 (1954) [hereinafter cited as Brown I].


nate segregated schooling, federal district courts continue their de-
segregation efforts.

A recent trend in state referenda and legislation promises to
make those efforts even more difficult. Tax limitation provisions —
whether in the form of constitutional restraints on state or local tax-
ing authority such as California’s highly publicized Proposition 138
or legislatively imposed ceilings on local taxing authority9 — may
significantly restrict the ability of a state or local government to raise
money.10 This Note examines a federal court’s dilemma when the
remedy of school desegregation collides with the trend of tax limita-
tion — when a school desegregation order requires funds that the
local school authorities do not have and cannot raise. Can the dis-
trict court order a local tax levy to fund school desegregation when
the school authorities have already reached their maximum taxing
limit? Is there a better alternative remedy?

To tackle those questions, this Note first elucidates three equita-
ble principles to guide courts in fashioning desegregation decrees. It
then explores the history of judicial power to order state and local
governments to levy taxes and finds that power tightly circumscribed.
In Section III, the Note offers an alternative to the court-
ordered tax levy: a decree that directs local school authorities to de-
segregate, letting them decide whether to fund the desegregation by
raising taxes or by reallocating their present budget. It assesses this
proposal in light of the three equitable principles of desegregation
and concludes that the proposal carries out those principles more
faithfully than a court-ordered tax levy.

I. PRINCIPLES FOR SCHOOL DESEGREGATION REMEDIES

In Milliken v. Bradley,11 the Supreme Court summarized its ear-
lier holdings and presented relatively specific guidelines for school
desegregation orders. The opinion, as further defined in more recent
cases, identifies three basic equitable principles to guide the forma-
tion of a decree. First, the remedy “must be designed as nearly as
possible ‘to restore the victims of discriminatory conduct to the posi-
tion they would have occupied in the absence of such conduct.’ ”12

Federal courts have been surprisingly bold in seeking such restora-

8. CAL. CONST. art. XIIIa.
10. Thirteen states passed referenda in the November 1978 election limiting the spending
or taxing power of state and local governments. See N.Y. Times, Nov. 9, 1978, § A, at 20, col.
5.
11. 433 U.S. 267 (1977) [hereinafter cited as Milliken II].
[hereinafter cited as Milliken I]).
tance to grant mandatory injunctions against government officers and triggered an increasing willingness to issue such decrees. 13 Expanding on the traditional flexibility of equitable remedies, 14 appellate courts have upheld a variety of prohibitions and affirmative requirements in desegregation orders. 15

The second principle for desegregation remedies, on the other hand, limits the permissible forms of a remedial decree: "[T]he desegregation remedy is to be determined by the nature and scope of the constitutional violation" 16 and must be directly related to the "condition alleged to offend the Constitution." 17 Hence, the district court must confine its remedy to eliminating the effects of past governmental discrimination and not attempt the herculean labor of eradicating the effects of all private segregative behavior. 18 This second principle has prompted the Supreme Court to strike down a discrepant remedy and trigger an increasing willingness to issue such decrees. 13


When confronting particularly recalcitrant local school authorities, district courts have appropriated broader power to facilitate desegregation by appointing a receiver over a troublesome school. See Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), cert. denied, 429 U.S. 1042 (1977); Turner v. Goolsby, 255 F. Supp. 724, 731-35 (S.D. Ga. 1965) (supplemental opinion 1966). Moreover, in many cases where courts have issued a comprehensive decree and retained jurisdiction, the district judge has virtually assumed the role of a receiver. See Roberts, The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School, 12 New Eng. L. Rev. 55, 74 (1976).


18. The remedies in southern desegregation cases before Milliken I stressed an affirmative duty on the part of school officials to desegregate completely, and courts judged each desegregation plan on its success in achieving that goal. See United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 489 (1972); Wright v. Council of Emporia, 407 U.S. 451, 462 (1972); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-23 (1971). Although these cases may appear to conflict with Milliken I's controlling principle, at least one commentator has contended that they may be consistent: where the school authorities had expressly labelled schools as black or white, complete integration may have been necessary to reverse such stigmatization; accordingly, the courts demanded complete desegregation. Kanner, From Denver to Dayton: The Development of a Theory of Equal Protection Remedies, 72 Nw. U. L. Rev. 382 n.1 (1977).
District court decree ordering a school system to maintain a specified racial balance in schools after racial discrimination through official action had been eliminated from the system.\(^{19}\) It has also led the Court to reject intersystem busing as a remedy where only one school system had been liable for constitutional violations.\(^{20}\)

The Supreme Court's third principle of school desegregation remedies requires lower courts to consider "the interests of state and local authorities in managing their own affairs, consistent with the Constitution."\(^{21}\) The district court must therefore choose a remedy that rectifies the constitutional violation with a minimal intrusion upon the autonomy of state and local governments. It is this principle that makes a judge pause before ordering a tax levy. The conflict between a state tax ceiling and the need for expensive remedial ac-


\(^{20}\) In Milliken I, the Court reversed an order requiring desegregation of 54 school districts in metropolitan Detroit. The district court had found only the Detroit school system to have treated students unequally but had included the suburban systems in the decree because desegregation in the city alone would have placed only a trivial percentage of white students in each school, 418 U.S. 717, 735 (1974). Although such a metropolis-wide remedy might have been appropriate had the suburban segregation been caused by the city system's unconstitutional acts, see Keyes v. School Dist. No. 1, 413 U.S. 189, 203 (1973), the Supreme Court held that because the disparate treatment of black and white students occurred only within the Detroit school system, the remedy had to be limited to that system. 418 U.S. at 744-45. The Court was not prepared to use school desegregation to reverse the effects of other sources of discrimination. See Milliken I, 418 U.S. at 757 (Douglas, J., dissenting); 418 U.S. at 762 (White, J., dissenting); 418 U.S. at 781 (Marshall, J., dissenting). See also Keyes v. School Dist. No. 1, 413 U.S. at 217 (Powell, J., concurring in part and dissenting in part).

