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The Supreme Court's Latest Rendition of Equality in Education: Examining the Traditional Components of Success in Missouri v. Jenkins

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Notes

THE SUPREME COURT'S LATEST RENDITION OF EQUALITY IN EDUCATION: EXAMINING THE TRADITIONAL COMPONENTS OF SUCCESS IN *MISSOURI v. JENKINS*

I. INTRODUCTION

The Fourteenth Amendment, ratified in 1868, provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[1] Not until 1954, however, did the United States Supreme Court hold that, under the Fourteenth Amendment, state-imposed racial segregation of public schools deprives African-Americans equal protection of the laws.[2]

The progeny of school desegregation cases that followed this holding projected the nation into a protracted mission aimed at integrating

1. U.S. CONST. amend. XIV, § 1. Originally adopted to terminate the institution of African-American slavery in the United States, the Fourteenth Amendment became the cornerstone of equal protection in America's school systems. John M. Jackson, Comment, *Remedy for Inner City Segregation in the Public Schools: The Necessary Inclusion of Suburbia*, 55 OHIO ST. L.J. 415, 415 (1994). In its first cases interpreting the Fourteenth Amendment, the United States Supreme Court interpreted its protections to declare all forms of discrimination against African-Americans unconstitutional. *Id.* at 415 n.2. (citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70-72 (1873); Strauder v. West Virginia, 100 U.S. 303 (1879), *overruled by* Taylor v. Louisiana, 419 U.S. 522 (1975)). The Court in *Strauder*, interpreting the Fourteenth Amendment, stated:

> What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, . . . that no discrimination shall be made against them by law because of their color?

Strauder, 100 U.S. at 307; *see also* Virginia v. Rives, 100 U.S. 313, 318 (1879), *overruled by* City of Greenwood v. Peakcock, 384 U.S. 808 (1966) (finding that Fourteenth Amendment applies exclusively to state action).

2. Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (*Brown I*). The Court in *Brown I* overruled the doctrine set forth in Plessy v. Ferguson. *Id.* at 494-95; *see also* Plessy v. Ferguson, 163 U.S. 537 (1896) (finding law allowing railway companies to provide separate but equal railway coaches for white and black passengers constitutional), *overruled by Brown I*, 347 U.S. at 483. The circumstances in *Plessy* did not implicate public education, rather it involved public transportation. *Plessy*, 163 U.S. at 538. The holding and rationale of *Plessy* provided the justification for "separate but equal" schools; establishing that public transportation could be provided in "separate but equal" facilities. *Plessy*, 163 U.S. at 550-51; *see also Brown I*, 347 U.S. at 488 (stating that under *Plessy*, "equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate"); Jackson, *supra* note 1, at 415 n.4 (stating that concept of separate but equal was adopted from holding and rationale of *Plessy*). For a further discussion of the Court's holding in *Brown I*, see *infra* notes 16-20 and accompanying text.

America's schools.[3] Now, over forty years later, federal courts are still attempting to measure the success of these desegregation efforts and to create innovative ways to overcome the remaining effects of state-imposed segregation.[4]

When measuring a school district's success at desegregation, federal courts must often decide whether a school district deserves "unitary status."[5] Disagreement exists among federal courts, however, concerning

3. Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1106 (1990). For a discussion of the history of school desegregation, see *infra* notes 16-40 and accompanying text.

4. *See* Mary Jordan, *Segregated School Compensation Results in Scant Gain, Study Says*, WASH. POST, Apr. 7, 1994, at A4 (explaining that despite courts' varying efforts to desegregate schools, many school districts remain segregated). For an example of a court's effort to desegregate a school system, see *infra* notes 30-33 and accompanying text.

5. Brown, *supra* note 3, at 1106-07. The exact definition of unitary status is highly controversial, as is the effect of a determination of unitary status on continuing desegregation plans. *Id.* at 1107 n.7. Generally, a school district secures unitary status when it achieves the goal of removing all vestiges of prior racial discrimination. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971) (stating that school board has burden of completely removing segregation); Brown, *supra* note 3, at 1107-08. As the Supreme Court has noted, however, considerable disparity exists among lower federal courts' definitions of "unitary." Board of Education v. Dowell, 498 U.S. 237, 245 (1991); *see also* J. Braxton Craven, Jr., *Integrating the Desegregation Vocabulary*—Brown *Rides North, Maybe*, 73 W. VA. L. REV. 1, 1-2 (1971) (noting that "unitary" is not clearly defined); T.A. Smedley, *Developments in the Law of School Desegregation*, 26 VAND. L. REV. 405, 405-06 (1973) (finding no clear standard of unitariness). *But see* Northcross v. Board of Educ., 397 U.S. 232, 236 (1970) (Burger, C.J., concurring) (rejecting contention that unitariness is undefined). Due to the lack of a clear definition, courts use many different meanings of unitariness. Brown, *supra* note 3, at 1107 n.7. Some courts use the term to indicate that a school district meets the requirements of *Brown I*. *See, e.g.*, United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987) (holding that school district is released from consequences of past misdeeds when it eliminates vestiges of segregated system); Riddick v. School Bd., 784 F.2d 521, 532-33 (4th Cir.) (finding that unitary status is achieved when all aspects of public education are freed from vestiges of state sanctioned racial segregation), *cert. denied*, 479 U.S. 938 (1986); Vaughns v. Board of Educ., 758 F.2d 983, 988 (4th Cir. 1985) (finding that unitary status is achieved by eliminating dual system and replacing it with one that eliminates all vestiges of segregation). Other courts, meanwhile, use the term "unitary" in reference to school districts that have desegregated student assignments. *See, e.g.*, Dowell v. Board of Educ., 890 F.2d 1483, 1503 (10th Cir. 1989) (holding that within context of finding unitariness, student reassignment plan must be judged by its effectiveness in maintaining unitary school system), *rev'd on other grounds*, 498 U.S. 237 (1991). Still, one other circuit drew a distinction between "unitary school districts," that do not operate segregated schools over an extended period of time, with "unitary status," which connotes a removal of all vestiges of past discrimination. NAACP v. Georgia, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985). The Supreme Court, however, expressed concerns in *Dowell* about using such precise definitions and explicitly refrained from using such definitions in *Dowell* or *Freeman v. Pitts*. *Dowell*, 498 U.S. at 245-46; Freeman v. Pitts, 503 U.S. 467, 487 (1992). For a further discussion of *Dowell* and *Freeman*, see *infra* notes 55-75 and accompanying text. Despite these disclaimers, the Supreme Court provided some guidance on unitary status stating that a unitary school system is one "within

what factors to consider when contemplating a school district's attainment of unitary status.[6] The Supreme Court recently had the opportunity to shed some light on this debate in *Missouri v. Jenkins*.[7]

The Supreme Court in *Jenkins* granted certiorari after the United States Court of Appeals for the Eighth Circuit denied rehearing for a decision that affirmed the federal district court's alleged use of a student achievement goal to gauge the success of a remedial desegregation plan.[8] Specifically, the Eighth Circuit's decision accepted the district court's use of improved standardized test scores as a criterion to measure a school district's compliance with a desegregation plan.[9] In *Jenkins*, the Supreme Court reversed the Eighth Circuit's holding and criticized its reliance on improved test scores as a factor in determining the success of the school district's desegregation plan.[10] Moreover, the Court used *Jenkins* to broadly address the proper scope of desegregation remedies under recent Supreme Court precedent.

This Note discusses the circumstances in *Jenkins* and examines the different approaches courts have taken when confronted with issues concerning unitary status.[11] In an effort to determine the essential components of

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which no person is to be effectively excluded from any school because of race or color." Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam). The Supreme Court also stated that a school system achieves unitary status when it can be described as a "nonracial system" of schools in which discrimination has been completely removed. Green v. County Sch. Bd., 391 U.S. 430, 436 (1968). For a more in depth discussion of unitary status, see *infra* notes 6, 33, 61, 88, 99 and accompanying text.

6. Brown, *supra* note 3, at 1108. In 1968, the Supreme Court broadly mentioned six aspects of a school system that school districts have an affirmative duty to desegregate to eliminate the racial identifiability of schools: student, faculty and staff assignments, extracurricular activities, facilities and transportation. *Green*, 391 U.S. at 435. For a further discussion of *Green*, see *infra* notes 30-33 and accompanying text. In more recent cases, however, the Supreme Court has retreated from upholding a required set of criteria that make up unitary status; rather, the Court directed lower courts to use the *Green* factors as general guidelines. *See, e.g., Freeman*, 503 U.S. at 492-93 (holding that factors expressed in *Green* "need not be a rigid framework" when appraising unitary status of school district); *Dowell*, 498 U.S. at 250 (stating that in determining unitary status, district courts should look to "every facet of school operations" including factors enumerated in *Green*). For a further discussion of *Dowell* and *Freeman*'s treatment of unitary status, see *infra* notes 55-75 and accompanying text.

7. 115 S. Ct. 2038 (1995).

8. *See* Jenkins v. Missouri, 19 F.3d 393, 395-96 (8th Cir. 1994) (questioning whether standardized test scores must improve before district court releases school district from its supervision). For a further discussion of the Eighth Circuit's reasoning in *Jenkins*, see *infra* notes 96-100 and accompanying text.

9. *Id.* at 395 (noting that test scores "must be only one factor in the equation"). For a further discussion of the Eight Circuit's reasoning, see *infra* notes 96-100 and accompanying text.

10. Missouri v. Jenkins, 115 S. Ct. 2038 (1995). For a further discussion of the Supreme Court's reasoning in *Jenkins*, see *infra* notes 111-45.

11. For a discussion of these different factors, see *infra* notes 31-75 and accompanying text.

a unitary school district, Part II of this Note analyzes the line of desegregation cases leading to *Jenkins*.[12] Part III discusses the long factual history preceding the Supreme Court's decision in *Jenkins*.[13] Part IV dissects the majority, concurring and dissenting opinions of *Jenkins* and scrutinizes the Court's reasoning in relation to prior desegregation cases.[14] Finally, Part V considers the repercussions of *Jenkins* and how the Court's decision will affect future litigation concerning school desegregation and unitary status.[15]

II. BACKGROUND

A. *The Supreme Court Establishes the Basis for Desegregation Remedies*

The first landmark case that addressed school segregation was *Brown v. Board of Education* (*Brown I*).[16] In *Brown I*, the Supreme Court decided a case that questioned long-held opinions concerning racial classification and states' rights.[17] The Court held that "in the field of public education

12. For a discussion of these cases, see *infra* notes 16-76 and accompanying text.

13. For a discussion of these facts, see *infra* notes 77-110 and accompanying text.

14. For a further discussion of the Supreme Court's opinion in *Jenkins*, see *infra* notes 111-267 and accompanying text.

15. For the definition of unitary status, see *supra* note 6 and *infra* note 33 and accompanying text.

16. 347 U.S. 483 (1954).

17. *Id.* at 493; *see* Constance Baker Motley, *The Historical Setting of* Brown *and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 9 (1992) (providing overview of *Brown I* in historical context). As Motley noted, *Brown I* represents "the first and foremost historical rectification of the Fourteenth Amendment to the Federal Constitution." *Id.* Specifically, *Brown I* recognized that the social policy of segregation, upheld in the Supreme Court's opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896), violated the Fourteenth Amendment's guarantee of equal protection under the law. *Id.* In *Plessy*, the Supreme Court affirmed the power of the southern states to provide separate but equal railroad facilities for African-Americans within their borders. *Plessy*, 163 U.S. at 551-52. *Plessy*'s most devastating result, however, involved its reaffirmation that African-Americans were inherently inferior in American society. Motley, *supra*, at 15. Many educational institutions in the North, which had accepted African-Americans after the Civil War, abandoned their private affirmative action after *Plessy*. *Id.* This abandonment demonstrated society's treatment of African-Americans in the years between *Plessy* and *Brown I*. *Id.*

Nonetheless, even before the Court's ruling in *Brown I*, the Court began to move away from the doctrine of "separate but equal." *See, e.g.*, McLaurin v. Oklahoma State Regents, 339 U.S. 637, 642 (1950) (prohibiting Oklahoma from segregating African-American male within its graduate school of education once it had admitted him); Sweatt v. Painter, 339 U.S. 629, 635-36 (1950) (ordering admission of African-American to University of Texas Law School where facilities were much superior to those at school for African-American citizens); Sipuel v. Board of Regents, 332 U.S. 631, 632-33 (1948) (requiring Oklahoma to provide legal education to African-American woman, which was already provided to Caucasian students within state); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 352

the doctrine of 'separate but equal' has no place."[18] Behind the Court's holding in *Brown I*, existed the theory that racial segregation stigmatized African-American children in a manner causing them to feel inferior in American society.[19] *Brown I* thus established that state-imposed segrega-

(1938) (preventing Missouri from sending African-American student out of state to receive law school education, that Caucasian students received at home).

