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Missouri v. Jenkins: Widening the Mistakes of *Milliken v. Bradley*

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COMMENTS

MISSOURI V. JENKINS: WIDENING THE MISTAKES OF *MILLIKEN V. BRADLEY*

I. INTRODUCTION

The scope of a court's power to provide equitable remedies has been the subject of countless court challenges and scholarly debates. Perhaps no area is more controversial in this regard than the federal judicial attempts to desegregate public schools. The principle guiding equity power in this arena is that "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation."[1] This limit on equity power, however, must be reconciled with the mandate in *Green v. County School Board* that a court must "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[2]

Since the original proclamation in *Brown v. Board of Education* ("*Brown I*") that the operation of segregated school systems violates the Constitution,[3] the Court has rapidly retreated from *Brown's* broad mission.[4] The Rehnquist Court has become increasingly frustrated with the large degree of judicial intervention in school desegregation cases,[5] and now allows for release from judi-

1. Milliken v. Bradley ("*Milliken II*"), 433 U.S. 267, 280 (1977) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

2. 391 U.S. 430, 437-38 (1968).

3. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

4. Steven I. Locke, Comment, Board of Education v. Dowell: *A Look at the New Phase in Desegregation Law*, 21 HOFSTRA L. REV. 537, 545 (1992) ("Beginning in the late 1970s, the focus of court decisions has shifted from limiting the breadth of desegregation orders to lifting those orders entirely." (footnotes omitted)).

5. *See infra* note 18.

cial oversight for findings of partial unitary status,[6] or if "the vestiges of de jure segregation have been eliminated to the extent practicable."[7]

The tension between effective remedies and limiting the scope of judicial oversight has been further exacerbated by the recent Supreme Court decision in *Missouri v. Jenkins*[8] (*"Jenkins II"*).[9] There, the Court held that a desegregation plan ordered by the district court, which attempted to create better inner-city schools in order to attract white students living in the surrounding suburbs, was an impermissible interdistrict remedy barred by the 1974 decision in *Milliken v. Bradley* (*"Milliken I"*).[10] Yet some form of remedy in which the effects extend beyond district lines may be the only practical solution to remedy purposeful segregation: "In most metropolitan school desegregation situations, desegregation would be greatly facilitated if judges began to recognize that, except in isolated rural areas, relief should not be limited to the immediate school districts. Unless remedies are regional, their institution will lead to a dramatic decline in white pupil school enrollment."[11]

In describing the decision in *Jenkins II,* one journalist wrote that "[l]ittle noticed among the court's rulings was a decision two weeks ago on school desegregation, yet it is this decision—which severely limits the judicial role in the nation's classrooms—that will have the most piercing effect."[12] Jesse Jackson was quoted as stating that "[n]o question, the Kansas City case was the major

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6. Freeman v. Pitts, 503 U.S. 467, 499 (1992).

7. Bd. of Educ. v. Dowell, 498 U.S. 237, 238 (1991).

8. 115 S. Ct. 2038 (1995).

9. There was an earlier *Missouri v. Jenkins* before the Supreme Court, which arguably should be called *"Jenkins I,"* and which would actually make the most recent Jenkins case *"Jenkins III."* Though the majority in Missouri v. Jenkins, 115 S. Ct. 2038 (1995), cited the earliest Supreme Court case as *"Jenkins I,"* this Comment will designate the 1990 Supreme Court case as *"Jenkins I"* and the 1995 case as *"Jenkins II"* since the earlier case did not directly involve desegregation. Perhaps in an attempt to highlight the protracted litigation in this case, the petitioners calculate this case to be Jenkins VII. Petitioners' Brief at 15, *Jenkins II*, 115 S. Ct. 2038 (1995) (No. 93-1823) (citing the appellate court case as *Jenkins VI).*

10. *Jenkins II*, 115 S. Ct. at 2051.

11. Grover G. Hankins, *The Constitutional Implications of Residential Segregation and School Segregation—To Boldly Go Where Few Courts Have Gone*, 30 HOW. L.J. 773, 773 (1987) (footnote omitted).

12. Juan Williams, *The Court's Other Bombshell; Schools, Not Voting Rights, Was the Key Racial Ruling*, WASH. POST, July 2, 1995, at C1.

case the court decided and it was devastating."[13] These are particularly strong condemnations of *Jenkins II* since, on the same day, the Supreme Court decided *Adarand Constructors, Inc. v. Pena*.[14] *Adarand* effectively abolished all government affirmative action programs by holding that all racial classifications, regardless of their intent, would receive strict scrutiny.[15] Yet by redefining "interdistrict" so as to broaden the already detrimental holding of *Milliken I*, the Court in *Jenkins II* has apparently abandoned any attempt to remedy segregation.

Justice Thomas, concurring in *Jenkins II*, wrote that "a deserving end does not justify all possible means," referring to attempts to remedy school segregation.[16] In this latest desegregation case before the Supreme Court, the Court did not heed Thomas's principle when it used an overly broad interpretation of Supreme Court Rule 14.1[17] to answer a question not before the Court for the purpose of limiting judicial authority.[18] However, if the end of desegregation cannot justify broad remedial powers, then certainly the end of judicial restraint cannot justify broad interpretations of Supreme Court jurisdiction.[19]

This Comment will examine the Court's strained use of judicial authority to reach its desired outcome. Specifically, part II of this Comment will discuss the background of the *Missouri v. Jenkins* cases and show how the majority stretched its own Rules to reach its result. Part III will discuss how the Court redefined

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13. *Id.*

14. 115 S. Ct. 2097 (1995).

15. *Id.* at 2113.

16. *Jenkins II*, 115 S. Ct. at 2073 (Thomas, J., concurring).

17. *See infra* notes 70-84, 87 and accompanying text.