This second equitable principle even led the Court tentatively to extend Milliken I to intrasystem violations. In Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), the Court required the plaintiffs to demonstrate how much of the segregation in the school system was caused by unconstitutional behavior, as distinct from that segregation caused by residential patterns or similar extraneous factors. It then concluded that courts should remedy only those segregative effects stemming from particular, proven acts of discrimination rather than remedy all segregation within the district. Thus, the plaintiffs had to prove the marginal effect of the defendant's unconstitutional behavior; the remedy could correct only such marginal discrimination. Kanner, supra note 18, at 403-05. See also School Dist. v. United States, 433 U.S. 667 (1977); Brennan v. Armstrong, 433 U.S. 672 (1977).

Perhaps recognizing the potentially crippling effect of this standard, the Court hedged somewhat and upheld systemwide remedies without closely examining the extent of the constitutional violation when Dayton reappeared before the Court, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979), along with a companion case, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979). The two decisions may well have rested on what dissenting Justice Rehnquist termed a "talismanic" reliance on the trial court's use of the words "systemwide violation." 443 U.S. at 491. (Rehnquist, J., dissenting). However, any other outcome would either have greatly increased the scope of appellate review in desegregation cases or have essentially eliminated school desegregation decrees through an insurmountable burden of proof.

tion by a school system epitomizes the tension between principles of desegregation and federalism.

II. JUDICIAL POWER TO ORDER TAXATION

The Supreme Court first raised the possibility that a federal court might levy a tax to pay for a remedy in *Griffin v. County School Board*. In that case, the school board of Prince Edward County, Virginia, had devised a complex scheme to avoid *Brown*'s mandate for desegregated schools. The county closed its public schools in 1951, and the Board of Supervisors did not levy taxes or appropriate funds for schools from that time until *Griffin* was decided in 1963. White parents quickly established all-white private schools, and the State of Virginia and Prince Edward County jointly paid tuition grants to those parents. Additionally, the county provided a 25 percent property tax credit for contributions to the white schools. From 1959 to 1963, there were no schools for black children in Prince Edward County. Reversing the Fourth Circuit's disposition of the case, the Supreme Court held that the schools' closing violated the equal protection clause. A state need not treat all of its counties alike, but “[w]hatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.”

The Court then discussed the appropriate remedy, affirming the district court decree:

The injunction against paying tuition grants and giving tax credits while public schools remain closed is appropriate and necessary since those grants and tax credits have been essential parts of the county's program ... to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia. For the same reasons the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.  


24. 377 U.S. at 231-32.

25. 377 U.S. at 231 (footnote omitted).

26. 377 U.S. at 233 (emphasis added) (footnote omitted). Significantly for the purpose of this Note, Justices Clark and Harlan disagreed with the holding that the federal courts are
Two aspects of *Griffin* raise doubts, however, about whether the Court's strong directive to levy a tax would be repeated in the face of a tax ceiling limiting funds available for desegregation. First, the constitutional violation in *Griffin* stemmed from the school authorities' total failure to provide funds for public schools. The issue was not how big a tax the school board should levy, but whether it should levy a tax for schools at all. Second, *Griffin* involved no statutory or constitutional tax limitation; the Supreme Court suggested a tax levy fully within the authority of the Board of Supervisors, an authority that the Board had exercised until it began efforts to block desegregation.

This second, potentially limiting feature of *Griffin* becomes crucial if a school board lacks the power to raise taxes to fund desegregation. Unfortunately, Justice Black's majority opinion in *Griffin* gave no guidance in defining the judicial power to levy taxes, since it cited no authority for the existence of the power at all. However, Judge J. Spencer Bell, in his dissent to the Fourth Circuit's resolution of *Griffin*, also endorsed a court-ordered tax levy, and he provided substantial precedent for that equitable remedy:

empowered to order the reopening of the public schools, but otherwise joined in the opinion. Thus, despite the constitutional violation, two Justices felt that some remedies were inappropriate due to the state or locality's interest in managing their own schools.

27. In *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817 (5th Cir. 1969), the Fifth Circuit recognized this distinction. The Plaquemines Board had systematically attempted to destroy its own school system to benefit white private schools, yet had kept the public schools operating at a minimum level so as to avoid the *Griffin* precedent. The court recalled "no record in any school which . . . revealed so graphically official attempts to destroy a public school system and to flout the mandates of the United States Constitution." 415 F.2d at 835 n.29.

The extensive district court decree ordered that the local authorities return the public schools to their pre-desegregation stature, and that the school board apply for federal aid from several specified programs. On appeal, the appellees cited *Griffin's* tax levy directive in support of the decree, but the Fifth Circuit refused to accept the analogy:

A most appealing argument can be made that if the district court has the power to require a county board to levy taxes for the operation of schools, it also has the power to require the School Board to accept proffered financial assistance from federal agencies. . . . But [*Griffin*] must be considered a unique case. The Prince Edward County schools were closed and the court directed that they be reopened and that taxes be levied and collected to operate them. The subjects of levy, tax rates, and collection methods were left to the commands of state law under state standards. Here the provision [of the district court order] goes beyond [*Griffin*], as to source, manner, and controls accompanying the funds . . . . We conclude that approval of the provision as now broadly written is not justified.