During the Topeka, Kansas school desegregation trial, a new theory developed for attacking the validity of segregation in education. Motley, *supra*, at 13; Brown v. Board of Educ., 98 F. Supp. 797, 799 (D. Kan. 1951). This theory proposed that state-imposed segregation had an adverse psychological effect on African-American children's inherent ability to learn. *Brown I*, 347 U.S. 483, 494 n.11 (1954). For a further discussion of the Court's finding concerning this adverse psychological effect, see *infra* note 19 and accompanying text.

18. *Brown I*, 347 U.S. at 495. Thus, *Brown I* specifically overruled *Plessy* and articulated a reversal of *Plessy*'s doctrine of social inferiority. *See* Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 636 (arguing that *Brown I* represents attempt to uproot deeply entrenched racism in American society). Furthermore, *Brown I* carried a message designed to make the Caucasian majority less convinced of its own superiority; *Brown I*'s symbolic effect included this message. *Id.*; *see also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 582-747 (1976) (arguing that *Brown I*'s symbolic importance had noted affect on American people and established societal values). Finally, as one commentator noted, the actual impact of *Brown I* was enormous:

> Because *Brown* rejected the very second-class citizenship afforded African Americans in earlier Supreme Court cases such as *Dred Scott v. Stanford* and *Plessy v. Ferguson*, *Brown* has had a profound impact on the dismantling of apartheid in America. In fact, it revitalized the Fourteenth Amendment's original purpose: to help Blacks claim their right to national citizenship. Not only was *Brown* the authority for the prohibition of segregation in a wide range of public activities, it provided the legal underpinnings for the Civil Rights Act of 1964.

Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1288 (1992); *see also* C. TSEHLOANE KETO, THE AFRICA-CENTERED PERSPECTIVE OF HISTORY 25-28 (1989) (noting that *Brown I* provided foundation for Civil Rights Act of 1964 and assimilation of millions of African-American citizens into American society).

19. *Brown I*, 347 U.S. at 494. In 1950, Dr. Kenneth B. Clark submitted a study concerning these psychological effects to the Supreme Court for its consideration of the constitutionality of racial discrimination in public schools. *See* John D. Cassais, *Ignoring the Harm: The Supreme Court, Stigmatic Injury, and the End of School Desegregation*, 14 B.C. THIRD WORLD L.J. 259, 262-64 (1994) (discussing Clark's findings that principle evil of school desegregation is that it stigmatizes excluded race as inferior). Ultimately, this study was the basis for Chief Justice Warren's holding, which stated "[t]o separate [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494.

In his study, Dr. Clark specifically studied the stigmatizing effects of segregation in African-American children. KENNETH B. CLARK, PREJUDICE AND YOUR CHILD 19-24 (1955) (reprinting 1950 study adopted in *Brown I*). Clark interviewed children aged three to seven to determine their attitudes about themselves and their race. *Id.* at 19. In the study, Clark used black and white dolls to demonstrate that African-American children illustrated a conspicuous preference for the white doll. *Id.* at 23. Clark concluded that this choice evidenced self-rejection on the part of the African-American children, which he identified as stemming from their awareness and acceptance of prevailing racial attitudes. *Id.* at 24; *see also* JOHN E. WIL-

tion unconstitutionally violated the Equal Protection Clause of the Fourteenth Amendment.[20]

A year after *Brown I*, *Brown v. Board of Education* (*Brown II*)[21] established the remedial structure to enforce the holding of *Brown I*, focusing on two directives.[22] First, the Court compelled local school boards to eliminate the existence of government-created dual school systems.[23] Second, the Court required school boards to implement desegregation orders

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LIAMS, RACE, COLOR AND THE YOUNG CHILD 191-92 (1976) (reaching similar conclusions in study where African-American children preferred pictures of caucasian children to African-American children). More importantly, Clark also found that segregated schools were a fundamental cause of this inferiority complex. Clark, *supra*, at 33. Clark argued that Caucasian children learned of their own superiority in school and vice versa. *Id.* Clark explained, "[a] child who is required to attend a segregated school is being taught that race is an important factor in his education. It is practically impossible for him to avoid including his appraisal of himself . . . the fact of his racial identity." *Id.* at 32-33.

Fifteen years later, Clark further explored these findings when he studied the effects of segregation in Harlem, New York. KENNETH B. CLARK, DARK GHETTO: DILEMMA OF SOCIAL POWER (2d ed. 1989). In that study, Clark found that children's IQ and academic achievement in overwhelmingly African-American inner-city schools lagged behind that of students elsewhere in New York City and throughout the nation. *Id.* at 117-25. Subsequent studies concerning segregation and its affect on minority students' achievement illustrated similar results. *See, e.g.*, Robert Dreeben & Adam Gamoran, *Race, Instruction, & Learning*, 51 AM. SOC. REV. 660, 661, 663 (1986) (finding significant learning disparities between African-Americans and Caucasians due largely to inferior resources in African-American schools). Still other studies have illustrated that African-American students' achievement improves when those school districts implement desegregation orders. *See, e.g.*, ROBERT L. CRAIN & RITA E. MAHARD, DESEGREGATION PLANS THAT RAISE BLACK ACHIEVEMENT: A REVIEW OF THE RESEARCH 7-35 (1982) (finding that desegregation resulted in increases in desegregated students' achievement, especially when desegregation began in kindergarten and first grade, and where transferee schools were predominantly, but not overwhelmingly, Caucasian); ROBERT L. CRAIN & RITA E. MAHARD, DESEGREGATION & BLACK ACHIEVEMENT 16 (1977) (concluding that desegregation resulted in and would continue to increase African-American students' achievement); Gail E. Thomas & Frank Brown, *What Does Educational Research Tell Us About School Desegregation Effects?*, 13 J. OF BLACK STUD. 155, 157-59 (1982) (examining studies that demonstrated improvement in African-American students' achievement after desegregation).

20. *Brown I*, 347 U.S. at 495. *See also* Neal Devins, *School Desegregation Law in the 1980's: The Courts' Abandonment of* Brown v. Board of Education, 26 WM. & MARY L. REV. 7, 14 (1984) (discussing that *Brown I* established basic substantive principle that intentional segregative acts are unconstitutional under Fourteenth Amendment). For a further discussion of desegregation and the Fourteenth Amendment, see *supra* note 1 and accompanying text.

21. 349 U.S. 294, 300-01 (1955) (*Brown II*).

22. *See* Devins, *supra* note 20, at 14 (discussing *Brown II*'s attempt to enforce mandate of *Brown I*).

23. *Brown II*, 349 U.S. at 299. The Court held that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these [school desegregation] problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles" established in *Brown I*. *Id.*

with "all deliberate speed."[24] In addition, the Court stated that federal district courts remained the most appropriate forum to oversee these directives.[25]

Brown I and *Brown II* provided the groundwork for the desegregation movement,[26] but did not provide much advice regarding the structure of desegregation remedies.[27] Initially, courts interpreted the "all deliberate

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24. *Id.* at 301. For courts' interpretations of *Brown II*'s "all deliberate speed" directive, see *infra* notes 28-30.

25. *Id.* at 299-300. The Court argued that district courts were the most proper forum "[b]ecause of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these [desegregation] cases can best perform th[e] judicial appraisal." *Id.* at 299. The Court further held that the district courts should have broad discretion to create remedies, stating that "[i]n fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Id.* at 300. The Court argued that this ability to shape remedies should be "characterized by a practical flexibility," allowing the courts to adjust for changing public and private needs. *Id.*; *see also* Missouri v. Jenkins, 495 U.S. 33, 78 (1990) (recognizing that district courts have wide range of possibilities when designing desegregation remedies); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 12 (1971) (quoting *Brown II*'s holding that district courts will be "guided by equitable principles"); Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1150 (6th Cir. 1992) (holding that federal district courts retain jurisdiction to modify desegregation decree to adapt its terms to changed conditions), *cert. denied*, 113 S. Ct. 2998 (1993); Gautreaux v. Chicago Hous. Auth., 503 F.2d 930, 935 (7th Cir. 1974) ("Having once found a constitutional violation, [the] district judge . . . should make every effort to achieve the greatest possible degree of actual desegregation . . . taking into account the practicality of situation." (citing Davis v. Board of Sch. Comm'rs, 402 U.S. 33, 37 (1971)), *aff'd*, 425 U.S. 284 (1976); Haney v. County Bd. of Educ., 429 F.2d 364, 369 (8th Cir. 1970) (finding that Arkansas Quality Education Act could not limit district court's power to fashion desegregation decree, which would effectuate nonracial school system). For a discussion of the Court's subsequent interpretations of the *Brown II* holding, see *infra* notes 30-54 and accompanying text.

26. *See* Cassais, *supra* note 19, at 267 (noting that *Brown I* and *Brown II* "recognized the inequality implicit in intentional segregation, and made it clear that the stigmatic injury to black children caused by such segregation is the harm to be remedied").

27. Devins, *supra* note 20, at 14. Devins noted that:

> Aside from suggesting that *Brown II* remedies address "varied local school problems," the Court remained silent on the nature and scope of the remedies. The Court thus left unresolved the central issue whether a school board could satisfy the *Brown* mandates merely by permitting black and white students to attend previously one-race schools or whether school districts must act affirmatively to bring together black and white schoolchildren. . . . In other words, the Court left unanswered the question whether affirmative, effect-orientated remedies would restore a plaintiff class to the position that would exist absent unconstitutional segregation or whether such affirmative relief would go too far by restructuring a possibly segregated world.

Id. at 14-15 (footnotes omitted); *see also* Frank I. Goodman, *De Facto School Desegregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 279 (1972) (arguing that Court did not address affirmative relief issue because "[n]one of the empirical studies brought to the Court's attention . . . even purported to isolate the effects of segregation per se."). For a further discussion of the duty to *affirmatively* desegregate, see *supra* notes 16-25 and accompanying text.

speed" language of *Brown II* as a requirement of nondiscriminatory admissions to public schools.[28] This interpretation, however, permitted school districts to resist the original intention of the *Brown* decisions.[29] The Supreme Court did not remedy this misinterpretation until 1968, when it decided *Green v. County School Board.*[30]

In *Green*, the Supreme Court ruled that a freedom of choice plan in a rural southern school district failed to satisfy the directives of the *Brown* decisions.[31] The *Green* Court held that school boards must come forward

28. Devins, *supra* note 20, at 15; *see, e.g.*, Goss v. Board of Educ., 373 U.S. 683, 689 (1963) (holding that transfer program permitting students to transfer from school where student is in racial minority to one where student is in racial majority was insufficient because similar majority to minority program did not accompany transfer program, allowing pupils to choose their school free of racial considerations); Cooper v. Aaron, 358 U.S. 1, 7 (1958) (holding that free admission of African-American children to schools fulfilled duty to desegregate); Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (arguing that Constitution "does not require integration. It merely forbids discrimination.").

More recently, one Supreme Court Justice echoed an argument reminiscent of these cases. *See* Freeman v. Pitts, 503 U.S. 467, 501 (1992) (Scalia, J., concurring) (arguing that free choice of schools is all that Constitution requires).

29. Brian K. Landsberg, *Equal Educational Opportunity: The Rehnquist Court Revisits* Green *and* Swann, 42 EMORY L.J. 821, 825 (1993). Landsberg noted that "between 1955 and 1968 the Court was repeatedly called upon to address foot-dragging and even defiance by school authorities." *Id.* Another commentator noted that:

> There is no denying that southern resistance to *Brown* was *massive*, manifesting itself in a variety of forms such as constitutional amendments requiring school closures, substitution of private schools (with tuition subsidies) for public schools, criminal laws forbidding school integration, resolutions of interposition purporting to nullify the *Brown* decision, NAACP harassment laws, and widespread physical violence and economic coercion.

Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 807 (1991). For documentation of the Supreme Court's decisions pertaining to these cases, see *supra* note 28 and accompanying text.

30. 391 U.S. 430 (1968).

31. *Id.* at 439-41. In *Green v. County School Board*, the school board operated two public schools, one each on the eastern and western side of the county. *Id.* at 432. The two schools were racially segregated, one consisting of all African-American students and the other all Caucasian. *Id.* This segregation continued despite the absence of any residential segregation in the rural Virginia county. *Id.* Following the Court's decision in *Brown II*, the school board continued to operate segregated schools pursuant to Virginia statutes, which were enacted to resist *Brown II*. *Id.* at 432-33. In 1965, however, after filing the original suit in *Green*, the school board adopted a "freedom of choice" plan to maintain eligibility for federal financial aid. *Id.* at 433. The plan permitted students, except those entering the first and eighth grades, to choose between the county's two schools. *Id.* at 433-34. The plan further held that students who did not choose a school would be assigned to the school they previously attended. *Id.* at 433. During the plan's three years of operation, no Caucasian student chose to attend the all African-American school, and 85% of the African-American students remained at the all African-American school. *Id.* at 441.

In rejecting the school board's "freedom of choice" plan, the Court held that the pattern of separate schools in *Green*, established under Virginia law, was "pre-

with plans "that promise[ ] realistically to work . . . *now*" and further stated that an acceptable desegregation plan must eliminate the dual school system "at the earliest practicable date."[32] Moreover, the Court noted several

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cisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws." *Id.* at 435. The Court further contended that the "freedom of choice" plan ignored the "thrust of *Brown II*," arguing that *Brown II* charged school districts "with the affirmative duty to take whatever steps might be necessary to convert to a *unitary system* in which racial discrimination would be eliminated root and branch." *Id.* at 437-38 (emphasis added). Although the Court did not define "root and branch," one commentator argued that it meant elimination of all-Caucasian and all-African-American schools. Drew S. Days III, Comment, *School Desegregation in the 1980's: Why Isn't Anybody Laughing?*, 95 YALE L.J. 1737, 1746 (1986) (book review). This represents the first time the Court used the term "unitary" in one of its desegregation decisions. Gary Orfield & David Thronson, *Dismantling Desegregation, Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 762-63 (1993). For a further discussion of issues concerning "unitary status," see *supra* note 5 and accompanying text; *see also infra* notes 33, 61, 88, 99 and accompanying text.

32. *Green*, 391 U.S. at 438-39. Once again, the Court placed the affirmative duty of desegregation on the school board. *Id.* at 437-38. This affirmative duty was also recognized in subsequent cases. *See* Freeman v. Pitts, 503 U.S. 467, 501 (1992) (recognizing that *Brown II* and *Green* placed an affirmative duty on school districts to desegregate); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458-59 (1979) (acknowledging that school boards have affirmative duty to take whatever steps necessary to eliminate racial discrimination and establish unitary school system); Milliken v. Bradley, 433 U.S. 267, 280-81 n.15 (1977) (*Milliken II*) (recognizing that district courts are authorized to design plans that will "realistically work now" because ultimate objective of remedy is to make victims of unlawful conduct whole); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971) (noting that burden is on school to come forth with workable desegregation plan that will "work now"); Brown v. Board of Educ. of Topeka, 892 F.2d 851, 866 (10th Cir. 1989) (holding that defendant school district must demonstrate it has done everything feasible to desegregate school system), *vacated*, 503 U.S. 978 (1992); *see also* Cassais, *supra* note 19, at 268 (noting that "freedom of choice" plan did not sufficiently fulfill school board's affirmative duty to desegregate). The Court also noted that in determining whether the school board met the Court's original desegregation mandate, it was relevant to consider that the first step, adopting a "freedom of choice" plan, happened ten years after *Brown II*. *Green*, 391 U.S. at 438. The Court argued that "[t]his deliberate perpetuation of the unconstitutional dual system . . . compounded the harm of such a system." *Id.*

Finally, the Court described the district courts' duty to assess the effectiveness of proposed desegregation plans. *Id.* at 439. Recognizing a district court's discretion, the Court stated:

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. . . . Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief.

Id. This passage, however, has been interpreted as an attempt to narrow the vision of *Brown I*. *See* Hayman & Levit, *supra* note 18, at 638-39 (arguing that *Green* may be read as anticipating end of court supervision).

factors that courts should consider in an evaluation of a school district's desegregation efforts.[33]

Building on the guidelines established in *Green*, the Court further clarified the duties of mandatory desegregation orders in *Swann v. Charlotte-Mecklenburg Board of Education*.[34] In *Swann*, the Supreme Court upheld a federal district court's bold plan to eliminate past discrimination, which included rearranged attendance zones and mandatory transporta-

33. *Green*, 391 U.S. at 435. In particular, the Court stated that the "[r]acial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—*faculty, staff, transportation, extracurricular activities and facilities.*" *Id.* (emphasis added). These "*Green* factors" have become the most commonly utilized guides in determining whether a school system is unitary. Orfield & Thronson, *supra* note 31, at 763. Furthermore, decisions since *Green* have recognized that the *Green* factors are interdependent. *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 (1979) (noting that faculty assignment segregation is inextricably related to segregation in student assignments); Vaughns v. Board of Educ., 742 F. Supp. 1275, 1291 (D. Md. 1990) (holding that *Green* factors are interdependent), *aff'd sub nom.*, Stone v. Prince George's County Bd. of Educ., 977 F.2d 574 (4th Cir.), *cert. denied*, 506 U.S. 1051 (1993).

34. 402 U.S. 1 (1971). In 1970, the Charlotte-Mecklenburg school system was the forty-third largest in the nation and included the city of Charlotte, North Carolina, spanning 22 miles east-west and 36 miles north-south. *Id.* at 6. In the 1968-69 school year, the school system served more than 84,000 students in 107 schools. *Id.* Approximately 71% of the students in these schools were Caucasian, and 29% were African-American. *Id.* Two-thirds of the 21,000 African-American students who attended schools in the entire district attended 22 schools which were either totally African-American or more than 99% African-American in June 1969. *Id.* at 7.

In December 1969, the district court rejected the school board's original proposals for desegregation. *Id.* at 8. The court subsequently selected an expert in education to submit a new desegregation plan. *Id.* In February 1970, the expert, Dr. John Finger, presented the district court with two student assignment plans: the "Finger plan" and the "board plan." *Id.* at 8-10. The two plans were largely similar, with the exception that the Finger plan treated the school system's elementary schools differently. *Id.* at 9. In addition to relying upon changes in geographic zoning, the Finger plan proposed the use of pairing, zoning and grouping techniques to achieve "student bodies throughout the system . . . rang[ing] from 9% to 38% Negro." *Id.* The district court specifically described the plan as follows:

> Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from fifth and sixth grades from the outlying white schools to the inner city black school.

Id. at 9-10.

The district court eventually adopted the Finger plan with certain modifications. *Id.* at 10. The final plan provided for seven school closures with student reassignment. *Id.* at 8. The plan further restructured school attendance zones to cure racial imbalance. *Id.* Moreover, the plan eliminated the existing race-based school busing system, created racially mixed administration and faculty, modified its free-transfer plan into an option "majority-to-minority" transfer system and established a single athletic league for all students. *Id.*

tion.[35] The Court in *Swann* acknowledged that school boards need not maintain a specific level of racial balance within schools.[36] The Court concluded that school districts were only required to exhibit a good faith effort to desegregate their schools and eliminate all vestiges of past discrimination.[37] The Court consequently acknowledged that significant racial imbalance within a school system could exist if state-imposed segregation did not cause that imbalance.[38]

Green and *Swann* established that school authorities must employ *affirmative* measures to eliminate vestiges of state-imposed racial segregation.[39] Thus, the Court rejected school systems' reliance on neutral

35. *Id.* at 32. For a detailed description of the desegregation plan, see *supra* note 34 and accompanying text. The *Swann* Court emphasized the established principle that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 15 (citing *Green*, 391 U.S. at 437-38). In addition, the Court stated that if school authorities fail to fulfill this affirmative duty, a district court can then exercise its equitable power to ensure that desegregation is achieved. *Id.* The Court noted, however, that "[i]n seeking to define . . . how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary." *Id.* at 16.

The *Swann* Court went on to conclude that the district court's desegregation plan fell within the court's judicial power to provide equitable relief. *Id.* at 30. The Court further stated that when defining a district court's scope of remedial power, "[s]ubstance, not semantics, must govern" the nature of the limitations placed upon the court. *Id.* at 31.

36. *Id.* at 24, 32. Specifically, the Court held:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every community must always reflect the racial composition of the school system as a whole.

Id. at 24.

37. *Id.* at 32. The Court wrote that once school officials make an affirmative good faith effort to desegregate their schools, they do not have to "make year-by-year adjustments of the racial composition of student bodies." *Id.* at 32.

38. *Id.* at 31-32; *see also* Devins, *supra* note 20, at 18 (discussing potential racial imbalances in school systems). The Court acknowledged that some of these racial imbalances could be attributed to other forms of discrimination, but chose not to address the specific issue in *Swann*. *Swann*, 402 U.S. at 23. The Court stated:

> We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

Id. One commentator argued that this aspect of the *Swann* decision reflected the Court's "struggle with [its] obligation to do justice . . . and recognition of the threat to racial order that fulfillment of that obligation clearly entailed." Hayman & Levit, *supra* note 18, at 640.

39. *Swann*, 402 U.S. at 32; *Green*, 391 U.S. at 438. For a further discussion of this affirmative duty, see *supra* notes 31-33, 37 and accompanying text.

practices to remedy segregation because these practices effectively placed the burden of desegregation on students.[40]

B. *The Supreme Court Retreats from the Promise of the* Brown *Decisions*

Although the Supreme Court in *Green* and *Swann* squarely placed the affirmative duty to desegregate on school systems, subsequent decisions by the Supreme Court manifested a gradual retreat from the constitutional safeguards set forth in the twenty years following *Brown I*.[41] *Milliken v. Bradley* (*Milliken I*)[42] represents the most prominent of these cases.[43]

In *Milliken I*, the Supreme Court addressed the issue of racially segregative school construction patterns in Detroit, Michigan.[44] The Court

40. Cassais, *supra* note 19, at 270-71 (citing *Swann*, 402 U.S. at 30; *Green*, 391 U.S. at 436). Cassais argued that *Swann* and *Green* established a remedial standard completely consistent with the inherent effects of state-imposed school segregation. *Id.* at 270.

41. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 418 (1977) (*Dayton I*) (holding that district court's remedy was not proportional to constitutional violation); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 440 (1976) (holding that district court's yearly re-adjustment of student assignments so that minority students would never form majority of students in any school exceeded district court's remedial grasp under Constitution); Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) (*Milliken I*) (rejecting district court's remedy for desegregation because remedy extended to adjacent school districts in which no intentional segregation was shown). *But see* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979) (*Dayton II*) (permitting plaintiffs to establish prima facie case of segregation without proving that intentionally discriminatory acts caused racially identifiable schools); Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (establishing presumption that all segregation in school district shown to be partially de jure segregated is presumed to result from intentional actions of school authorities).

42. 418 U.S. 717 (1974).

43. For a discussion of the *Milliken I* holding, see *infra* notes 44-46 and accompanying text.

44. *Milliken I*, 418 U.S. at 721-22. In *Milliken I*, the district court observed that the cause of segregation in Detroit, Michigan stemmed from government and private action. *Id.* at 724 (citing Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Mich. 1971)). Specifically, the district court concluded that the Detroit Board of Education created and maintained optional attendance zones which "had the 'natural, probable, foreseeable and actual effect' of allowing white pupils to escape identifiably Negro schools." *Id.* at 725 (quoting *Milliken*, 338 F. Supp. at 587). Of the eighty-six school districts in the Detroit metropolitan area, the racial composition was 81% African-American and 19% Caucasian. *Id.* at 765 n.1 (White, J., dissenting). Within the metropolitan area, the public school enrollment consisted of 64% African-American students and 34% Caucasian students—with most schools either all-Caucasian or all-African-American. *Id.* (White, J., dissenting). Further, the Court found that "[w]ith one exception . . . defendant Board has never bused white children to predominately black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,961 vacant seats in schools 90% or more black." *Id.* at 725-26 (citing *Milliken*, 338 F. Supp. at 588).