18. It is clear that one goal of the Court was to limit judicial authority. Chief Justice Rehnquist stated that the "end purpose" of desegregation orders "is not only 'to remedy the violation' . . . but also 'to restore state and local authorities to the control of [the] school system.'" *Jenkins II*, 115 S. Ct. at 2056 (quoting Freeman v. Pitts, 503 U.S. 467, 489 (1992)). Justice O'Connor wrote: "Unlike Congress[,] . . . federal courts have no comparable license and must always observe their limited judicial role." *Id.* at 2061 (O'Connor, J., concurring). Justice Thomas wrote that "[s]uch extravagant uses of judicial power are at odds with the history and tradition of the equity power and the Framers' design." *Id.* at 2067 (Thomas, J., concurring).

19. Predicting the possible activism of the Rehnquist Court, one author wrote that "Chief Justice Rehnquist, Justices O'Connor and Scalia, and any other new Justices of a strongly conservative political bent, if they become a majority, will have to choose between institutional restraint and a form of judicial activism not very different from the activism of their immediate predecessors, albeit in pursuit of conservative rather than liberal policy goals." Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 135 (1987).

interdistrict by ignoring the important distinctions between *Milliken I* and *Hills v. Gautreaux*.[20] Finally, part IV will discuss the ramifications of *Jenkins II* on the ability of courts to offer effective remedies to children in segregated school systems.

II. THE STRAINED PATH TO *JENKINS II*

After the *Brown v. Board of Education* decision ordered the desegregation of public schools,[21] Kansas City was one of many school districts that tried to evade that order.[22] It did so by redrawing district boundary lines in order to create a single-race district,[23] assigning children to single-race schools,[24] and by relying on the Missouri Attorney General's declaration that the *Brown* mandate was "unenforceable."[25] In fact, the Missouri Constitution required the separation of the races in public schools, and that constitutional provision was not repealed until 1976.[26]

In 1977, the Kansas City Municipal School District ("KCMSD") and several students brought suit against the State of Missouri alleging that the State and surrounding suburban school districts had "caused and perpetuated a system of racial segregation in the [KCMSD]."[27] The district court for the Western District of Missouri realigned the KCMSD as a defendant[28] and the suits against the suburban school districts were eventually dismissed.[29] The district court found that the State and KCMSD were liable for operating an intradistrict segregated school system within Kansas City, and several remedial orders were implemented to eliminate the vestiges of discrimination.[30]

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20. 425 U.S. 284 (1976).
21. 347 U.S. 483, 495 (1954).
22. Theodore M. Shaw, Missouri v. Jenkins: *Are We Really a Desegregated Society?*, 61 FORDHAM L. REV. 57, 57-58 (1992).
23. *Id.*
24. *Id.*
25. *Jenkins II*, 115 S. Ct. at 2091 (Ginsburg, J., dissenting).
26. *Id.*
27. *Jenkins II*, 115 S. Ct. at 2042.
28. Jenkins v. Missouri, 593 F. Supp. 1485, 1505 (W.D. Mo. 1984).
29. *Jenkins II*, 115 S. Ct. at 2042.
30. *Id.*

A. Jenkins I

The district court, in 1986, approved a remedy that allowed for the creation of a magnet school program at a cost of $142 million.[31] "'Magnet Schools,' as generally understood, are public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality."[32] Under the district court plan almost all of the schools in the entire district were converted into magnet schools.[33] In order to fund the desegregation plan, the district court ordered a specific dollar amount increase in the KCMSD tax levy.[34] The court of appeals reversed in part, allowing the levy to stand, but stated that the district court should in the future order the KCMSD to submit the tax levy and enjoin the State from prohibiting the increase, rather than impose the tax itself.[35]

In 1990, the Supreme Court in *Missouri v. Jenkins*[36] ("*Jenkins I*")[37] upheld the reversal and modifications ordered by the Eighth Circuit, stating that principles of comity require that the district court only directly impose a tax when no alternative, less intrusive means are available.[38] In this case, that meant that the district court could not set the actual tax rate, but could order the KCMSD to submit a levy in excess of a state constitutional limit in order to fund its share of the desegregation remedy.[39]

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31. Missouri v. Jenkins, 495 U.S. 33, 40 (1990).

32. *Id.* at 40 n.6. *But see generally* Kimberly C. West, Note, *A Desegregation Tool that Backfired: Magnet Schools and Classroom Segregation*, 103 YALE L.J. 2567 (1994) (discussing the continued racial segregation within magnet school programs).

33. *Jenkins II*, 115 S. Ct. at 2043.

34. Jenkins v. Missouri, 672 F. Supp. 400, 412-13 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *aff'd in part, rev'd in part*, 495 U.S. 33 (1990).

35. Jenkins v. Missouri, 855 F. 2d 1295, 1314 (8th Cir. 1988), *aff'd in part, rev'd in part*, 495 U.S. 33 (1990). The Missouri Constitution limited property taxes to a specific dollar amount per assessed value that could be increased by two-thirds of voters but only to another specified limit. MO. CONST., art. 10, § 11(b), (c).

36. 495 U.S. 33 (1990).

37. *See supra* note 9 (discussing the numbering of the *Jenkins* opinions within this Comment).

38. *Jenkins I*, 495 U.S. at 37, 50-52.

39. *Id.* at 43, 58. The Court's holding that a district court does have the power to impose a tax was significant and has been the subject of much debate. *See, e.g.*, Drew A. Perkins, Casenote, *When the Prohibition on Judicial Taxation Interferes with an Equitable Remedy in a School Desegregation Case*, 26 LAND & WATER L. REV. 373 (1991); Thomas J. Walsh, Casenote, *"No Taxation Without Representation . . . Unless Desegregation":*

The *Jenkins I* petition for certiorari presented two questions.[40] Only the first question, regarding whether a Federal court could impose a tax, was granted certiorari.[41] The second question raised in the petition asked: "Whether a federal court, remedying an intradistrict violation under *Brown v. Board of Education*, may a) impose a duty to attract additional non-minority students to a school district, and b) require improvements to make the district schools comparable to those in surrounding districts."[42] It was this second question, posed but not granted certiorari in *Jenkins I*, that was ultimately answered by *Jenkins II*.[43]

Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, stated in *Jenkins I* that he was troubled that the Court even addressed the constitutionality of the district court's tax levy, because the whole magnet school remedy ordered by the district court was an impermissible interdistrict remedy for an intradistrict violation.[44] The magnet school program was interdistrict because the plan tried "to make a magnet of the district as a whole. The hope was to draw new nonminority students from outside the district."[45] Justice Kennedy's detailed arguments in support of the proposition that the remedy was impermissible foreshadow with striking similarity the arguments adopted by the majority in *Jenkins II*.[46] While admitting that the Court was required through its "limited grant of certiorari to assume that the remedy chosen by the District Court was a permissible exercise of its remedial discretion," Justice Kennedy still thought it was the Court's duty to address the underlying remedy in deciding whether the tax was appropriate.[47]

The Power of Federal Courts to Order Tax Increases to Desegregate Schools: Missouri v. Jenkins, 12 HAMLINE J. PUB. L. & POL'Y 191 (1991).