415 F.2d at 833.

The circuit court stated, however, that its reversal was without prejudice to the right of the district court to order the board to apply for specific funds where it had failed to apply in order to retard desegregation. 415 F.2d at 833.

28. A rereading of *Griffin*, when considered within the unique facts of the case, suggests this interpretation. See text at note 26 supra.


30. Curiously, Justice Black's opinion failed to refer to Judge Bell's discussion of the tax levy remedy. Arguably, its failure to mention any precedent suggests agreement with the dis-
Neither am I impressed with the argument that the district court has no power to compel a levy of taxes for a monetary appropriation by the defendant Board of Supervisors should it fail to obey the mandate of the district court. It should be enough to cite Virginia v. West Virginia.\textsuperscript{31}

\textit{Virginia v. West Virginia}\textsuperscript{32} involved an indebtedness that arose between the two states at the time of their separation. Congress approved the terms of West Virginia's debt when it admitted the new state into the Union. Worried that West Virginia might never pay, Virginia sued its Siamese twin, requesting that the Supreme Court compel the state to levy a tax to pay the debt. The Court recognized the debt's validity, but refrained from issuing a tax levy injunction despite considerable dicta suggesting that such a remedy was within its power. The Court trusted either that West Virginia would willingly comply once the Court had certified the obligation or that Congress would enforce the debt because it had approved the obligation originally. If those methods failed, however, the Court appeared willing to issue an injunction compelling state taxations. As Judge Bell concluded in his \textit{Griffin} dissent, the \textit{Virginia} Court was “plain in its implication that West Virginia could be compelled to pay if compulsion were the only way to accomplish the result.”\textsuperscript{33}

The \textit{Virginia} court had in turn relied heavily upon a series of nineteenth-century municipal bond cases.\textsuperscript{34} There the Supreme Court had shown little reluctance in ordering tax levies to pay holders of delinquent municipal bonds when the municipality had failed to exercise its full taxing power.\textsuperscript{35} However, the Court had recog-


\textsuperscript{32} 246 U.S. 565 (1918).

\textsuperscript{33} Griffin v. Board of Supervisors, 322 F.2d at 347 (Bell, J., dissenting), revd. sub nom. Griffin v. County School Bd., 377 U.S. 218 (1964).

\textsuperscript{34} Judge Bell also cited them in his Griffin dissent, 322 F.2d at 347. Although some of the bond cases involved bonds issued for capital improvements or judgments against municipalities, the majority of these cases arose from railroad bonds. State statutes had incorporated railroad companies within each state, authorizing the state's political subdivisions to invest in the railroad stock and issue bonds in order to pay for the stock. The municipal investment was necessary to provide sufficient capital for the railroads.

\textsuperscript{35} E.g., Labette County Comrs. v. United States ex rel. Moulton, 112 U.S. 217 (1884);
nized two substantial limitations on its authority to order taxation. First, the local government could only be compelled to levy taxes to the extent permitted by state law. Since the local government was a creature of state law, that law circumscribed the local government’s taxing authority. “We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation.” Second, if the local government was already taxing at its statutory maximum, the Court would not investigate the local budget to identify unnecessary expenditures to be reallocated for payment of the debt. The determination of proper and necessary expenditures was within the discretion of municipal authorities, and the Court felt it had no “right to control that discretion, much less to usurp and supersede it.”

Although distinctions can be drawn between these bond cases and school desegregation remedies, the reliance on the bond cases in the Fourth Circuit dissent to Griffin suggests that their limitations

City of Galena v. Amy, 72 U.S. (5 Wall.) 705 (1866). Cf. Louisiana v. Jumel, 107 U.S. 711 (1883) (eleventh amendment barred suit against state on a bond). The authority to tax under state law was crucial in these decisions. If a state statute permitted the municipality to increase taxes, the Court was willing to order such an increase to pay bondholders. Indeed, the Court encouraged the inclusion of new parties not originally liable for the judgment if they were necessary to levy the tax, Labette, 112 U.S. at 224, and was even willing to issue mandamus against a newly formed township that had enveloped the governmental functions of the original bonding authority, Graham v. Folsom, 200 U.S. 248 (1906).

36. See Yost v. Dallas County, 236 U.S. 50 (1915); Clay County v. McAleer, 115 U.S. 616 (1885); Thompson v. Allen County, 115 U.S. 550 (1885); United States v. County of Macon, 99 U.S. 582 (1879); City of Memphis v. United States, 97 U.S. 293 (1878); City of Cleveland v. United States, 11 F. 341 (6th Cir. 1901); Weaver v. City of Ogden City, 111 F. 323 (C.C.D. Utah 1901).

37. See City of Cleveland v. United States, 111 F. 341, 343 (6th Cir. 1901).

38. United States v. County of Macon, 99 U.S. 582, 591 (1879). Eighty years later, the Griffin Court faintly echoed the same limitation: “the District Court may . . . require the Supervisors to exercise the power that is theirs to levy taxes . . . .” Griffin v. County School Bd., 377 U.S. 218, 233 (1964) (emphasis added).