In accordance with these violations, the district court ordered the Detroit Board of Education to create a desegregation plan for Detroit. *Id.* at 729. Furthermore, the district court ordered the State to enact a desegregation plan for the tri-county metropolitan area encompassing Detroit. *Id.* In doing so, the court or-

overruled the district court's decision that it was impossible to desegregate the Detroit school system without involving the suburbs, holding "there [was] no constitutional wrong calling for an interdistrict remedy."[45] Thus, the Court concluded that desegregation remedies could not extend beyond the district where the constitutional violation existed.[46]

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dered the plan to include not only the city of Detroit, but also the surrounding suburban districts that did not commit any constitutional violations. *Id.* at 729-30. In evaluating the multi-district plan, the court held:

> [I]t is proper for the court to consider metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to the present intra-city desegregation plans before it and, in the event that the court finds such intra-city plans inadequate to desegregate such schools, the court is of the opinion that it is required to consider a metropolitan remedy for desegregation.

Id. at 732 (citation omitted).

The Court of Appeals for the Sixth Circuit upheld this plan, arguing that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan." *Id.* at 735 (citing Bradley v. Milliken, 484 F.2d 215, 249 (6th Cir. 1973) (en banc)).

45. *Id.* at 745. Chief Justice Warren Burger, writing for the majority in *Milliken I*, held that the district court's desegregation order was overly broad and that the desegregation remedy should be limited to the district where the constitutional violation actually occurred, that is, the Detroit school district. *Id.* The majority wrote:

> [A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

Id. Thus, the imposition of an interdistrict remedy required proof that a constitutional violation exists in one district that in turn caused segregation in a neighboring district. *Id.*; *see also* Robert T. Abramson, Note, *States' Rights—Minimally Obtrusive Means Required in Imposing Desegregation Remedies Upon Local School District*—Missouri v. Jenkins, 21 SETON HALL L. REV. 387, 396-97 (1991) (noting that Court's decision to impose multi-district remedy would alter and disrupt entire structure of Michigan's public school system).

46. *Milliken I*, 418 U.S. at 745. The Court explained its deference to district boundaries: "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 quality of the education process." *Id.* at 741-42. It has been argued, however, that "[t]he result in *Milliken*—that the remedy should be limited to Detroit City public schools—was a blow to proponents favoring a more integrated society after *Brown*." Bernard James & Julie M. Hoffman, Brown *in State Hands: State Policymaking and Educational Equality After* Freeman v. Pitts, 20 HASTINGS CONST. L.Q. 521, 531 (1993). James and Hoffman further noted that:

> [A]fter *Brown II*, the primary obligation to provide a remedy for unlawful segregation in schools rested with federal courts. The judges—primarily district court judges—were supposed to fashion decrees relying on the traditional equity power of the federal judiciary. The Court in *Brown II* noted that "[i]n fashioning and effectuating the decrees, the courts will

Following the Court's decision in *Milliken I*, the district court approved a multi-faceted desegregation plan aimed at remedying segregation in the Detroit school system.[47] *Milliken v. Bradley* (*Milliken II*)[48] addressed the constitutionality of this plan.[49] In *Milliken II*, the Supreme Court upheld the district court's remedial educational programs for children subjected to past acts of de jure segregation.[50] The Court main-

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be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

The position of the *Milliken* majority (the Justices split 5-4) was thus difficult to justify. It offered a stunted version of judicial authority after a constitutional violation had been found because of the potentially disruptive effect multi-district orders might have on state educational operations.

Id. (quoting *Brown II*, 349 U.S. at 300 (footnotes omitted)). For a further discussion of the *Brown II* holding, see *supra* notes 21-29 and accompanying text.

47. Milliken v. Bradley, 433 U.S. 267, 270 (1977) (*Milliken II*). Specifically, the district court ordered the Detroit School Board to implement a four-part plan to eradicate de jure segregation in the Detroit school system. *Id.* at 275-76. First, the district court ordered the General Superintendent of Detroit's schools to institute a remedial reading and communications skills program. *Id.* at 275. The court held that there was "no educational component more directly associated with the process of desegregation than reading." *Id.* (quoting Bradley v. Milliken, 402 F. Supp. 1096, 1138 (E.D. Mich. 1975)). Second, the court ordered the Detroit Board of Education to establish a comprehensive in-service teacher training program to help teachers understand the desegregation process and to ensure that all teachers would treat students equally in a desegregated school. *Id.* at 275-76. Third, the court ordered the district to administer tests in a way "free from racial, ethnic and cultural bias." *Id.* at 276 (citing *Milliken*, 402 F. Supp. at 1142). Fourth, the district court required that the school district hire counselors both to help with the numerous problems arising during the changes in the school system, and to counsel students concerning the new vocational and technical school programs available under the desegregation plan. *Id.* Finally, the district court ordered the school district and the State of Michigan to bear the cost of the four programs equally. *Id.* at 277.

48. 433 U.S. 267 (1977).

49. For a discussion of the underlying district court's holding pertaining to *Milliken II*, see *supra* note 47.

50. *Milliken II*, 433 U.S. at 279-83. This represents the first time the Court directly addressed the question of whether federal courts could create remedial education programs as part of school desegregation decrees. *Id.* at 279. The Court noted that the general principles concerning a district court's remedial powers were well established by the Court's prior decisions. *Id.* In particular, the Court emphasized the basic rule from *Brown II* that "[i]n fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Id.* at 279-80 (citing *Brown II*, 349 U.S. 294, 300 (1955)). For a further discussion of *Brown II*, see *supra* notes 21-29 and accompanying text.

The Court set forth three factors which federal courts must consider when applying the *Brown II* equitable principles. *Id.* at 280-81. First, the nature of the desegregation remedy must be consistent with the nature and scope of the constitutional violation. *Id.* (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)). Second, desegregation decrees must be *remedial* in nature; they "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Id.* (quoting *Milliken I*, 418 U.S. at 746). Finally, the Court held that when

tained that the four-part remedial plan fell within the district court's equitable power and endorsed the district court's discretion to fashion a remedial desegregation plan for a school district.[51]

The Supreme Court's decisions in *Milliken I* and *Milliken II* limited multi-district remedies to school districts that previously operated segregated schools.[52] *Milliken II*, however, affirmed the district court's ability to exercise broad discretion when creating remedial desegregation plans.[53] This ruling held special significance because it enabled courts to employ innovative tactics when developing strategies to desegregate school systems.[54]

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devising desegregation remedies, federal courts must "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.* at 280-81. The Court narrowed these requirements, however, noting that if "school authorities fail in their affirmative obligations . . . judicial authority may be invoked." *Id.* at 281 (citing *Swann*, 402 U.S. at 15).

51. *Milliken II*, 433 U.S. at 280. The Court stated that these remedies coincided with the constitutional violation:

> These specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive *de jure* racial segregation.

Id. at 282. In addition, the Court carefully noted that the remedy in *Milliken II* was not a mandatory blueprint for subsequent cases. *Id.* at 287; *see also* Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (holding that "[t]here is no universal answer to complex problems . . . ; there is obviously no one plan that will do the job in every case"). For a further discussion of *Green*'s holding, see *supra* notes 30-33 and accompanying text.

Finally, the Court addressed the State's argument that the Eleventh Amendment, which prevents damages for accrued monetary liability, precluded the district court from holding the State liable for desegregation expenses. *Milliken II*, 433 U.S. at 288-89 (citing Edelman v. Jordan, 415 U.S. 651, 663-64 (1974)). The Court rejected the State's reliance upon *Edelman*, noting that the Court in *Edelman* held that it could not seek "payment of state funds . . . as a necessary consequence of compliance *in the future* with a substantive federal-question determination." *Id.* at 289 (citing *Edelman*, 415 U.S. at 668). Thus, because the desegregation plan in *Milliken II* intended to operate "*prospectively*," the Eleventh Amendment did not preclude judgment against the State. *Id.* at 290.

52. *Milliken II*, 433 U.S. at 270-71; *Milliken I*, 418 U.S. at 745. For a further discussion of these cases, see *supra* notes 42-52 and *infra* notes 53-54 and accompanying text.

53. *Milliken II*, 433 U.S. at 283. For a further discussion of the Court's explanation of a district court's discretionary power to implement desegregation remedies, see *supra* notes 46, 50-51 and *infra* notes 70-73 and accompanying text.

54. *Id.* at 287; *see also* Missouri v. Jenkins, 495 U.S. 33, 60-61 (1990) (Kennedy, J., concurring) (finding that district court's innovative desegregation plan did not overstep discretionary powers granted to district courts in *Milliken II*). For a further discussion of the desegregation plan instituted in *Jenkins*, see *infra* notes 85-89 and accompanying text.

C. *The Court's Attempts to Define "Unitary Status" and to Establish Criteria to Measure a Desegregation Plan's Success*

Although the desegregation cases through *Milliken II* carefully defined a district court's ability to design remedial desegregation plans, the effect of a finding of unitariness remained uncertain prior to the Supreme Court's decisions in *Board of Education v. Dowell*[55] and *Freeman v. Pitts*.[56] Before these decisions, the only certainty was that a finding of unitary sta-

55. 498 U.S. 237 (1991). The desegregation litigation in Oklahoma City began in 1961, when African-American students and their parents brought suit against the local school board to end state-imposed segregation in their public schools. *Id.* at 240. The students in *Dowell* succeeded in their case, but the practical implementation of the desegregation plan did not occur until 1972, when the district court ordered the school board to adopt a "Finger plan." Dowell v. Board of Educ., 338 F. Supp. 1256, 1273-74 (W.D. Okla.), *aff'd*, 465 F.2d 1012, 1014-15 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). This Finger plan used an "elementary school feeder system" to restructure high school attendance zones by assigning students to junior and senior high schools according to the elementary school zone where they lived. *Dowell*, 338 F. Supp. at 1267. The plan succeeded in desegregating the Oklahoma City school district, resulting in a substantially integrated school system. Ronald F. Berestka, Jr., Recent Case, 25 SUFFOLK U. L. REV. 1215, 1215-16 (1991). Upon finding that the school board successfully eliminated all vestiges of de jure segregation, the district court granted the school board's request for unitary status and ordered the case terminated. *Id.* at 1216.

Nonetheless, the school board voluntarily continued to operate under the Finger plan until 1985, when students and parents filed a "Motion to Reopen Case," contending that the district needed a new "Student Reassignment Plan" to counter demographic changes in the district. Dowell v. Board of Educ., 606 F. Supp. 1548, 1549-50 (W.D. Okla. 1985), *rev'd*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). The district court, however, declined to reopen the case, concluding that the school district was fully integrated. *Dowell*, 606 F. Supp. at 1555. The Tenth Circuit reversed, stating that finding unitariness within a district does not preclude a plaintiff from arguing that unitariness had been subsequently destroyed. *Dowell*, 795 F.2d at 1522. On remand, the district court terminated the Finger plan based upon its finding of unitary status. Dowell v. Board of Educ., 677 F. Supp. 1503, 1520-22 (W.D. Okla. 1987), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 498 U.S. 237 (1991). The district court's decision to terminate the desegregation decree was addressed in *Board of Education v. Dowell*, 498 U.S. 237 (1991). For a discussion of the Court's decision in this case, see *infra* notes 59-67 and accompanying text.