40. *Jenkins II*, 115 S. Ct. at 2076 (Souter, J., dissenting).

41. *Jenkins I*, 495 U.S. at 45.

42. *Jenkins II*, 115 S. Ct. at 2076 (citations omitted) (Souter, J., dissenting).

43. *See Jenkins II*, 115 S. Ct. at 2047 (rejecting certiorari).

44. *Jenkins I*, 495 U.S. at 76-77 (Kennedy, J., concurring in part and in the judgment).

45. *Id.* at 60.

46. For example, Justice Kennedy wrote in *Jenkins I* that "[s]uch a plan [as that adopted by the District Court] as a practical matter raises many of the concerns involved in interdistrict desegregation remedies." *Jenkins I*, 495 U.S. at 76 (Kennedy, J., concurring). Chief Justice Rehnquist wrote in *Jenkins II* that the district court plan was an impermissible interdistrict remedy. *Jenkins II*, 115 S. Ct. at 2052.

47. *Jenkins I*, 495 U.S. at 78-80 (Kennedy, J., concurring in part and in the judgment).

B. Jenkins II

As part of the broad desegregation plan, which the taxes were used to support in *Jenkins I*, the district court in 1987 ordered substantial capital expenditures, including salary increases for almost all of the school district's 5000 employees in order to ensure quality education throughout the district.[48] The State of Missouri challenged the district court order compelling salary increases for all KCMSD staff as beyond the scope of the court's remedial authority.[49] The State also challenged the continued funding of remedial "quality education" programs under *Freeman v. Pitts*,[50] arguing that the KCMSD had "achieved partial unitary status."[51] Under *Freeman*, courts may withdraw their supervision of segregated school systems incrementally when particular discrete aspects of the system are found to be no longer segregated.[52] The Supreme Court remanded this aspect of the case to the district court, explaining the correct test to apply under *Freeman*.[53] Specifically, the Court held that "improved achievement on test scores is not necessarily required for the State to achieve partial unitary status as to the quality education programs."[54]

In its petition for certiorari, the State presented two questions, both of which were granted certiorari.[55] The first question asked whether a school district could fail to satisfy the 14th Amendment, and therefore "preclud[e] a finding of partial unitary status," solely because test scores had not risen to some "unspecified level."[56] The second question presented was whether the order of salary increases was so attenuated as to violate notions that a remedy must directly address the constitutional violation.[57]

In their brief to the Court, the Petitioners reframed the second question concerning salary increases into a question addressing the

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48. *Jenkins II*, 115 S. Ct. at 2044.
49. *Id.* at 2045.
50. 503 U.S. 467 (1992).
51. *Jenkins II*, 115 S. Ct. at 2045.
52. Freeman v. Pitts, 503 U.S. 467, 490-91 (1992).
53. *Jenkins II*, 115 S. Ct. at 2055. The *Freeman* test is "whether there has been full and satisfactory compliance with the [desegregation] decree," "whether retention of judicial control is necessary or practicable to achieve compliance with the decree," and "whether the school district has demonstrated . . . its good faith commitment to the whole of the court's decree." *Freeman*, 503 U.S. at 491.
54. *Jenkins II*, 115 S. Ct. at 2055.
55. *Id.* at 2046.
56. *Id.* at 2076 (Souter, J., dissenting) (quoting Petition for Certiorari at i).
57. *Id.*

validity of an interdistrict remedy when there was no showing of an interdistrict violation.[58] The petition for certiorari had asked,

> "Whether a federal court order granting salary increases to virtually every employee of a school district—including non-instructional personnel—as a part of a school desegregation remedy conflicts with applicable decisions of this Court which require that remedial components must directly address and relate to the constitutional violation and be tailored to cure the condition that offends the Constitution?"[59]

The question as rewritten in the Petitioners' brief asked, "Whether the courts below erred in implementing an interdistrict remedy in an intradistrict case by ordering salary increases for all employees of the school district for the purpose of increasing the desegregative attractiveness of the school district."[60] The Petitioners' question was now almost identical to the question to which they were denied certiorari in 1990.[61] As the Respondents' brief pointed out, the Petitioners devoted only a few pages to the questions upon which certiorari was granted and devoted the rest of their brief to issues not before the Court.[62]

Justice Kennedy's concurrence in *Jenkins I* apparently guided the State of Missouri to reformulate its arguments.[63] Noticeably resembling Justice Kennedy's opinion, the State's principal argument was that the district court's order to increase salaries was interdistrict despite only an intradistrict finding of discrimination:[64]

> There is no question that increases in the "quality" of education in the Kansas City schools theoretically *could* promote integration, in the sense that superior quality schools might further the goal of attracting additional non-minority students from the suburbs or private academies. But that goal is inherently *inter*district in nature, and this case is,

58. Petitioners' Brief, *supra* note 9, at i.

59. *Jenkins II*, 115 S. Ct. at 2076 (Souter, J., dissenting) (quoting Petition for Certiorari at i).

60. Petitioners' Brief, *supra* note 9 at i.

61. *See supra* note 42 and accompanying text (stating the question raised in *Jenkins I*).

62. Respondents' Brief at 1-2, *Jenkins II*, 115 S. Ct. 2038 (1995) (No. 93-1823).

63. *See Jenkins I*, 495 U.S. at 76 (Kennedy, J., concurring in part and in the judgment) (stating that the district court order was an impermissible interdistrict remedy).