39. See Missouri ex rel. Harshman v. Winterbottom, 123, 215 (1887); Clay County v. McAleer, 115 U.S. 616 (1885); City of E. St. Louis v. United States ex rel. Zebley, 110 U.S. 321 (1884); City of Cleveland v. United States, 111 F. 341 (6th Cir. 1901).


41. The most obvious distinction between the bond cases and the desegregation cases is that Virginia v. West Virginia and the later bond cases were actions in contract: no constitutional violation had occurred. Of course, this distinction is tempered somewhat by the constitutional quality that the courts accorded contract rights at the time of these bond cases. See, e.g., Louisiana v. Jumel, 107 U.S. 711, 728, 746 (1883) (Field, J., and Harlan, J., dissenting). Hence, courts at the turn of the century may have used as extensive an equitable remedy in defense of contract rights as they would have for any personal constitutional right. But even the courts in the bond cases recognized that the complainant bondholders were worthy of only limited sympathy:

While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not infrequently [sic] been gross carelessness on the part of purchasers when investing in such securities. . . . If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment.

United States v. County of Macon, 99 U.S. 582, 590 (1879). Clearly there is no comparable
on the taxation remedy may have continuing vitality. That vitality could well leave a modern federal court groping for an alternative to ordering a tax levy.

III. AN ALTERNATIVE TO ORDERING A TAX LEVY THAT EXCEEDS A STATUTORY MAXIMUM

A fully remedial alternative to the court-ordered tax levy does exist: courts may order integration within the existing school budgets, requiring school officials to spend funds for desegregation and to decrease expenditures for other school programs. By limiting its order to a simple demand for desegregation, the district court would leave to state and local authorities the problem of deciding whether to increase taxes or to reallocate the budget.42 This proposal offers obvious advantages over a court-imposed tax levy. It keeps district courts out of the business of raising taxes and administering schools while it remedies the constitutional violations. It avoids extreme reaction to the less invidious cause of the dilemma (tax limitations do not inherently frustrate the formation of unitary, nonracial school systems).43 It protects the paramount role of state and local authorities in designing curricula and administering schools. “No single tradition in public education is more deeply rooted than local 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 the quality of the educational process.”44

Even more important, by shifting funds and cutting back other culpability on the part of segregated schoolchildren. Thus, no matter how highly a court may value contract rights, an equal protection violation is apt to receive a more aggressive remedy.

A second theme that may distinguish the bond obligation cases from school desegregation is the Supreme Court’s evolving view of the eleventh amendment: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. It was not until Ex parte Young, 209 U.S. 123 (1908), that the Supreme Court established the right of citizens to sue their own state for an injunction forbidding prospective enforcement of an unconstitutional statute. See Edelman v. Jordan, 415 U.S. 651, 664 (1974). In the bond cases before Young, the 19th-century notion of state immunity from suit may have encouraged courts to give considerable respect to statutes limiting local taxing authority; a court would be understandably reluctant to compel a municipality to violate a statute when the court could not enjoin the state from enforcing it against the municipality. In Yost v. Dallas County, 236 U.S. 50 (1915), however, Justice Holmes’s majority opinion held strictly to the earlier bond precedents that limited taxation for bond payment to the methods and limitations prescribed by state statute, Young notwithstanding. Thus, evolution of the eleventh amendment has not necessarily eliminated separate treatment for authorized and unauthorized tax levies.


programs rather than directly raising taxes, the proposal starkly presents the true constitutional and economic choice facing local citizens: given that schools must be integrated, for what calibre of education are they willing to pay? The choice is not between segregated and desegregated schools; it may be between desegregated schools for half days with low taxes and desegregated schools for full days with high taxes. But once the federal courts assure a desegregated system, the proposal leaves the remaining determinations with the state and school district. If they prefer a higher standard of education than their tax limit permits after desegregation, then their remedy is to raise that limit. And such an allocation of responsibility seems harmonious with the federal system. Since state and local authorities have unfettered discretion under the federal Constitution to establish the original quality of public education, the same discretion should allow citizens to maintain or select a different standard.

45. Such a severe decrease in classes could cause an even more severe decrease in state aid for the local school system. This is, however, a burden that the state has imposed on its own school systems much like a state-imposed tax limitation. If conditions under either type of restriction become catastrophic, the state electorate can remedy the difficulty if it so desires.

46. Several cases have held that desegregation may not cause a reduction in educational quality or a discontinuance of any courses, services, or extracurricular activities offered by the schools before desegregation. See Plaquemines Parish School Bd. v. United States, 415 F.2d 817, 831 (5th Cir. 1969); Bradley v. School Bd., 325 F. Supp. 828, 846 (E.D. Va. 1971). But see Brewer v. School Bd., 456 F.2d 943, 946-48 (4th Cir.), cert. denied, 406 U.S. 933 (1972). However, such holdings arise where local authorities have actively fostered a private, white school system by degrading the public schools. See note 27 supra. In such situations, the cutbacks in public education were part of a scheme to avoid constitutionally required desegregation. They conflicted with the school board’s affirmative duty under the remedial order to create a unitary school district. Absent such devious motives to impede desegregation, however, a school cutback would probably be found constitutionally permissible.