56. 503 U.S. 467 (1992). The *Freeman* case involved the desegregation decree of the DeKalb County, Georgia School System ("DCSS"), a major suburban area of Atlanta. *Id.* at 471. The DCSS was segregated for decades prior to the Supreme Court's *Brown I* decision. *Id.* at 471-72. The DCSS's response to *Brown II*'s order to desegregate with "all deliberate speed" was typical of many school systems. *Id.* at 472. Interpreting "all deliberate speed" as giving opportunity to delay desegregation, the DCSS took no affirmative steps to desegregate the DCSS until the 1966-67 school year, when the district adopted a freedom of choice plan. *Id.* This plan had little-to-no effect on the segregated school system in the DCSS. *Id.*

After the Court's decision in *Green v. New Kent County School Board*, African-American students and their parents in the DCSS filed a class action against the school district. *Id.*; *see* Green v. County Sch. Bd., 391 U.S. 430, 438 (1968) (holding that "[t]he time for mere 'deliberate speed' has run out"). The district court subsequently entered an order approving a desegregation plan which was implemented in the 1969-70 school year. *Freeman*, 503 U.S. at 472. This plan abolished the freedom of choice plan and adopted a school attendance plan. *Id.* at 473.

tus returned control of a school system to local school authorities.[57] Most notably, three difficult and unresolved questions persisted: (1) What factors constitute unitariness?; (2) What effect does a finding of unitariness have on the burden of proof against school authorities? and (3) How should authority be shifted to local officials?[58]

In *Dowell*,[59] the Court stated that judicial supervision ends when the school board "complie[s] in good faith with the desegregation decree . . .

This plan closed all African-American schools and reassigned their students to other neighborhood schools. *Id.*

Between 1969 and 1986, limited judicial intervention occurred in the DCSS. *Id.* The only substantial action occurred in 1976 when the district court ordered the DCSS to expand its student transfer program and to reassign teachers reflecting the racial balance in the school system. *Id.* In addition, the district court approved a boundary line change for one elementary school attendance zone. *Id.*

In 1986, the petitioners in *Freeman* asked the district court to dismiss the ongoing litigation and declare that the DCSS had achieved unitary status. *Id.* In analyzing whether the DCSS achieved unitariness, the district court considered the "*Green* factors." *Id.* For a further discussion of the "*Green* factors," see *supra* note 33 and accompanying text. Nevertheless, the district court also considered an additional factor: the quality of education offered to African-American and Caucasian students in the DCSS. *Freeman*, 503 U.S. at 473.

The district court concluded that the school district had achieved unitary status with regard to student assignments, transportation, physical facilities and extracurricular activities. *Id.* at 473. Vestiges of the segregated system remained, however, with respect to teacher and principal assignments, resource allocation and quality of education. *Id.* Consequently, the district court released the DCSS from its supervision in the categories in which it achieved unitary status but retained supervision in the other categories. *Id.* The Court of Appeals for the Eleventh Circuit reversed this decision, holding that the district court maintained complete authority over the school district until it achieved unitary status in all relevant categories. *Id.* at 471.

57. *See* United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987) (holding that school board can function freely after attaining unitary status so long as it does not purposefully discriminate); Vaughns v. Board of Educ., 758 F.2d 983, 988 (4th Cir. 1985) (same); Valley v. Rapides Parish Sch. Bd., 646 F.2d 925, 937 (5th Cir. 1981) (same), *cert. denied*, 455 U.S. 939 (1982); Oliver v. Kalamazoo Bd. of Educ., 640 F.2d 782, 808 (6th Cir. 1980) (same); Cassais, *supra* note 19, at 279 (noting that finding of unitariness returns school system to local school authorities); *see also* Thomas E. Chandler, *The End of School Busing? School Desegregation and the Finding of Unitary Status*, 40 OKLA. L. REV. 519, 553 (1987) (discussing how district courts should abdicate their authority when school systems are deemed unitary).

58. Cassais, *supra* note 19, at 279. For a further discussion of these specific issues concerning unitary status, see *supra* notes 56-57 and *infra* notes 59-76 and accompanying text. For a more general discussion of unitary status, see *supra* notes 6, 33, 61, 88, 99 and accompanying text.

59. 498 U.S. 237 (1991). The Supreme Court in *Dowell* granted certiorari to resolve a split of opinion between the Court of Appeals for the Fourth and Tenth Circuits. *Id.* at 244.

In *Riddick v. School Board*, 784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986), the Fourth Circuit affirmed the district court's conclusion that a finding of unitariness shifted the burden of proof regarding discriminatory intent from the school board to the plaintiffs. *Id.* at 528. The Fourth Circuit further concluded that a finding of unitariness is based upon a showing that all aspects of a school

and the vestiges of past discrimination ha[ve] been eliminated to the *extent practicable*."[60] Furthermore, the Court referred to *Green*'s language that a district court should consider "not only . . . student assignments, but . . . 'every facet of school-operations, faculty, staff, transportation, extra-curricular activities and facilities'" when addressing vestiges of past discrimination.[61] Therefore, the Court condoned the potential release of a school

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system are free from vestiges of prior racial discrimination, according to the factors established in *Green*. *Id.* at 532-33 (citing *Green*, 391 U.S. at 435).

The Tenth Circuit stated its contrary opinion on the issue of unitariness in *Dowell v. Board of Education*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 498 U.S. 237 (1991). In contrast to *Riddick*, the *Dowell* court held that a desegregation decree ordering a school system to achieve unitary status can terminate only upon showing an extreme change in the school district's circumstances. *Id.* at 1490-91.

Thus, the disagreement between the Fourth and Tenth Circuits involved the issue of when a school district should be released from judicial control. *Dowell*, 498 U.S. at 249-50. The *Dowell* Court ultimately remanded the case to the district court to determine whether the school district complied with the desegregation decree. *Id.* at 251. In offering guidance to the district court, however, the Court provided several meanings of the term "unitary status." *Id.* at 245-50. For a further discussion of the Court's holding in *Dowell*, see *infra* notes 59-67 and accompanying text.

60. *Dowell*, 498 U.S. at 249-50. Before reaching this conclusion, the Court provided various interpretations of the term "unitary." *Id.* at 245-46. The Court recognized that different courts define the word "unitary" in different ways. *Id.* For example, some lower courts use "unitary" to describe a school district that "has completely remedied all vestiges of past discrimination." *Id.* at 245 (citations omitted). Nevertheless, other courts use "unitary" to describe any school district that "has currently desegregated student assignments, whether or not that status is solely the result of a court-imposed desegregation plan." *Id.* (citations omitted). Thus, the Court recognized that "a school district could be called unitary and nevertheless still contain vestiges of past discrimination." *Id.* The Court concluded this analysis stating:

> We think it is a mistake to treat words such as "dual" and "unitary" as if they were actually found in the Constitution. The constitutional command of the Fourteenth Amendment is that "[n]o State shall . . . deny to any person . . . the equal protection of the laws." Courts have used the terms "dual" to denote a school system which has engaged in intentional segregation of students by race, and "unitary" to describe a school system which has been brought into compliance with the command of the Constitution. We are not sure how useful it is to define these terms more precisely, or to create subclasses within them.

Id. at 245-46.

Following an inconclusive discussion of unitary status, the Court confronted the substantive issue of *Dowell*. *Id.* at 246-47. In setting the standard for the withdrawal of court supervision, the Court accentuated *Brown II*'s original holding that "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination," and that desegregation orders were not intended to "operate in perpetuity." *Id.* at 247-48.

61. *Id.* at 250 (quoting *Green*, 391 U.S. at 435). The Court used the "*Green* factors" to determine whether past discrimination was eradicated. *Id.* The Court held that if these factors are satisfied, unitary status is achieved and local authorities regain control of the schools. *Id.* In making this conclusion, the Court acknowledged the importance of local control over public schools and the notion that desegregation decrees should not extend beyond the time required to remedy past de jure segregation. *Id.* at 248 (citing *Milliken II*, 433 U.S. 267, 280-82 (1977)). The Court further recognized the importance of local control over public schools

district from court supervision, even if its schools remain segregated.[62] Nonetheless, the Court warned that even a school district "released from an injunction imposing a desegregation plan . . . remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment."[63]

Justice Marshall, writing the dissent in *Dowell*,[64] expressed concern with the vagueness of the majority opinion.[65] Justice Marshall believed that as long as conditions of racial segregation declared unconstitutional under *Brown I* persist in a school district, compliance with a desegregation order remains incomplete.[66] Justice Marshall emphasized that the ulti-

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by specifically noting that "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Id.*

62. *Id.* at 250.

63. *Id.* One question remains, however: How does the finding of unitary status affect the burden of proof? *See* Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653 (1987), which contends that:

> Allocation of the burden of proof after a finding of unitariness should depend, as it does prior to unitariness, upon considerations of fairness and policy in light of the probability of continued intent to discriminate. Courts should consider the original proof of unconstitutional systemic segregation in evaluating evidence that a dual system is being reestablished and should allocate burden accordingly.

Id. at 668. Nevertheless, a more recent speculation, in light of *Dowell*, asserted:

> The clear import of *Dowell* is that it eliminates federal supervisory jurisdiction upon a finding of unitariness. The implicit presumption is that any segregation occurring after the determination of unitariness is de facto, and a plaintiff must commence an entirely new suit and demonstrate present purposeful discrimination on the part of the school board to reestablish federal court supervision.

Hayman & Levit, *supra* note 18, at 647-48. Thus, it seems that the plaintiff has the burden of proving present purposeful discrimination after a finding of unitariness. *Id.*

64. *Dowell*, 498 U.S. at 251 (Marshall, J., dissenting). Justices Blackmun and Stevens joined Justice Marshall's dissent.

65. *Id.* at 261 (Marshall, J., dissenting). Justice Marshall was most concerned with the majority's definition of "unitariness." *Id.* at 256-57 (Marshall, J., dissenting). In Marshall's opinion, the proper analysis required taking into account "the unique harm associated with a system of racially identifiable schools and must expressly demand the elimination of such schools." *Id.* at 257 (Marshall, J., dissenting). In his criticism of the majority's definition, Marshall clung to the original focus of *Brown I*, which emphasized the particular social harm that racially segregated schools inflict upon African-American children. *Id.* (Marshall, J., dissenting). For a discussion of these inherent psychological harms discussed in *Brown I*, see *supra* note 19 and accompanying text. For the majority's definition of unitariness, see *supra* note 60 and accompanying text.

66. *Id.* 498 U.S. at 252 (Marshall, J., dissenting). Justice Marshall stated, "I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions." *Id.* (Marshall, J., dissenting).

In addition, Justice Marshall condemned the majority for equivocating the possible re-emergence of racially identifiable schools. *Id.* at 263 (Marshall, J., dissenting). In particular, Justice Marshall contended that the majority's opinion

mate goal of a school board is to "eliminate *any* condition that perpetuates the message of racial inferiority inherent in the policy of state-sponsored segregation."[67]

A year after the *Dowell* holding, *Freeman v. Pitts*[68] provided the Supreme Court with another opportunity to refine developed principles concerning unitary status.[69] Specifically, the Court decided whether a district court can relinquish its supervision over those aspects of a school system that comply with a desegregation order if other aspects of the system remain in noncompliance.[70]

In *Freeman*, the Court held that a district court's ultimate objective is "to remedy the [constitutional] violation and . . . restore state and local authorities to the control of a school system."[71] The Court, exhibiting

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hinted that the district court could ignore the effect of residential segregation in perpetuating racially identifiable schools if this residential segregation is attributable to "private decisonmaking and economics." *Id.* at 264 (Marshall, J., dissenting) (citing *Dowell*, 498 U.S. at 250 n.2). For a further discussion of this issue, see *infra* notes 81-82 and accompanying text.

67. *Id.* at 268 (Marshall, J., dissenting).

68. 503 U.S. 467 (1992).

69. For the facts and procedural history of *Freeman*, see *supra* note 56 and accompanying text. For the Court's previous discussion of unitary status, see *supra* notes 55-68 and *infra* notes 70-71 and accompanying text. For the Court's subsequent refinement of unitary status, see *infra* notes 72-73 and accompanying text.