64. *Jenkins II*, 115 S. Ct. at 2049.

and always has been, an *intra*district case.[65]

Agreeing with the State, a majority of the Court held that the entire remedial program, including the salary increases, was an interdistrict remedy beyond the scope of the violation.[66] The entire order was interdistrict because the district court "set out on a program to create a school district that was equal to or superior to the surrounding [suburban school districts]."[67] To achieve this end, the district court's order was "not designed solely to redistribute the students within the KCMSD. . . . Instead, its purpose [was] to attract nonminority students from outside the KCMSD schools."[68] A court may not seek to create a better school system for the purpose of attracting whites into the school district unless the suburbs have been found in violation of the Constitution.[69]

C. The Court Expands Rule 14.1

The Supreme Court may grant certiorari for an entire petition or make a limited grant of certiorari to only a portion of the questions presented.[70] In *Jenkins I*, the Court used its authority to make a limited grant of certiorari to answer only the question regarding the power of a district court to impose a tax, and not the question concerning the validity of the remedy the tax was being imposed to fund.[71] In *Jenkins II*, the Court granted certiorari to the entire petition, agreeing to answer two distinct questions.[72] Neither question on its face concerned the validity of the magnet school desegregation plan.

Under Supreme Court Rule 14.1(a), a question presented to the Court in a petition for a writ of certiorari will "be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court."[73] However, the question must be "more closely allied to the question raised than merely being 'related' or 'complementary' to that question."[74] As stated by the Court, "Rule

65. Petitioners' Brief, *supra* note 9, at 19.
66. *Jenkins II*, 115 S. Ct. at 2051.
67. *Id.* at 2050.
68. *Id.* at 2051.
69. *Id.*
70. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 5.10 (7th Ed. 1993).
71. *Jenkins I*, 495 U.S. at 45.
72. *Jenkins II*, 115 S. Ct. at 2046.
73. SUP. CT. R. 14.1(a).
74. STERN, *supra* note 70, § 6.25 (citing Yee v. City of Escondido, 503 U.S 519, 537

14.1(a) forces the petitioner to focus on the questions the Court has viewed as particularly important, thus enabling us to make efficient use of our resources."[75] However, a majority of the Court held that the entire school desegregation plan was fairly before the Court when the question concerning the validity of salary increases was raised.[76]

The case law clearly establishes that "an issue is fairly comprehended in a question presented when the issue must be resolved in order to answer the question."[77] It was certainly possible to assess the validity of test scores and salary increases without questioning the validity of the entire remedial plan.[78] Chief Justice Rehnquist asserted that the remedial program was before the Court because, "[g]iven that the District Court's basis for its salary order was grounded in 'improving the desegregative attractiveness of the KCMSD,' we must consider the propriety of that reliance in order to resolve properly the State's challenge to that order."[79] Under Chief Justice Rehnquist's rationale, however, that question should have been answered in *Jenkins I* before the tax was imposed; yet the majority in *Jenkins I* refused to consider the entire remedial order.

Justice Souter, in his dissent, argued that even if a loose interpretation of Rule 14.1(a) allowed for this inquiry, such a course is unfair because the litigants were not warned in advance.[80] The Court normally operates under a notion of fairness: "Were we routinely to consider questions beyond those raised in the petition, the respondent would lack any opportunity in advance of litigation on the merits to argue that such questions are not worthy of review."[81] The dissent stated that "if it really were essential to decide the foundational issue to address the two questions that are presented, the Court could give notice to the parties of its intention to reach the broader issue, and allow for adequate briefing and

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(1992)).

75. Yee v. City of Escondido, 503 U.S. 519, 536 (1992).

76. *Jenkins II*, 115 S. Ct. at 2047.

77. *Id.* at 2077 (Souter, J., dissenting) (citing Procunier v. Navarete, 434 U.S. 555, 560 n.6 (1978), and United States v. Mendenhall, 446 U.S. 544, 551-552 n.5 (1980)).

78. *Id.*

79. *Jenkins II*, 115 S. Ct. at 2047 (quoting Petition for Certiorari at A-90) (citations omitted).

80. *Id.* at 2077 (Souter, J., dissenting).

81. *Yee*, 503 U.S. at 536.

argument on it."[82] It is a normal procedure for the Court to ask litigants to further brief an issue if it has not been briefed.[83] Though the petitioners did give notice to the respondents by virtue of the arguments adopted in their brief, the respondents, believing those questions were not before the Court, only briefly addressed the validity of the underlying remedial order.[84]

Perhaps even more troubling than the Court's broad reading of Rule 14.1 is that the Court had already denied certiorari in 1990 for the exact same issue under the exact same circumstances as that decided in 1995. By doing this, the Court undermined its own judicial authority by making decisions appear politically motivated. Nothing in the litigation substantially changed between 1990 and 1995. As one journalist observed, "[t]he main thing that has changed since 1990 is that Justice Thurgood Marshall—the lawyer who argued the Brown case—has been replaced by Justice Clarence Thomas."[85]

This broad reading of Supreme Court Rule 14.1, as well as the Court's willingness to invalidate the very magnet school remedy that in 1990 supported the Court's order to impose a tax,[86] shows a strong activism from the conservative side of the bench. In describing this activist stance of the Rehnquist Court, one author wrote that "we are now experiencing a period of judicial activism bent on overturning many civil rights gains of the past 40 years. . . . If the Supreme Court continues to be stacked with ideologues, it is conceivable that people will one day not simply reject the authority of the court, but reject our entire system of law as well."[87]

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82. *Jenkins II*, 115 S. Ct. at 2077-78 (Souter, J., dissenting).

83. *See* STERN, *supra* note 70, §§ 6.25-6.26 (discussing the Court's power to rephrase the questions presented).

84. *See* Respondents' Brief, *supra* note 62, at 44-49.