In Palmer v. Thompson, 403 U.S. 217 (1971), the city of Jackson, Mississippi, had closed its swimming pools following a court order that all park facilities be desegregated. The city desegregated its parks, zoo, auditoriums, and golf courses, but closed the pools because, according to the findings of the district court, the city concluded that the pools could not be operated peaceably and economically on an integrated basis, 403 U.S. at 219. A divided Supreme Court permitted the closing, holding that it need not examine the possible racial motivations of the city when the effect of the closing was neutral to both blacks and whites and when permissible legislative concerns such as preserving the public peace and purse may have been the actual motive, 403 U.S. at 234-25. See generally L. Tribe, American Constitutional Law § 16-17 (1978).

Later Supreme Court cases state that discriminatory intent is needed to violate equal protection even if the actual effect on the races is not equal. In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), the Court stated that proof of discriminatory intent is required to show a denial of equal protection. 429 U.S. at 265. Washington v. Davis, 426 U.S. 229 (1976), decided a year before Arlington Heights, reached the same conclusion, stressing that neutrality in a statute’s application between black and white citizens weighed heavily against unconstitutionality. See 426 U.S. at 246-48.

A school cutback to fund desegregation appears constitutional whether the court uses an intent or an effect standard. Under the effect standard, the cutback will apply equally to black and white students and certainly be less suspect than the pool closing in Palmer. If, however, a court requires a finding of discriminatory intent, as in the more recent cases of Washington and Arlington Heights, a school cutback still withstands constitutional attack since it would be part
of education following tax limitation and desegregation.47

As appealing as this proposal appears, it can be fully acceptable only if it satisfies the three equitable principles of Milliken.48 The remainder of this Section renews attention to those principles, exploring the tension that tax limitation can create among them. It seeks to demonstrate that a blunt desegregation order satisfies those principles and resolves their internal tension in a more appealing manner than does a court-ordered tax levy.

A. Tension Among the Equitable Principles

This Note’s proposal satisfies the second principle — that the extent of the remedy should be determined by the nature and scope of the constitutional violation49 — rather easily. Indeed, it seems to be a better fitting remedy than a court-ordered tax levy. Since segregation typically arises from discriminatory school districting plans and not from the local government’s tax rate, state and local tax structures would appear to be beyond the scope of the constitutional violation.50

More intricate is the question of how the proposal reconciles an inevitable tension between the first and third principles — between the commands that victims of discrimination be restored as nearly as possible “to the position they would have occupied in the absence of
such conduct" and that courts consider the interests of state and local governments in managing their own affairs. The proposal certainly seems solicitous of local interests; at first glance, one could hardly accuse it of breaching the third principle. A decree directing local authorities to desegregate without stipulating precisely how to do it respects concerns for federalism far more than a court-ordered tax levy. But it may require a reallocation of funds that reduces the quality of education for all students, black and white. Once a school board has, for example, unconstitutionally constructed schools in a discriminatory fashion, that misallocation of buildings may make it more expensive to operate a nonracial system than it would have been had the discriminatory construction never occurred. Even without such a misallocation of schools, the costs of transporting students across the city to integrate schools may cause the discontinuance of school orchestras, track teams, or advanced chemistry classes. The victims of school segregation may not be fully restored "to the position they would have occupied in the absence of" discrimination.

This conflict between full restoration and federalism is not easily resolved. Determining where the plaintiffs in a desegregation case might have been had there been no discrimination involves considerable guesswork. School systems are not static, and a district court cannot know precisely what a school system would be like had invidious discrimination not been shaping decisions for ten or twenty years.

It may have been in recognition of this uncertainty that the Supreme Court originally stressed the broad flexibility of equitable remedies in Brown — the "facility for adjusting and reconciling public and private needs." The public needs at stake where a district court must reconcile a desegregation order and a tax ceiling include public concerns for federalism — the balance of power between

51. 433 U.S. at 280 (quoting Milliken I, 418 U.S. 717, 746 (1974)).
52. 433 U.S. at 280-81.
55. The strongest reminder of the vitality of federalism is National League of Cities v. Usery, 426 U.S. 833 (1976), which overturned a federal statute extending minimum wage and maximum hour requirements to all employees of the states and their political subdivisions. The Court hinted that the statute offended state sovereignty under the tenth amendment, 426 U.S. at 842-43, and held that it "improperly interfer[ed] with the integral governmental functions of [state and local governments]." 426 U.S. at 851. Because National League of Cities involved a federal statute under the commerce clause rather than a remedial decree for a constitutional violation, its reasoning is not directly applicable to the issue of federalism and remedial taxation. The Court's distaste for federal acts that "overwhelm state fiscal policy,"
state and national governments. Accordingly, to resolve the conflict between the principle of full restoration and the principle of federalism, one must ask whether, under *Milliken*, an equitable remedy for discrimination may fall short of fully compensating the victims in an effort to maintain the balance of federal-state relations. To pose the question slightly differently, does federalism require that some desegregation decrees be less than fully compensatory? This Note will conclude that it does so require where complete desegregation can be obtained within state-permitted tax rates, and where additional funds are necessary only to raise the quality of the curriculum to meet the trial judge's estimation of what the schools would have been like absent segregation.

Two themes in modern cases lead to this conclusion: (1) the judicial reluctance to circumvent state statutes if the circumvention is unnecessary to remedy the constitutional violation, and (2) the willingness of the Supreme Court to permit some individual rights to suffer in order to preserve the balance of federalism.