70. *Freeman*, 503 U.S. at 485. The Court answered this question in the affirmative. *Id.* at 489. The Court acknowledged that the discretion to incrementally withdraw its supervision and control stemmed from the Court's holding in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). *Freeman*, 503 U.S. at 488 (recognizing that *Spangler* held that district court exceeded its remedial authority in requiring annual readjustment of school zones when changes in racial makeup of schools were attributable to demographic shifts in community)). In recognizing a district court's discretion to order incremental withdrawal of its supervision, the Court listed a number of factors that should be considered when contemplating a partial withdrawal. *Id.* at 491. It has been argued, however, that the *Freeman* Court's reliance on *Spangler* was misplaced. Bradley W. Joondeph, Note, *Killing* Brown *Softly: The Subtle Undermining of Effective Desegregation in* Freeman v. Pitts, 46 STAN. L. REV. 147, 155-56 (1993). Joondeph noted that *Spangler* stands for the following three propositions:

> (1) courts are limited as to the affirmative steps they can require a school district to undertake under a desegregation order; (2) this limit is by definition the point at which the school district has eliminated all vestiges of the unlawfully segregated system; and (3) a school system may eliminate such vestiges sequentially, and may therefore discharge its duty to desegregate in some *Green* areas before others.

Id. at 156. Focusing on the third factor, Joondeph contrasted *Spangler* and *Freeman*, and noted that *Spangler* did not establish the principle of incremental withdrawal. *Id.* at 155.

71. *Freeman*, 503 U.S. at 489. The Court held that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." *Id.* As one commentator noted, however,

> [t]he Court failed to mention the need to remedy the *effects* of the violation. . . . The Court's recognition of the desire for local control is not new, but its characterization of this control as the "ultimate objective"

substantial deference to a district court's discretionary powers, balanced the importance of local control when defining unitary status.[72]

In attempting to clarify the requirements of unitary status, the *Freeman* Court held that the factors expressed in *Green* need not be rigid. The Court emphasized the appropriateness of the district court's inquiry into the "quality of education," *in addition* to its evaluation of the traditional *Green* factors.[73] The Court noted that the "discretion to order the incre-

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makes this familiar consideration into a much heavier counterweight to the rights of black children.

Lisa Stewart, Note, *Another Skirmish in the Equal Education Battle,* 28 HARV. C.R.-C.L. L. REV. 217, 224-25 (1993) (footnote omitted).

72. *Freeman,* 503 U.S. at 488-89. The Court concluded that the concept of unitary status is helpful when defining the scope of a district court's authority. *Id.* at 486. The Court noted, however, that unitariness is not a precise concept and cited *Dowell* for the proposition that it is a mistake to treat the word unitary as if it exists in the Constitution. *Id.* at 486-87 (citing Dowell v. Board of Educ., 890 F.2d 1483 (10th Cir. 1989), *rev'd,* 498 U.S. 237, 246-47 (1991)). For a further discussion of the *Dowell* Court's interpretation of unitary status, see *supra* note 60 and accompanying text. This imprecise concept of the term unitary was important for the Court, because it wished to avoid limiting a district court's equitable discretion within a narrow interpretation of "unitary." *Id.* at 487. The Court noted:

> The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision.

Id. It has been argued, however, that *Freeman* effectively redefined unitary status. *See, e.g.,* Joondeph, *supra* note 70, at 160 (arguing that "in cases where the district court withdraws supervision incrementally, *Freeman* implicitly elevates the selected *Green* areas to the *exclusive* indicia of compliance," allowing district court to declare "the system unitary even if the school district remains segregated as measured by other criteria"); Frank H. Stubbs, III, Note, Freeman v. Pitts: *A Rethinking of Public School Desegregation,* 27 U. RICH. L. REV. 399, 411 (1993) (asserting that *Freeman* Court "largely ignored a review of these intangible factors [mentioned in Justice Marshall's dissenting opinion in *Dowell*] before granting unitary status to the [DeKalb County School System]"). For a further discussion of Marshall's dissent in *Dowell,* see *supra* notes 64-67 and accompanying text.

73. *Freeman,* 503 U.S. at 492. The Court ruled that the district court's consideration of additional factors beyond those set forth in *Green* were within the court's equitable discretion. *Id.* The Court also held that this type of analysis enabled the district court to inquire "whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to insure full compliance with the court's decree." *Id.* For a further discussion of *Freeman*'s treatment of the district court's exercise of discretionary powers, see *supra* note 72 and accompanying text.

With regard to DeKalb County's "quality of education" programs, the majority held that the district court should maintain jurisdiction because the school district did not fully comply with the requirements of a unitary quality of education program. *Id.* at 492. Specifically, the Court found that the district court previously rejected contentions that racial disparities existed in educational resources (e.g., library books, teachers with more experience). *Id.* at 482-83. The Court also found that the district court considered expert testimony concerning the overall education program in the DCSS, as well as objective evidence of African-American achievement indicated by African-American students' improvement on standardized tests, such as the Iowa Tests of Basic Skills and the Scholastic Aptitude Test.

mental withdrawal of its supervision in a school desegregation case must be exercised in a manner consistent with the purposes and objectives of its equitable power."[74] Thus, while the Court in *Freeman* reaffirmed a district court's ability to exercise broad discretion in desegregation cases, the Court failed to outline the precise criteria applicable in determining

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Id. at 483. Nevertheless, the district court did not ultimately grant unitary status because "teachers in schools with disproportionately high percentages of white students tended to be better educated and have more experience than their counterparts in schools with disproportionately high percentages of black students" and because there were disparities in per pupil expenditures in racially identifiable schools. *Id.* at 483.

74. *Id.* at 491. Among the factors that the Court listed were the following:

> whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

Id. The Court further instructed district courts to give special attention to a school system's record of compliance when deciding to withdraw its supervision. *Id.* The Court relied on *Dowell* for this notion. *Id.*; *see Dowell*, 498 U.S. at 249-50 (stating that "[t]he District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether vestiges of past discrimination had been eliminated to the extent practicable"). For a further discussion of the Court's holding in *Dowell*, see *supra* notes 59-67 and accompanying text.

In discussing a district court's equitable power, the *Freeman* Court also mentioned demographic factors as a cause of segregation that was not remediable. *Freeman*, 503 U.S. at 493-96. The Court deemed these to be factors of private choices, thus presenting no constitutional implications. *Id.* at 495. Between 1950 and 1985, DeKalb County grew from 70,000 to 450,000 in total population. *Id.* at 475. More notably, in 1969, the DCSS had 5.6% African-American students; in 1986 the percentage of African-American students was 47%. *Id.* In addition, during the 1970s, Caucasians predominately populated the northern half of DeKalb County, while African-Americans settled in the southern half of the county. *Id.* The Court cited these demographic changes as having a prominent effect on the racial composition of the DCSS schools. *Id.*

In *Freeman*, these demographic factors were relevant to the Court's discussion pertaining to a school district's "good faith" effort in eliminating vestiges of discrimination. *Id.* at 495. In particular, the Court stated that the district court did not have the duty to cure racially identifiable schools, stating: "Where resegregation is a product not of state action but of private choices, it does not have constitutional implications." *Id.* The Court further stated that:

> As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.

Id. at 496. Based upon these notions, the Court upheld the district court's conclusion that the DCSS had no duty to order massive expenditures to desegregate the school system, because demographic changes caused the resegregation. *Id.* at 496-97.

unitariness.[75] This deficiency is a conspicuous element of the Court's decision and it ultimately prompted confusion in federal courts, as illustrated by the Eighth Circuit's sharply split decision in *Jenkins v. Missouri*.[76]

III. FACTS

In 1977, the Kansas City, Missouri School District ("KCMSD") implemented a desegregation plan that re-assigned students within the school district and attempted to effect a minimum of thirty percent minority enrollment in every KCMSD school.[77] The plan transferred minority students from schools with large minority enrollments to schools with low minority enrollments and vice versa.[78] In addition, the plan changed school boundary lines and created attendance zones; thus, more than 16,000 KCMSD students began attending new schools.[79] Despite these efforts to desegregate the KCMSD, by 1985, the desegregation plan had clearly failed.[80] This failure largely resulted from "white flight"[81] to pri-

75. *Id.* at 486-87. For the *Freeman* Court's discussion of unitariness, see *supra* notes 70-75 and accompanying text.

76. 19 F.3d 393 (8th Cir. 1994). For a thorough analysis of the Eighth Circuit's decision in *Jenkins*, see *infra* notes 96-110 and accompanying text.

77. Jenkins v. Missouri, 639 F. Supp. 19, 35 (W.D. Mo. 1985). Sixty-five community members chosen to represent students, parents, teachers and various Kansas City groups and organizations developed this desegregation plan. *Id.* Prior to the implementation of the desegregation plan, the enrollment in the Kansas City, Missouri School District ("KCMSD") was 65.6% minority students. *Id.* Twenty of the district's schools were between 30 and 80% minority, and forty-one others were more than 80% minority. *Id.*

78. *Id.* at 35-36.

79. *Id.* More specifically, the desegregation plan embraced four directives. *Id.* The plan (1) altered boundary lines for school assignment, (2) paired and clustered elementary schools to integrate minority and majority students, (3) created enlarged secondary attendance zones, allowing two-way reassignment of students and (4) adopted innovative school zoning ordinances to further adjust student assignment. *Id.*

80. *Id.* at 36. At that time, nineteen of the fifty elementary schools in the KCMSD had an enrollment of 90% or more minority students. *Id.* Following the desegregation plan's implementation, no KCMSD school enrolled less than 30% minority students in grades one through twelve. *Id.* More specifically, the enrollment in three of the eight junior high schools in the KCMSD was 90% or more African-American, and three of the eight senior high schools had enrollments which were 90% or more African-American. *Id.*

Nonetheless, during the 1979-80 school year, the United States Office of Civil Rights identified the KCMSD as "in compliance" with federal requirements for school desegregation under Title VI of the Civil Rights Act of 1964. *Id.* The 1984-85 enrollment in the KCMSD was 36,259 total students with 68.3% African-American, 26.7% non-minority, 3.7% Latino and 1.3% other minority groups. *Id.*

81. *Id.* at 37. "White flight" is the mass migration of whites to suburban schools in response to government-mandated school integration. *See* Wendy R. Brown, Comment, *The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty to Provide Equal Educational Opportunity*, 60 TENN. L. REV. 63, 102-03 (1992) (finding that "[white flight] tops the list as the most enigmatic intervening factor for which to compensate in eradicating segregated school systems"). White flight occurs when Caucasians move out of communities in response to African-

vate and suburban Kansas City schools.[82]

In 1985, the United States District Court for the Western District of Missouri addressed the failure of the KCMSD's desegregation plan in *Jenkins v. Missouri*.[83] In *Jenkins*, the district court found that state-imposed "[s]egregation had caused a system wide *reduction* in student achievement in the schools of the KCMSD" and that the KCMSD's 1977 desegregation plan reflects an unsuccessful attempt at curing existing segregation.[84] Pursuant to this finding, District Court Judge Clark fashioned a court-imposed remedial desegregation plan intended to "make the constitutional ideal of equal justice under the law a 'living truth.'"[85]

Americans moving in—many times in response to desegregation efforts. *Id.* As the whites move away to the suburbs, efforts to desegregate become more difficult. *Id.* In past cases, the Supreme Court held that school boards could not use white flight and the resulting change in housing patterns as a justification for refusing to dismantle segregated school systems. *Id.*; *see, e.g.*, Johnson v. Board of Educ., 457 U.S. 52, 52 (1982) (per curiam) (holding that racial quotas purportedly designed to prevent white flight were unlawful because they resulted in denial of admission to some African-Americans); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972) (deciding that "white flight" could not "be accepted as reason for achieving anything less than complete uprooting of the dual public school system"); Riddick v. School Bd., 784 F.2d 521, 539 (4th Cir. 1986) (finding that "white flight" could not be used as justification for failing or refusing to dismantle dual school system). In a more recent Supreme Court decision, however, the Court disallowed the use of housing discrimination and segregation to prove a state's failure to desegregate public education. *See* Freeman v. Pitts, 503 U.S. 467, 494-95 (1992) (discharging school board from obligation to achieve racial balance because segregated housing accounted for segregated schools and attributing segregated housing to "private choices"); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976) (holding that no constitutional right exists to particular degree of racial balancing or mixing); *Milliken I*, 418 U.S. 717, 740-41 (1974) (stating that desegregation, in sense of dismantling school system, does not require any particular level of racial balance). For a further discussion of *Milliken I* and *Freeman*, see *supra* notes 42-47, 68-75 and accompanying text.