85. William H. Freivogel, *School Desegregation Comes to a Crossroads*, ST. LOUIS POST-DISPATCH, June 18, 1995, at 1B.

86. *See* Paul C. Roberts, *Two Court Rulings: Dissenting Opinions*, THE COMMERCIAL APPEAL, June 18, 1995, at B6 ("From the standpoint of constitutional law, the second round of *Missouri v. Jenkins* is disastrous. What emerges is the spectacle of the Supreme Court permitting [district court] Judge Clark in 1990 to illegally impose judicial taxation for desegregation purposes prior to ruling in June 1995 on the permissibility of his desegregation remedy.").

87. Roberto Rodriguez & Patrisia Gonzales, *Justices' Rulings May Diminish Meaning of Laws*, FRESNO BEE, July 17, 1995, at B5.

III. REDEFINING "INTERDISTRICT"

In deciding that the district court had exceeded its remedial authority by providing an "interdistrict remedy," the *Jenkins II* Court stated that *Milliken I*[88] informed their decision.[89] However, by so deciding, the Court ignored important distinctions between *Milliken I* and the 1976 housing desegregation case of *Hills v. Gautreaux*.[90] By ignoring those distinctions, the Court rejected the fundamental message of *Gautreaux*: an interdistrict remedy is permissible if it does not bind an otherwise innocent and independent governmental entity.[91] Furthermore, the Court reframed the term "interdistrict" to mean something unrecognizable. The *Milliken I* and *Gautreaux* Courts presupposed an involuntary order imposed on outlying districts. There was no such imposition in *Jenkins II*. An intradistrict remedy that has interdistrict effects is not necessarily an "interdistrict remedy." If interdistrict effects were to make for an interdistrict remedy, all desegregation orders that cause white flight would be impermissible.

A. Milliken v. Bradley

Milliken v. Bradley, a 1974 school desegregation case, held that a district court had exceeded its remedial powers when it ordered an interdistrict remedy without a showing of interdistrict de jure segregation.[92] The district court had ordered a metropolitan-wide remedy that required the consolidation of fifty-four separate school districts into a single Detroit metropolitan district after it found de jure segregation in the Detroit city schools.[93] The Supreme Court held that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[94] The *Milliken II* Court formally announced a three-part test that was developed in *Milliken I* to evaluate the scope of equitable remedies: (1) the remedy must be related to the constitutional violation; (2) the remedy must try to restore the victims to the place they would have been absent the constitutional violation; and

88. 418 U.S. 717 (1974).
89. *Jenkins II*, 115 S. Ct. at 2048-49.
90. 425 U.S. 284 (1976).
91. *Id.* at 305-06.
92. *Milliken I*, 418 U.S. at 744-45.
93. *Id.* at 740, 745.
94. *Id.* at 745.

(3) the federal courts must respect the issues of state and local autonomy.[95]

The *Milliken I* Court criticized the district court's basic assumption that "school district lines are no more than arbitrary lines on a map drawn 'for political convenience.'"[96] The Court explained that rather than "arbitrary lines," the boundaries designating distinct school districts represent "deeply rooted . . . local control over the operation of schools."[97] Besides tension over the loss of local control, the *Milliken* Court was deeply concerned about the district court becoming a "'legislative authority'" to resolve such unanswered complex questions as what would be the status of the currently elected school boards, which boards would levy taxes to support the mega-district, and who would determine curricula.[98]

The interdistrict remedy was impermissible because it would bind an otherwise independent political entity that was not guilty of the constitutional violation.[99] The Court stated that "[b]efore the boundaries of separate and autonomous school districts may be set aside . . . it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district."[100] In his concurrence, Justice Stewart explained that "traditions of local control of schools, together with the difficulty of a judicially supervised restructuring of local administration of schools, render improper and inequitable such an interdistrict response."[101]

The *Milliken I* decision was heavily criticized in that it "sanctioned, and even encouraged, white flight from the cities to the suburbs where white children could be protected from forced integration."[102] The dissent focused on the ineffectiveness of future

95. *Milliken II*, 433 U.S. 267, 280-81.

96. *Milliken I*, 418 U.S. at 741.

97. *Id.*

98. *Id.* at 743-44.

99. *See* Hills v. Gautreaux, 425 U.S. 284, 293 (1976) ("Although the *Milliken* opinion discussed the many practical problems that would be encountered in the consolidation of numerous school districts by judicial decree, the Court's decision rejecting the metropolitan area desegregation order was actually based on fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities.").

100. *Milliken I*, 418 U.S. at 744-45.

101. *Id.* at 755 (Stewart, J., concurring).

102. Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 890 (1993); *see also Milliken*, 418 U.S. at 759 (Douglas, J., dissenting) ("When we rule against the metropolitan area remedy we take a step that will likely

desegregation after *Milliken I*: "The majority . . . seems to have forgotten the District Court's explicit finding that a Detroit-only decree, the only remedy permitted under today's decision, 'would not accomplish desegregation.'"[103]

B. Hills v. Gautreaux

Two years after the five member majority in *Milliken I*, a unanimous Supreme Court decided *Hills v. Gautreaux*.[104] After ten years of litigation, the *Gautreaux* Court found purposeful segregation in Chicago public housing. The plaintiffs were tenants of the Chicago Housing Authority ("CHA") who alleged that CHA, HUD, and the Chicago City Council were purposely locating public housing in all black neighborhoods.[105] HUD and CHA were found to have violated the 14th Amendment of the Constitution by maintaining segregated housing facilities.[106]

In fashioning a remedy, the district court denied the respondents' request for a metropolitan wide remedy because "the wrongs were committed within the limits of Chicago and solely against residents of the City."[107] The court of appeals reversed, stating that a metropolitan-wide remedy was appropriate.[108] Before the decision was announced, however, the Supreme Court decided *Milliken I*.[109] The appellate court distinguished *Milliken I* and held that a metropolitan-wide remedy was not barred "because of the equitable and administrative distinctions between a metropolitan public housing plan and the consolidation of numerous local school districts."[110]

The Supreme Court affirmed the Seventh Circuit in a unanimous decision, distinguishing the result from *Milliken I*.[111] In *Milliken I*, school districts that had not violated the Constitution

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put the problems of the blacks and our society back to the period that antedated the 'separate but equal' regime of *Plessy v. Ferguson*.").