B. Judicial Respect for State Law

The first theme manifests itself in the funding section of school desegregation decrees: The funding order is often a vaguely worded requirement that the defendants "who have such power ... request[,] ... raise and appropriate all funds requisite for the operation of the . . . school system in full compliance with the terms" of the specific order. Other courts avoid the funding issue by branding it "premature," using the mere incantation of the *Griffin* taxation rem-


56. A tax limitation's embodiment in a state constitution or referendum is not apt to alter the courts' analysis; the Supreme Court has overturned both types of state laws, passing only to comment that their form or popularity has no bearing on their constitutionality. *See* e.g., *Reitman v. Mulkey*, 387 U.S. 369, 379-81 (1967); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 727-28 (1964). *See also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

edy as a threat to the local authorities. Thus, local tax and expenditure laws, unrelated to the constitutional violation, remain untouched by the decree.

The Eighth Circuit has discussed the relationship between state law and equitable remedies in school desegregation cases, but it has drawn no express distinction between those state laws that must be circumvented to remedy the constitutional violation and those that could be left undisturbed by the decree. In *Haney v. County Board of Education*, an Arkansas statute provided that annexation was the only permissible way to combine two separate school districts. The plaintiffs in *Haney* requested that two districts be united by means of consolidation, which would have provided greater administrative equality for the smaller, black district. Instead, the district court proceeded under the statute and annexed the black district to the larger one. On appeal, the Eighth Circuit upheld the district court's decision to abide by the state annexation statute. Although the appellate court observed that the "remedial power of the federal courts under the Fourteenth Amendment is not limited by state law" when that law fails to provide a nonracial school system, it nevertheless held that annexation was as successful in achieving that goal as consolidation. On the other hand, the court did object to the state-mandated procedure for creating the new school board, which effectively left all five white members in office for up to four years and gave only

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58. E.g., Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), cert. denied, 429 U.S. 1042 (1977); Pettaway v. County School Bd., 230 F. Supp. 480 (E.D. Va. 1964). In *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), the court found that conditions in a state mental institution violated minimum constitutional standards and observed:

> [W]e regard as premature any issue as to whether the district court should appoint a Special Master for the purposes of selling or encumbering state lands to finance these standards, or should enjoin certain state officials from authorizing expenditures for nonessential state functions, and thereby alter the state budget or by other means order a particular mode of financing the implementation of the stipulated standards.

503 F.2d at 1317.

59. The district court may, however, enjoin the withholding of previously appropriated funds as a device to elude desegregation. In *James v. Duckworth*, 170 F. Supp. 342 (E.D. Va.), aff'd, 267 F.2d 224 (4th Cir.), *cert. denied*, 361 U.S. 835 (1959), the city council of Norfolk, Virginia, voted to withdraw previously approved funding for all schools above the sixth grade to avoid desegregation. The district court enjoined that withholding of funds. In affirming, the Fourth Circuit relied heavily on the city council's earlier allocation of the funds; it was unnecessary to compel funding for the schools directly since enjoining the later resolution withholding funds accomplished the same result. *James v. Duckworth*, 267 F.2d 224 (4th Cir.), *cert. denied*, 361 U.S. 835 (1959). This distinction is hardly a satisfying one, but it reflects concerns for "the interest of state and local authorities in managing their own affairs," *Milliken II*, 433 U.S. 267, 280-81 (1977), and a desire to minimize interference in funding procedures.

60. 429 F.2d 364 (8th Cir. 1970).


63. 429 F.2d at 368.
three short-term seats to representatives of the black school district. The court found that the statute mandating such an allocation violated the equal protection clause and accordingly reversed the district court's approval of the school board representation procedure.64

Despite the strong assertion of equitable powers in Haney, it is hardly clear that its reasoning extends to state tax ceilings. Haney merely overturned a statute compelling appointment of a racially unbalanced school board. Discriminatory application of such facially neutral state school provisions is often the taproot of a constitutional violation.65 Surely the network of school regulations that led to a constitutional violation cannot command great respect from a court seeking to remedy that violation. Indeed, to require obedience to all school statutes would straitjacket the federal courts from successfully remedying discrimination; the only way the court in Haney could give the black district equal representation on the school board was to circumvent the state-required procedure.

Sidestepping a state limitation upon local taxing authority, however, is another matter. In modern desegregation cases, abuse of taxation powers is rarely the basis for a constitutional violation. A desire to thwart desegregation is not the inspiration for tax limitation measures; such ceilings generally apply equally to all expenditures of local government and are independent of the provisions that authorities use or misuse to discriminate against minority students. Moreover, the tax limitation itself does not compel discrimination; rather, it merely restricts the options of the district court in designing its equitable remedy. Few would argue that a court should order a non-discriminatory state teachers' college to double its admissions because more teachers are needed in a nearby school district undergoing desegregation. Although such a change might eventually assist the desegregation remedy, the college lies beyond the scope of the constitutional violation and accordingly should be beyond the reach of the court's equitable powers.66 Likewise, although circumvention of the state tax limitation may provide a more elegant remedial decree, the court's equitable powers should not extend that far if another remedy would alleviate the constitutional violations while sparing the state law.67

64. 429 F.2d at 369. The Eighth Circuit relied principally upon Louisiana v. United States, 380 U.S. 145 (1965), for its statement that state law did not restrict remedies of fourteenth amendment violations. 429 F.2d at 368. Like Haney, however, the Court in Louisiana found the state statute itself unconstitutional. Thus, neither case gives a district court clear authority to ignore state law that, though constitutional in application, forces the equitable decree to follow one remedial course rather than another.


66. This argument is nothing more than a restatement of the second equitable principle of desegregation, discussed in the text at notes 16-20 supra.