82. *Jenkins*, 639 F. Supp. at 36. Between 1977 and 1985 the KCMSD majority enrollment decreased more than 44% while minority enrollment decreased only 30%. *Id.* at 36. Despite these statistics, the KCMSD proposed, in 1985, to continue the existing desegregation plan. *Id.* The proposal promised to make appropriate modifications in the original plan for school closing and aimed to achieve the highest possible level of desegregation in the KCMSD schools. *Id.* In particular, the proposal pledged to "reduce the percentage of black students in schools where they represent a disproportionate share of the students (compared to the enrollment of the District as a whole)." *Id.* The State of Missouri estimated that in order to achieve these goals, approximately 4,270 students would need to be transferred at a cost in excess of five million dollars. *Id.*

83. 639 F. Supp. at 19.

84. *Id.* at 24. The district court found that test results from the Iowa Test of Basic Skills in grade one through six illustrated that there were only a few elementary schools of the fifty in the KCMSD that performed at or above the national norm in reading and mathematics. *Id.* The court further found, through the testimony of several expert witnesses, that achievement scores in the KCMSD would improve if the school system had "adequate resources, sufficient staff development, and proper teaching methods." *Id.*

85. *Id.* at 22-23 (citing Cooper v. Aaron, 358 U.S. 1, 20 (1958)). Judge Clark based his conclusion concerning the function of a remedial plan on a long history

The KCMSD implemented the desegregation plan fashioned in the district court during the 1985-86 school year.[86] This plan consisted of

of case law. *Id.* at 23. Judge Clark continued that "[t]he basic remedial principle, repeatedly articulated by the courts in school desegregation cases, is that 'the scope of the remedy is determined by the nature and extent of the constitutional violation.'" *Id.* (quoting *Milliken I*, 418 U.S. at 744 (holding that federal courts may order multi-district remedy for school desegregation only when there is finding that all districts involved are responsible for segregation to be remedied)); *see also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979) (finding that court imposed remedy should be commensurate with violation ascertained); *Dayton I*, 433 U.S. 406, 420 (1976) (noting that various types of remedial measures did not suffice to justify system-wide remedy absent showing that such remedy was necessary to eliminate all vestiges of state-imposed school desegregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (stating that judicial powers may be exercised only on basis of constitutional violation). Finally, Judge Clark noted that the primary goals of any desegregation remedial plan should be to prohibit new violations and eliminate the effects of prior constitutional violations in the school district. *Jenkins*, 639 F. Supp. at 23; *see also* Green v. County Sch. Bd., 391 U.S. 430, 440 (1968) (holding that Constitution requires abolition of discriminatory system and its effects); Louisiana v. United States, 380 U.S. 145, 154 (1965) (stating that "[w]e bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"). For a further discussion of *Green*, see *supra* notes 30-33 and accompanying text.

In designing the desegregation plan, Judge Clark also used the language of *Brown II* to guide the district court, stating that the district court should have the flexibility to fashion an equitable remedial decree. *Jenkins*, 639 F. Supp. at 23. Judge Clark argued that this ability would allow the court to exercise practicality in adjusting the remedy to changing public and private needs. *Id.* (citing *Brown II*, 349 U.S. 294, 300 (1955)).

The court further held that the goal of any desegregation plan is clear—"[t]he elimination of all vestiges of state imposed segregation." *Id.* The court once again justified its ability to impose a broad plan stating that in achieving the plan's goals, "the district court may use its broad equitable powers, recognizing that these powers do have limits." *Id.* The court recognized that these limits require the court to remain within the scope of the constitutional violation and respect the interests of state and local authorities in managing their own affairs. *Id.*

Finally, the court recognized that the implementation of the desegregation plan would be complex and difficult: "'The pain of transition is an unfortunate, but inevitable result of deliberate policies which have isolated black Americans from the schools . . . of white Americans.'" *Id.* (quoting United States v. School Dist. of Omaha, 521 F.2d 530, 546 (8th Cir.), *cert denied* 423 U.S. 946 (1975)).

Judge Clark's desegregation plan was designed to broadly achieve three primary goals. *Jenkins*, 639 F. Supp. at 33-35, 54. First, the plan was devised to attract majority (Caucasian) students to the KCMSD in order to provide minority students with a multiracial educational program. *Id.* at 34-35. Second, the court aspired to provide a high quality education program, whether or not a significantly desegregated school population ever actually resulted. *Id.* at 33-34. Finally, the court stated that its long term goal was to "make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." *Id.* at 54. In addition to stating these goals, the court further held that the State of Missouri should bear the burden of removing the vestiges of discrimination because it was state mandated policies that originally caused segregation in Missouri's schools. *Id.* at 23-24.

86. Jenkins v. Missouri, 19 F.3d 393, 398 (8th Cir. 1994).

multiple components that strived to integrate the schools of the KCMSD and improve student achievement.[87] The focal point of the court's deseg-

87. *Jenkins*, 639 F. Supp. at 26-56. The components of the desegregation plan included: (1) a plan to enhance the KCMSD's school evaluation, (2) an order to reduce elementary and secondary school class size, (3) the formation of a summer school program, (4) the institution of full day kindergarten classes, (5) school sponsored tutoring, (6) early childhood development programs, (7) effective school programs, (8) staff development, (9) mandatory student reassignment and (10) massive capital improvements within the KCMSD. *Id.*

The first component of the desegregation plan was designed to enhance the KCMSD's school evaluations. *Id.* at 26. The Missouri State Department Elementary and Secondary Education's (DESE) highest classification was "AAA." *Id.* This rating designates that a school system quantitatively and qualitatively has the necessary resources to provide a rudimentary education to its students. *Id.* From 1977-85, the KCMSD had a quality rating of "AA," while all other school districts in the Kansas City area were rated "AAA." *Id.* The court justified this component, stating that "[t]he patrons of [the] school district, especially the parents of potential students of that school district, view a AAA rating as an important factor in measuring the school's ability to educate its students." *Id.* at 27. The court noted that the KCMSD's eligibility for a "AAA" rating was dependent on its improvement in library resources, specialty teachers, additional student counselors and increased planning time for elementary school teachers. *Id.* at 26-27. In particular, the court marked three areas to improve to achieve a "AAA" rating from the DESE. *Id.* at 26-28. First, the court ordered the KCMSD to hire additional librarians and to make expenditures on library and media resources. *Id.* at 26. Second, the court ordered the KCMSD to allow more planning time for teachers during the school day and further ordered the district to hire additional specialty teachers to teach art, physical education and music courses. *Id.* at 27. In addition, the court required the district to hire thirty-one each of new certified teachers and teacher's aids to insure that teachers were not overworked. *Id.* Third, the court ordered the KCMSD to hire eighteen school counselors to comply with the "AAA" standard for elementary and secondary level standards. *Id.* Finally, the court decreed that the KCMSD and the State of Missouri would equally bear the maximum cost for achieving "AAA" status, $4,738,500. *Id.* at 28. The KCMSD was eventually awarded the "AAA" rating in 1987-88 school year and since that time has "maintained and greatly exceeded AAA requirements." *Jenkins*, 19 F.3d at 401 (Beam, J., dissenting).

The second component of the district court's desegregation plan aimed to reduce the size of elementary and secondary school classes. *Jenkins*, 639 F. Supp. at 28-30. This component aspired to increase individual attention for lower achieving students and decrease teaching loads for teachers so that classes did not get "bogged down." *Id.* The court thus implemented the following maximum class sizes in the KCMSD schools: no more than twenty-two students in kindergarten through third grade, no more than twenty-seven students in grades four through six and on the secondary level, no more than 125 students per teacher per day. *Id.* at 30. The court described these class sizes as minimum goals and contended that the ideal goal would be classes of twenty or less students. *Id.* The court stated that the total costs for these changes were not to exceed $12,000,000 and that the State of Missouri was solely responsible for this amount. *Id.*

The third component of the district court's desegregation plan was the implementation of a summer school program. *Id.* This summer program was designed to achieve three basic goals. *Id.* at 30-31. First, it sought to provide remedial and developmental learning experiences for students in the elementary and secondary education levels. *Id.* Second, it sought to provide reinforcement and enrichment for secondary students. *Id.* at 31. Third, it sought to provide a desegregated learning experience at both the elementary and secondary school levels. *Id.* The district court viewed the summer program as an opportunity to improve academic

achievement through an expansion in the amount of learning time available to students within the KCMSD. *Id.*. The total cost of this program, $745,000, was divided equally between the KCMSD and the State of Missouri. *Id.*

The fourth component of the district court's desegregation plan was the implementation of a full day kindergarten. *Id.* Under the plan, full day kindergarten was proposed in KCMSD schools that did not already have such programs. *Id.* In accordance with these expanded kindergarten programs, the court further ordered the KCMSD to hire an additional thirty-nine certified kindergarten teachers. *Id.* The total cost of these programs, $1,092,000, was borne equally by the KCMSD and the State of Missouri. *Id.* at 32.

The fifth component of the district court's desegregation plan was an "effective school" program designed to improve local involvement throughout the KCMSD. *Id.* at 33. This program earmarked funds that various school committees could use to help students further improve academic achievement. *Id.* at 34.

The sixth component of the district court's desegregation plan was staff development. *Id.* at 35. This development component fashioned to provide training to administrative personnel and teachers on the goals and principles of desegregation, the implementation of effective instructional programs, effective methods for communicating these goals to parents and the community and methods aimed to assist the KCMSD staff in the desegregation effort. *Id.* These staff development programs were ordered to take place after school, on weekends and during the summer with a fund of $500,000 provided for payment of stipends. *Id.* The State of Missouri provided the $500,000 to the KCMSD. *Id.*

The seventh component of the district court's desegregation plan was designed to implement mandatory student reassignment. *Id.* The court, citing "white flight" as "no excuse for school officials to avoid the implementation of a reasonable desegregation plan[,]" recognized that further mandatory student reassignment would increase the instability of the KCMSD and reduce the potential for desegregation. *Id.* at 37-38 (citing Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968)). The court thus avoided implementing additional reassignment orders and instead ordered a study into the feasibility of reducing the percentage of African-American students in the twenty-five schools where enrollment remained 90% or more African-American. *Id.* at 38.

The eighth component of the district court's desegregation plan aimed to accomplish increased voluntary interdistrict transfers through cooperation with other districts in the Kansas City area. *Id.* at 38. In addition, the court ordered the state to pay the transportation and costs of any KCMSD African-American students who wished to transfer from a school within the KCMSD where their race was in the majority to another school in the Kansas City area where their race was a minority. *Id.* at 39. Further, the state was ordered to pay the same costs for any nonminority student living in other school districts who wished to transfer to a KCMSD school with a minority enrollment greater than 50%. *Id.*

The ninth component of the district court's desegregation plan directed massive capital improvements throughout the KCMSD. *Id.* The court held that the condition of sixty-eight school facilities in the KCMSD "adversely affect[ed] the learning environment and serve[ed] to discourage parents who might otherwise enroll their children in the KCMSD." *Id.* The court went on to list the long inventory of problems with KCMSD schools, from faulty heating systems to crumbling playground equipment. *Id.* at 39-40. Noting that the improvement of these facilities was an important factor in the success of a desegregation plan, the court ordered the KCMSD to submit a $37,000,000 capital improvements plan aimed to achieve three directives: (1) eliminating safety and health hazards, (2) correcting conditions that impeded the comfort needed for a good learning climate and (3) improving facilities to make them visually attractive. *Id.* at 41. The court assigned the cost of these improvements to the State of Missouri. *Id.*

Finally, the district court's desegregation plan formed a central committee to help administer the massive desegregation effort. *Id.* at 41-43. Consequently, the

regation plan, however, involved the creation of "magnet schools."[88] These magnet schools attempted to attract both majority (Caucasian) and minority (African-American) students from Kansas City's suburbs and augment educational opportunities for all students in the KCMSD.[89]

In the years that followed the court-implemented desegregation plan, the district court approved further requests to magnetize all high and middle schools.[90] The district court also approved a massive capital improve-

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district court selected members for a Monitoring Committee to oversee the implementation of the plan. *Id.* at 42. This Committee consisted of ten members: four African-Americans, four Caucasians and two Latinos. *Id.* This Committee was further broken down into subcommittees, which were responsible for overseeing specific aspects of the desegregation plan. *Id.*

88. *Id.* at 34. Magnet schools are traditionally thought of as one of the most effective desegregation methods. Kimberly C. West, Note, *A Desegregation Tool That Backfired: Magnet Schools and Classroom Segregation*, 103 YALE L.J. 2567, 2567 (1994). In addition, magnet schools are presently used extensively as part of court-ordered desegregation plans throughout the United States. *See* Janet R. Price & Jane R. Stern, Comment, *Magnet Schools as a Strategy for Segregation and School Reform*, 5 YALE L. POL'Y REV. 291, 294 n.5 (1987) (identifying *Jenkins* as "the most recent example of a court-ordered plan involving extensive use of magnets"). Typically, magnet schools offer a special curriculum aimed at drawing students of different racial backgrounds. West, *supra*, at 2567.