103. *Milliken I*, 418 U.S. at 783 (Marshall, J., dissenting).

104. 425 U.S. 284 (1976).

105. *Id.* at 286.

106. *Id.* at 288-89.

107. Gautreaux v. Romney, 363 F. Supp. 690, 691 (N.D. Ill. 1973), *rev'd sub nom.* Gautreaux v. Chicago Housing Auth., 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976).

108. Gautreaux v. Chicago Housing Auth., 503 F.2d 930, 939 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976).

109. Hills v. Gautreaux, 425 U.S. 284, 291 (1976).

110. *Id.* (citing Gautreaux v. Chicago Housing Auth., 503 F.2d at 935-36).

111. *Id.* at 297, 306.

would have been forced to consolidate under the district court's remedial order.[112] In *Gautreaux*, however, "a judicial order directing relief beyond the boundary lines of Chicago [would] not necessarily entail coercion of uninvolved governmental units."[113]

The *Gautreaux* Court held that *Milliken I* represented an understanding of the limits of equity power and the role of federal courts, and not a rule against interdistrict remedies in all cases.[114] "Nothing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred."[115] The *Gautreaux* Court further elucidated that "the District Court's proposed remedy in *Milliken* was impermissible because of the limits on the federal judicial power to interfere with the operation of state political entities that were not implicated in unconstitutional conduct."[116]

C. Jenkins II *Re-reads* Gautreaux

Gautreaux represented the limits of the *Milliken I* decision. If innocent governmental units are not coerced, then interdistrict remedies may be appropriate. When the majority of the Court in *Jenkins II* found *Milliken I* to inform their decision, they seemed to ignore the distinctions emphasized in *Gautreaux* and thereby effectively overruled *Gautreaux*. The *Jenkins II* dissent argued that *Gautreaux* controlled because *Jenkins II* would not bind any innocent autonomous entities.[117] Since the magnet school program adopted by the district court would only cross district lines if students voluntarily moved across those lines, the remedy would not be an inappropriate interdistrict remedy.[118]

Yet the *Jenkins II* majority, composed of the same four Justices who dissented in *Jenkins I*, stated that *Gautreaux* was not overruled,[119] and noted three major distinctions between *Gautreaux* and *Jenkins II*.[120] First, the Court stated that in *Gautreaux*, the

112. *Milliken I*, 418 U.S. at 743.
113. *Hills v. Gautreaux*, 425 U.S. at 298.
114. *Id.* at 294, 298.
115. *Id.* at 298 (footnote omitted).
116. *Id.*
117. *Jenkins II*, 115 S. Ct. at 2088 (Souter, J., dissenting).
118. *Id.* at 2089.
119. *Id.* at 2053 ("Our decision today is fully consistent with *Gautreaux*.").
120. *Id.* at 2053-54.

Court had found that the "'relevant geographic area for the purposes of [plaintiffs'] housing options [was] the Chicago housing market, not the Chicago city limits.'"[121] Supporting this, Justice O'Connor's concurrence stated that HUD's authority extended beyond the city limits, so limiting the remedy to the city limits would have been "'arbitrary and mechanical.'"[122] Further, the Court said *Milliken I* was distinguished in *Gautreaux* because "racial segregation in schools is 'to be dealt with in terms of "an established geographic and administrative school system."'"[123]

Second, the majority noted that *Gautreaux* involved a federal agency, HUD, rather than a State, so it did not raise the same federalism issues as did *Jenkins II*.[124] Third, the majority stressed that the *Gautreaux* Court did not actually support an interdistrict remedy; rather, they remanded to see if such a remedy was appropriate.[125]

The dissent, however, countered this reading of *Gautreaux* by pointing out that in *Gautreaux* there was "no indication that the violation had produced any effects outside the city itself,"[126] undermining any argument that the constitutional violation was actually metropolitan-wide. While the dissent acknowledged that the *Gautreaux* Court found the housing market to be metropolitan-wide, it further stated that the remedy was permissible "not only because that was the area of the housing market . . . but also because the trial court could order a remedy in that market without binding a governmental unit innocent of the violation and free of its effects."[127]

The dissent argued that the clear question before the Supreme Court in *Gautreaux* was whether a court could order a remedy that

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121. *Jenkins II*, 115 S. Ct. at 2053 (quoting *Gautreaux*, 425 U.S. at 299).

122. *Id.* at 2058 (quoting *Gautreaux*, 425 U.S. at 300). The full quote from *Gautreaux*, however, envisions a wider scope of judicial authority: "To foreclose [metropolitan wide] relief solely because HUD's constitutional violation took place within the city limits of Chicago would transform *Milliken*'s principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct." *Gautreaux*, 425 U.S. at 300.

123. *Jenkins II*, 115 S. Ct. at 2053 (quoting *Gautreaux*, 425 U.S. at 298 n.13).

124. *Id.* at 2054.

125. *Id.* at 2053. However, with the understanding that an interdistrict remedy was constitutional, HUD and the plaintiffs voluntarily entered into an interdistrict agreement. *See* Gautreaux v. Landrieu, 523 F. Supp 665, 668 (N.D. Ill. 1981), *aff'd sub nom.* Gautreaux v. Pierce, 690 F.2d 616 (7th Cir. 1982).

126. *Jenkins II*, 115 S. Ct. at 2088 (Souter, J., dissenting).