67. See note 88 infra.
United States v. Missouri gave the Eighth Circuit an opportunity to clarify Haney and the relationship between a desegregation decree and a conflicting state law—specifically, a state tax limitation. The district court had ordered a merger of three school districts as a remedy for state-enforced segregation. It heard evidence and found that the tax rate necessary to finance the desegregated operation of a unified district would have to be higher than the previous rates in any of the three districts. The Missouri Constitution requires that a two-thirds majority of the local citizens approve a school district’s tax levy. Nevertheless, the district court recognized that such approval was unlikely in the aftermath of a desegregation order and simply imposed the higher tax rate without referendum.

On appeal, the Eighth Circuit seemed much less eager to ignore state taxation law than it had been to interfere with school board representation law in Haney. After firmly restating its dictum from Haney that state law did not constrain the equitable remedies of federal courts, the circuit court nonetheless proceeded to review the Missouri law governing tax rates after annexation. Without deciding which rate would apply under state law, the court found a less offensive method than the district court to resolve the dispute. The local school board had asked the district court to amend its decree and lower the tax rate to that of the highest of the three old school districts. The lower court had refused, asserting that the new district should not begin operations with a deficit budget. Stating that “[m]aximum consideration should be given the views of the state and

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68. 515 F.2d 1365 (8th Cir. 1975).
70. 388 F. Supp. at 1059. See 515 F.2d at 1371.
71. Mo. Const. art. 10, § 11(c).
72. 388 F. Supp. at 1059.
73. 388 F. Supp. at 1060.
74. United States v. Missouri, 515 F.2d at 1372.
75. 515 F.2d at 1372 n.7 & 8. Unfortunately, Missouri law governing tax rates after district annexation was anything but clear. Missouri v. Conley, 485 S.W.2d 469 (Mo. App. 1972), held that the existing tax rate in each district continued to apply after annexation, but the case did not deal with an annexation caused by judicial decree. See Mo. Stat. Ann. § 162.441 (Vernon 1965) (amended 1973). Several earlier opinions of the Missouri Attorney General had held that the voter-approved levy of the annexing district would apply to the annexed territory. See Op. Mo. Atty. Gen. No. 362 (1969). Supporting this view, the state constitution required that uniform taxes be levied throughout the territorial limits of the levying authority. Mo. Const. art. 10, § 3. Thus, although state precedents conflicted as to which rate should apply, they clearly indicated that a rate no higher than that of the annexing district could be levied without voter approval.
76. Also, the State Board of Education had moved to amend the judgment, arguing that sufficient state and federal funds would be available to maintain the district at a tax rate consistent with Missouri law.
77. 515 F.2d at 1372.
local officials concerned,” the Eighth Circuit remanded that portion of the district court’s decree. It held that the school board’s request should have been granted, thereby establishing the highest original, voter-approved levy as the rate for the new district. In its conclusion, the court remarked that the maximum tax rate “shall be no higher than that of the annexing district,” clearly echoing the view of Missouri law expressed in the attorney general’s opinions. The Eighth Circuit thus achieved a result that was arguably consistent with a state taxation law and escaped the need to reexamine its dictum in Haney or the actual relationship between remedial equity powers and state tax limitations.

The Supreme Court has not expressly addressed the issue of which state laws a court may override in formulating a desegregation decree. But in voter rights and reapportionment cases, the Court has reversed several remedial decrees that had circumvented more state law than was necessary to remedy the constitutional violation. In Whitcomb v. Chavis, for example, the Court upheld statewide redistricting but reversed the district court’s elimination of multi-member districts that the legislature had distributed through the state for political ends. And in Sixty-Seventh State Senate v. Beens, the district court’s decree had not only reapportioned, but also reduced the membership of the state’s House of Representatives.

78. 515 F.2d at 1373.
79. 515 F.2d at 1373 (emphasis added).
80. See note 75 supra.
84. Similarily, in White v. Weiner, 412 U.S. 783 (1973), the district court chose one of three alternative redistricting plans because it provided the most compact and least gerrymandered districts, even though it was not quite as effective at equalizing the population among the districts as one of the other plans. The Supreme Court reversed, holding that the district court should have chosen the plan submitted by the state which, although politically motivated, allocated voters more equally. It concluded that district courts should defer to state policy when fashioning relief unless that state policy is subject to constitutional challenge, and the Court found no such vulnerability in legislative policy designed to preserve the constituencies of incumbent congressmen. 412 U.S. at 797. See also Ferrell v. Oklahoma ex rel. Hall, 339 F. Supp. 73 (W.D. Okla.), affd mem., 406 U.S. 939 (1972).
by one fourth and the Senate by one half. The Supreme Court would have had no difficulty with a "court-imposed minor variation from a State's prescribed figure when that change is shown to be necessary to meet constitutional requirements," but it found the unnecessarily drastic change in size a violation of the lower court's equity powers.

Thus, the reapportionment cases recognize a distinction between those state laws that must be circumvented to effect a remedial decree and those that need not. Although the Eighth Circuit did not expressly adopt such a distinction for desegregation cases, the result in United States v. Missouri suggests that similar reasoning may have been at work.

C. Judicial Deference to Federalism

The second theme supporting this Note's conclusion is the occasional willingness of the Supreme Court to sacrifice individual rights for federalism values. The school desegregation cases themselves demonstrate such a trade-off. In the seminal case assessing a school desegregation remedy, Brown II, the Supreme Court exhibited restraint in its equitable directives that can only be attributed to federalism concerns. Rather than ordering immediate dismantling of the segregated school systems, which would have instantly remedied the constitutional harm, the Court directed that the dual systems be dismantled "with all deliberate speed." This infamous phrase was a product of judicial restraint; previous desegregation cases had established the Court's power to require immediate relief. Moreover, the Court not only delayed complete implementation, it also rather surprisingly entrusted primary responsibility for desegregating schools to the local school boards, the very parties found liable for intentional discrimination.

86. 406 U.S. at 199.
87. 406 U.S. at 20.
89. 349 U.S. 294 (1955).
90. 349 U.S. at 301.
92. 349 U.S. at 299.
The Supreme Court’s deference to principles of federalism has extended beyond school desegregation cases. In Reynolds v. Sims,\textsuperscript{93} for example, the Court recognized certain legitimate state interests in reapportionment. It held that reapportioned legislative districts may deviate from perfect population equality if the lines follow boundaries of an existing political subdivision. Since the state accords these subdivisions independent political authority, it may also grant them independent legislative representation.\textsuperscript{94} The Court directed district courts, in formulating remedies, to consider the imminency of a new election, the complexity of state election processes, and whether the remedy might impose “embarrassing demands” upon a state.\textsuperscript{95} The influence of federalism upon the Court’s decision in Sims is evident when one compares those state reapportionment principles to the Court’s treatment of federal congressional districts. Absolute representational equality is the standard for congressional apportionment.\textsuperscript{96} For state legislative districts, however, the Court has allowed population deviations of 16 percent, where the variance preserves the integrity of local political boundaries.\textsuperscript{97} The Court thus sacrifices representational equality — and individual rights of representation — out of respect for the states’ internal government.

Judicial abstention, typified by Younger v. Harris,\textsuperscript{98} is another Supreme Court doctrine that sacrifices vindication of individual rights for the sake of federalism. Under that doctrine, a defendant in a state criminal trial, as well as in some civil trials where the state is the plaintiff,\textsuperscript{99} cannot obtain a federal court injunction to halt the state proceeding on grounds of state violation of federal constitutional rights. Absent a significant threat of irreparable injury, the defendant must pursue any federal rights through state appellate channels, ultimately appealing to the Supreme Court if necessary.\textsuperscript{100} The “vital consideration” supporting this doctrine is federalism: “the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the State.”\textsuperscript{101} Thus, if the state trial court misunderstands the federal rights involved, a defendant may have to endure a criminal prosecution under a statute that is unconstitutional on its face\textsuperscript{102} or

\begin{itemize}
\item \textsuperscript{93} 377 U.S. 533 (1964).
\item \textsuperscript{94} 377 U.S. at 580-81.
\item \textsuperscript{95} 377 U.S. at 585.
\item \textsuperscript{96} See Wesberry v. Sanders, 376 U.S. 1 (1964).
\item \textsuperscript{98} 401 U.S. 37 (1971).
\item \textsuperscript{100} See Younger v. Harris, 401 U.S. 37, 45 (1971).
\item \textsuperscript{101} 401 U.S. at 44.
\end{itemize}
supported by an unconstitutional search. Respect for state institutions rests as the cornerstone of this doctrine restricting the protection of civil rights.

Surely the power of a state's citizens to establish a maximum taxing authority deserves as much respect by a federal court as does the design of a state's political boundaries or the operation of a state's trials. The ultimate inquiry is whether the costs of federal rejection of a state taxation limit outweigh the costs of a decree's failure to place the victims of discrimination precisely where the court guesses they would have been absent the discrimination. The cases in which the Supreme Court has considered the effect of federalism upon remedial decrees suggest that the scales tip against a district court decree that would unnecessarily override a state tax limitation.

CONCLUSION

The resolution this Note proposes for the clash between desegregation and tax limitation is an ugly one. But when a school district is without funds, without authority to raise taxes, and under an expensive affirmative duty to desegregate, there are no pretty options. This Note's proposal — to order school authorities to cut programs as necessary to fund desegregation rather than impose a state-prohibited tax — recognizes a school district's constitutional duty to remedy discrimination as well as the right of state and local govern-

102. See 401 U.S. at 54.
106. One case that might suggest a different conclusion, Hills v. Gautreaux, 425 U.S. 284 (1976), did not involve a direct collision of federal and state governmental entities. Although the Court upheld the plaintiffs' request for an order spanning local political boundaries, no political unit of the state of Illinois was a party in Hills; the order was directed solely to the Department of Housing and Urban Development. 425 U.S. at 296. The Court noted that the Chicago Housing Authority, the agency the federal funds were to flow through, had power under state law to operate beyond city limits. 425 U.S. at 298 n.14.
107. Commentators have offered other awkward answers to this difficulty, ones more disquieting from a sociological standpoint. Perhaps the directives of Brown v. Board of Education cannot and should not be expected to solve all aspects of the problems of segregated education. See Read, supra note 2, at 48-49. The answers, however, may require altered assumptions about local control of education and federalism that will come not from the courts, but from the political process. See Orfield, supra note 53, at 802. For a thoughtful judicial appraisal of this central issue, see Justice Powell's dissenting opinion in Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 479 (1979).
ments to establish tax levies and school budgets. Were a district court to levy a tax in excess of a locality's authority, the order would rest on precedent of questionable applicability, interfere with the federal system in a manner unnecessary to fulfill the mandate of equal protection, and confiscate the responsibility of determining educational standards that has rationally and constitutionally rested with local citizens.