127. *Id.* at 2089.

extended beyond the Chicago city boundaries, specifically "'the permissibility . . . of "interdistrict relief for discrimination in public housing in the absence of a finding of an inter-district violation."'"[128] While the dissent did not directly discuss Chief Justice Rehnquist's federalism distinction, it is clear that the dissent did not find any federalism concerns in *Gautreaux*, not because it involved a federal actor, but rather because no innocent sovereign was bound by the district court's order:

> We held that a district court may indeed subject a governmental perpetrator of segregative practices to an order for relief with intended consequences beyond the perpetrator's own subdivision, even in the absence of effects outside that subdivision, so long as the decree does not bind the authorities of other governmental units that are free of violations and segregative effects.[129]

While the majority tries to distinguish *Jenkins II* from *Gautreaux*, the distinctions seem to misunderstand the fundamental holding of *Gautreaux*. The district court, upon remand of *Gautreaux*, clearly understood the ruling of the Supreme Court to give the district court full power to order relief outside the city boundaries.[130] The issue raised in *Gautreaux*, and reiterated by the unanimous Court, was simply "the authority of the District Court to order HUD to take remedial action outside the city limits of Chicago."[131] The Court held that HUD's "constitutional and statutory violations were committed in Chicago."[132] The *Gautreaux* opinion squarely rests on the assertion that the remedy need not be limited by the geographical boundaries of where the violation occurred so long as no other innocent governmental entity is bound by the granted relief.[133]

Even if *Gautreaux* was not overruled, although the dissent suggests otherwise,[134] the meaning of "interdistrict" has been so

128. *Id.* at 2088 (quoting *Gautreaux*, 425 U.S. at 292).
129. *Id.* at 2088.
130. *See Gautreaux v. Landrieu*, 523 F. Supp. at 665.
131. *Gautreaux*, 425 U.S. at 296.
132. *Id.* at 297.
133. *See id.* at 299-300 (finding that an order against HUD and CHA, which was not limited to Chicago, but instead applied to the greater metropolitan area, was consistent with the "nature and extent of the constitutional violation").
134. *Jenkins II*, 115 S. Ct. at 2090 (Souter, J., dissenting) (asserting that "*Gautreaux's* holding is now effectively overruled").

broadened that the *Gautreaux* exception is rendered meaningless. While the litigants in the actual ongoing *Gautreaux* litigation may not have grounds to challenge the *Gautreaux* exception, it seems unlikely that the Court will ever again recognize situations that require courts to order remedies that extend beyond district lines, unless a federal entity is the violator. Yet, the Court in *Gautreaux* recognized that "[t]o foreclose [metropolitan-wide] relief solely because HUD's constitutional violation took place within the city limits of Chicago would transform *Milliken*'s principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct."[135]

IV. THE EFFECT OF *JENKINS II* ON THE FUTURE OF SCHOOL DESEGREGATION

In the early desegregation cases, the Court searched for ways to remedy segregation. Believing that purposeful segregation caused injury to minority students who were subjected to those explicit policies, courts ordered systems to become unitary, whereby the schools would no longer be recognizable as single race schools. However, in *Milliken I*, the Court stopped looking at effective remedies, instead factoring the interests of non-violating school districts into the equation and erring on the side of autonomous school districts.[136] In their brief to the Supreme Court, the *Milliken I* plaintiffs explained that "'[i]f that dividing 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*.'"[137]

135. *Gautreaux*, 425 U.S. at 300.

136. *See Milliken I*, 418 U.S. at 762 n.13 (Douglas, J., dissenting) ("Mr. Justice Stewart indicates that equitable factors weigh in favor of local school control and the avoidance of administrative difficulty given the lack of an 'interdistrict' violation. It would seem to me that the equities are stronger in favor of the children of Detroit who have been deprived of their constitutional right to equal treatment by the State of Michigan.").

137. PAUL R. DIMOND, BEYOND BUSING, INSIDE THE CHALLENGE TO URBAN SEGREGATION 101 (1985).

A. *The Movement Away from* Brown

Understanding the ramifications for school desegregation of limiting, if not overturning, *Gautreaux* requires an examination of the Court's retreat from the mandates of *Brown v. Board of Education* ("*Brown II*").[138] In *Brown II*, the Court held that segregation must be abolished with "all deliberate speed."[139] School desegregation proponents viewed the *Brown* decisions as allowing school districts to continue to resist orders to desegregate.[140] However, thirteen years later in *Green v. County School Board*, the Court held that a freedom of choice plan to desegregate the Virginia county school system "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system."[141] The *Green* decision added meaningful requirements to the broad mandate of *Brown II* by stating that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."[142] The Court further held that "whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed."[143]

The Rehnquist Court has often retreated from the mandates of *Brown II* and *Green*. Several decisions by the Court have severely undercut the command that de jure segregation must be completely destroyed until a unitary system has been created. *Milliken*, as already discussed, held that an interdistrict remedy for an intradistrict violation was inappropriate if it bound other innocent governmental entities.[144] Writing for the majority in *Board of Education v. Dowell*, Chief Justice Rehnquist wrote that "it is a mistake to treat words such as 'dual' and 'unitary' as if they were

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138. 349 U.S. 294 (1954).

139. *Id.* at 301.

140. *See generally* Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237 (1968-69) (discussing the Warren's Court long involvement in the development of race relations law). Carter writes that "it is clear that what the formula required was movement toward compliance on terms that the white South could accept." *Id.* at 243.

141. 391 U.S. 430, 438 (1968). A freedom of choice plan allows students to voluntarily attend any school within the district, thereby abolishing any governmental control of segregative school assignments. *Id.* at 430. However, a freedom of choice plan that follows a de jure segregated system will usually fail to integrate without proactive measures. *Id.* at 437-38.

142. *Id.* at 439 (emphasis omitted).

143. *Id.* (citation omitted).

144. *See supra* notes 92-103 and accompanying text.

actually found in the Constitution."[145] Adopting a new test, the Court held that a school board may be released from judicial oversight if "the local authorities have operated in compliance with [the desegregation decree] for a reasonable period of time."[146] The new test asks only whether a school district in violation has done all that is practicable to return the school district to a unitary, nonracial status.[147] In a sharp dissent, Justice Marshall criticized the majority's new, more lenient standard: "[O]ur school-desegregation jurisprudence establishes that the effects of past discrimination remain chargeable to the school district regardless of its lack of continued enforcement of segregation, and the remedial decree is required until those effects have been finally eliminated."[148]

B. How Jenkins II *Changes the Landscape*

Milliken I is a watershed in the history of desegregation jurisprudence. As one author explains, "Neighborhood schools were considered a legitimate desegregation tool by the Supreme Court in *Brown II* when it opined that a permissible remedy would be the '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.'"[149] Yet *Milliken I* foreclosed such a remedy.

Jenkins II similarly changes the focus by redefining "interdistrict" so that judicial control over desegregation remedies are mostly ineffective. The *Milliken I* order was impermissible because it would have restricted an innocent and autonomous entity, other suburban school districts, by requiring them to become part of a single mega-district.[150] The *Gautreaux* order was permissible because no such entity would have been so bound; however, the plan was still an interdistrict remedy because there would have been substantial involuntary effects on outlying districts.[151] Public housing sites would be built within those outlying suburbs, with significant effects within those districts.

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145. 498 U.S. 237, 245 (1991).

146. *Id.* at 248.

147. *Id.*

148. *Id.* at 262 (Marshall, J., dissenting) (emphasis omitted).

149. Christine H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation*, 36 WM. & MARY L. REV. 613, 613-14 (1995) (quoting *Brown II*, 349 U.S. 294, 300-01 (1955)).

150. *See supra* part III.A.

151. *See supra* part III.B.

The *Milliken II* test for evaluating the scope of desegregation remedies requires that the remedy be related to the constitutional violation.[152] The magnet school program ordered by the district court in *Jenkins II* did address the intradistrict violation. As Chief Justice Rehnquist states for the majority in *Jenkins II*, "As a component in an intradistrict remedy, magnet schools are attractive because they promote desegregation while limiting the withdrawal of white student enrollment that may result from mandatory reassignment."[153] The issue for the majority is not whether the magnet school program failed to address the intradistrict violation but rather whether it was an impermissible interdistrict remedy that violated *Milliken I*: "The District Court's remedial plan, in this case, however, is not designed *solely* to redistribute the students within the KCMSD . . . . Instead, its purpose is to attract nonminority students from outside the KCMSD schools. But this interdistrict goal is beyond the scope of the intradistrict violation . . . ."[154]

Yet, it is a dilution of the term "interdistrict" to label an order to create a school system with the ultimate aim of voluntarily attracting whites to move back into the city as interdistrict. There are no costs placed on the suburban school districts, and the magnet school plan only effects those districts to the extent students voluntarily re-enter the KCMSD. The *Jenkins II* dissent argued that *Milliken I* did not mean that a "remedy that takes into account conditions outside of the district in which a constitutional violation has been committed is an 'interdistrict remedy.'"[155] The KCMSD plan of segregative attractiveness, with a goal of attracting suburban white students, is not an interdistrict remedy.[156]

Redefining as interdistrict, and therefore impermissible, a remedy that tries to confront the reality of segregation in our inner city schools is far reaching. Many commentators see the *Jenkins II* decision as delineating the end of judicial control over desegregation remedies.[157] While there is no new rule requiring district

152. *Milliken II*, 433 U.S. 267, 280. *See supra* notes 92-95 and accopanying text (discussing the *Milliken II* test).

153. *Jenkins II*, 115 S. Ct. at 2051.

154. *Id.* (emphasis added).

155. *Jenkins II*, 115 S. Ct. at 2087 (Souter, J., dissenting).

156. *Id.* at 2088.

157. *See, e.g.*, David G. Savage, *Education: Justices Say Low Achievement Levels of Minority Schools Don't Justify Long-term Judicial Control*, L.A. TIMES, June 13, 1995, at A15 (writing that *Jenkins II* "make[s] clear that the justices are willing to end desegrega-

courts to relinquish control without an interdistrict violation, beyond stating that it is impermissible to have interdistrict goals, the Court has eliminated one of the last effective remedies for segregation: voluntary transfer programs across district boundaries. In the wake of *Milliken I*, many commentators had proposed magnet schools plans as viable desegregation alternatives. Sounding much like the dissent in *Jenkins II*, one author has written that "[u]nlike mandatory reassignment plans . . . the districts participating in a metropolitan voluntary plan retain their independent political identities," and would therefore be permissible under *Milliken I*.[158]

Another author recognized the great burden on courts when creating such magnet school plans, stating that "[v]oluntary remedies, relying on magnet schools and enhanced educational offerings, must . . . promise to effectively desegregate area schools to pass constitutional muster. To accomplish these ends, educational offerings must be sufficiently attractive to entice students to voluntarily transfer to a school outside their neighborhood."[159] The irony, of course, is that if the district court in *Jenkins II* had tried to create a less expansive magnet school program, the court would have failed to show the plan's integrative effectiveness. However, when it implemented the only effective remedy, the court was barred under an expansive reading of *Milliken I*. In discussing previous decisions by the Rehnquist Court, one author explained that

> [w]hat emerges from these relatively recent Court decisions is a judicial acquiescence to the status quo as constitutionally permissible. The status quo consists of relatively wealthy suburbs, with public school districts made up of largely white students, surrounding relatively impoverished cities in separate public school districts made up of largely minority students.[160]

In the area of desegregation, the Rehnquist Court has chosen the goal of judicial restraint over the value of remedying constitutional violations. Yet, "the length of judicial supervision should not

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tion programs even if black students remain isolated from whites and attend city schools where achievement is low."); Williams, *supra* note 12, at C1 (writing that the *Jenkins II* decision has closed the door on court ordered remedies to segregation).

158. Rossell, *supra* note 149, at 627.

159. Neal Devins, *School Desegregation Law in the 1980's: The Courts' Abandonment of* Brown v. Board of Education, 26 WM & MARY L. REV. 7, 15 n.19 (1984).

160. Rodney J. Blackman, *Returning to Plessy*, 75 MARQ. L. REV. 767, 776 (1992).

be relevant to determining whether discrimination has been eliminated."[161] And this is where the Court has erred. First, it erred by cloaking judicial activism in the words of restraint. Second, and more importantly, the Court has done just what the *Gautreaux* Court warned against: making boundary lines "arbitrary and mechanical," so that they become a "shield for those found to have engaged in unconstitutional conduct."[162]

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161. Carter, *supra* note 102, at 891.
162. *Gautreaux*, 425 U.S. at 300.