> One study conducted in Montgomery County, Maryland, found that: The magnet programs leave the racial composition of the nonmagnet students' classes largely unaffected. This is because the schedule of specialized magnet courses limits the number of opportunities for sharing classes with the rest of the student body. Where magnet and nonmagnet students do not mix in the classroom, they are mostly in classes with other high-achieving students and relatively more [Caucasian] students.

MAGNET SCHOOL POLICY STUDIES AND EVALUATIONS, 261, 265 (Donald R. Waldrup et al. eds., 1993). Thus, the magnet programs often resulted in overall integration.

This result is not limited to Montgomery County, Maryland. For example, in 1987, Maton Elementary Schools in Perine, Florida had "one of the most successful magnet programs in [Dade] County." Lourdes Fernandez, *Housing Foils School Desegregation*, MIAMI HERALD, Nov. 5, 1987, at 18. In the Perine school, the building was desegregated—52% African-American, 38% Caucasian and 10% Latino—but in the classrooms outside of one magnet program, 75% of the fifth and sixth graders were African-American, and 95% of the kindergartners were African-American. *Id.*

89. *Jenkins*, 639 F. Supp. at 34, 53-54. The district court viewed magnet schools as a way to expand the "desegregative educational experience for KCMSD students." *Id.* at 53. The district court noted that a key to the success of the magnet program was the commitment of the Board of Education, the superintendent, the administration, the staff of the schools and the parents and patrons. *Id.* The court held that this commitment, "when coupled with quality planning and sufficient resources can result in the establishment of magnet schools which can attract non-minority enrollment as well as be an integral part of district-wide improved student achievement." *Id.* at 53-54.

The specifics of the KCMSD magnet program included the institution of fully magnetized school programs throughout the KCMSD, which consisted of smaller class sizes, quality educational opportunities and increased individual student attention. *Id.* at 54. The total operating budget for these magnet schools of $12,972,727 was divided between the KCMSD and the State of Missouri. *Id.* at 55.

90. Missouri v. Jenkins, 495 U.S. 33, 40 (1990). Specifically, the district court endorsed a marked expansion of the magnet school program in 1986. *Id.* The

ments program.[91] The district court noted that these wide-ranging remedies provided the KCMSD with facilities and opportunities not available anywhere in the country.[92]

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court adopted a KCMSD proposal that every high school, middle school and half of the elementary schools in the KCMSD become magnet schools by the 1991-92 school year. *Id.* This expansion included the addition of a performing arts middle and high school, a technical school and a $32,000,000 dual-theme high school for computer and Classical Greek Style education. *Id.* The court also approved the KCMSD's proposed budget of $142,736,025 for implementation of the magnet program, as well as the expenditure of $52,858,301 for additional capital improvements. *Id.*

Following these expenditures, in 1987, the district court adopted a plan requiring $187,450,334 in further capital improvements. Jenkins v. Missouri, 672 F. Supp. 400, 408 (W.D. Mo. 1987). At the same time, the district court accepted the KCMSD's argument that it had "exhausted all available means of raising additional revenue." *Id.* at 411. The district court, finding itself with "no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan," and contending that the "United States Supreme Court has stated that a tax may be increased if 'necessary to raise funds adequate to . . . operate and maintain without racial discrimination a public school system,'" ordered the KCMSD property tax level raised from $2.05 to $4.00 per $100 of assessed valuation through the 1991-92 fiscal year. *Id.* at 412-13 (quoting Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, 233 (1964)). The United States Supreme Court eventually upheld this tax increase. *See Jenkins*, 495 U.S. at 33 (holding that tax increase for educational purposes did not exceed equitable powers of district court).

91. *Jenkins*, 672 F. Supp. at 402. In approving the KCMSD's request for these expenditures, the district court noted that "[t]he KCMSD facilities still have numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments." *Id.* at 403. The court attributed these conditions to remaining vestiges of state-imposed segregation, contending that "the State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools." *Id.* Consequently, the court noted that a long-range capital improvement plan was essential to the overall success of the continuing desegregation plan. *Id.*

The district subsequently approved the KCMSD's long-range capital improvement plan, which broadly called for the renovation of approximately fifty-five schools, the closure of eighteen facilities and the construction of seventeen new schools by 1996. *Id.* at 405. More specifically, the improvement plan provided for the expansion of certain classrooms, new athletic facilities, learning resource centers, cafeterias, art and music rooms and administrative areas. *Id.* at 406. Finally, the plan included funding for the construction of specialized facilities needed for the implementation of the long-range magnet school plan "crucial to the success of the Court's total desegregation plan." *Id.*

The Kansas City Technical Center provides an example of these specialized facilities. *Id.* This Center, a four year vocational and technical magnet high school, was designed to prepare students for either college, entry level employment or both. *Id.* This magnet school proposed to offer programs ranging from cosmetology to robotics. *Id.* For a general discussion of magnet schools, see *supra* note 88 and accompanying text.

92. Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. July 30, 1993) (order granting extension of desegregation plan).

In early 1992, the KCMSD presented the district court with its proposed budget for the eighth year of the desegregation plan.[93] In response, the state of Missouri lodged numerous objections to the budget and argued that the KCMSD deserved unitary status in the "high-quality education" aspect of the desegregation plan.[94] Despite these arguments, the district court did not make any findings on the unitary status question and approved the budget, which included new goals for a "Long Range Magnet Program."[95] Following these findings, the State appealed the district court's order to the Eighth Circuit Court of Appeals.[96] The State contended that current quality education programs had achieved unitary status and that the district court erred in ordering further programs.[97]

93. Jenkins v. Missouri, 19 F.3d 393, 400 (8th Cir. 1994). The court-approved budget for the 1992-93 school year was $54,592,191. *See* Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. June 17, 1992) (order approving KCMSD budget for 1992-93 school year). This budget included funding for the continuation of the school desegregation plan's fundamental components. *Id.* For a further discussion of these components, see *supra* note 87 and accompanying text.

94. *Jenkins*, 19 F.3d at 400. Specifically, the state relied upon *Freeman v. Pitts*, 503 U.S. 467 (1992), claiming that the KCMSD had achieved partial unitary status with respect to the "high-quality education program." *Id.* For a further discussion of the State's arguments, see *infra* notes 96-98 and accompanying text. For a further discussion of *Freeman*, see *supra* notes 71-75 and accompanying text. For a further discussion of unitary status, see *supra* notes 6, 33, 61, 88 and *infra* note 99 and accompanying text.

95. *See* Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. June 17, 1993) (order affirming KCMSD's proposed budget for 1992-93 school year). Although the district court did not directly address the State's request for a declaration of unitariness in the June 17, 1992 Order, the district court alluded to the State's request in three subsequent orders. *Jenkins*, 19 F.3d at 400. First, on April 16, 1993, the court approved additional funding for magnet schools and directed the KCMSD to submit further financing proposals. *Id.*; *see* Jenkins v. Missouri, No. 77-0420-CV-W-4 at 9-13 (W.D. Mo. Apr. 16, 1993) (order approving additional magnet school funding). As part of this order, the court found that while the educational opportunities in the magnet schools were better than previously available and had successfully gained the interest of many majority students, the KCMSD could not be declared partially unitary because academic achievement was still at or below national norms for many grade levels. *Id.* at 9-13. Second, on June 30, 1993, the district court approved a contested salary order and thus effectively denied the State's request for a declaration of unitariness. *Jenkins*, 19 F.3d at 400; *see* Jenkins v. Missouri, No. 77-0420-CV-W-4 at 4 (W.D. Mo. June 30, 1993) (order approving salary increases in KCMSD). Finally, on July 30, 1993, the court held in part that "it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time." *Jenkins*, 19 F.3d at 400; *see* Jenkins v. Missouri, No. 77-0420-CV-W-4, at 4 (W.D. Mo. July 30, 1993).

96. *Jenkins v. Missouri*, 11 F.3d 755 (8th Cir. 1993). The State appealed several issues to the Eighth Circuit, including the State's mandatory assumption of costs for "flagship magnets." *Id.* at 758. This Note, however, focuses exclusively on the State's contention that the KCMSD schools had achieved partial unitary status. This issue determines the State's responsibility for desegregation costs and invokes many of the State's other arguments which raise the same issues.

97. *Id.* at 760-63. Specifically, the State argued that the district court erred as a matter of law when it failed to address the State's request for partial unitary status in the June 17, 1992 Order. *Id.* at 760. For a discussion of the June 17, 1992 order, see *supra* note 95. The State further argued even if the district court did not issue

The Eighth Circuit rejected these arguments and affirmed the district court's orders, holding that the district court correctly observed that the implementation of quality education programs, alone, did not achieve unitary status.[98] Rather, the Eighth Circuit argued, the proper test hinges on whether the plan eliminates the vestiges of segregation to the greatest extent practicable.[99] In particular, the court noted that the success of the quality education programs must be measured by their effect on the students. Further, the court held that it would take time to "remedy the system-wide reduction in student achievement in the KCMSD schools."[100]

Following the Eighth Circuit's decision, the State appealed for a rehearing en banc.[101] In denying rehearing, the Eighth Circuit addressed

findings of fact regarding the unitary status of the KCMSD, the district court abused its discretion when it held that the quality education programs as not unitary. *Id.* at 762.

98. *Id.* at 760-66. The Eighth Circuit first held that the district court did not err when it failed to articulate its reasoning for not addressing the unitary issue in the June 17, 1992 Order. *Id.* at 760-61. The court supported this reasoning, contending that "[r]ejection of the State's argument is demonstrated by the district court's failure to make findings based on these arguments." *Id.* at 761; *see also* Switzer Bros., Inc. v. Locklin, 297 F.2d 39, 45 (7th Cir. 1961) ("[F]ailure to enter findings with respect [to certain evidence] is tantamount to findings adverse to appellants upon the evidence."), *cert. denied*, 369 U.S. 851 (1962). In addition to these arguments, the Eighth Circuit also referred to the district court's subsequent orders to illustrate that the district court considered and rejected the State's argument concerning partial unitary status. *Jenkins*, 11 F.3d at 761. For a further discussion of these subsequent orders, see *supra* note 95.

After addressing the first prong of the State's argument, the Eighth Circuit turned to the State's argument that the district court abused its discretion when it held the quality education programs were not unitary. *Id.* at 762. The Court rejected this argument. *Id.* at 763-66. The Eighth Circuit held that to determine whether the KCMSD had achieved unitary status, the court must consider the "constitutional injury, the methods selected to remedy that injury, the goals of the remedy, and the success achieved by the remedy in eliminating the vestiges of the constitutional violations to the extent practicable." *Id.* at 764. The court, in addressing these questions, noted that the injuries in the KCMSD involved the remaining vestiges of a dual school system, which take the form of *reduced student achievement* and *white flight*, which in turn caused a racially isolated school district. *Id.* at 764 (emphasis added). The court argued that these injuries had not yet been cured, holding that the "success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation." *Id.* at 766.

99. *Id.* at 765-66. The court noted that "[t]he only evidence before the district court with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made." *Id.* at 765. The court further held that this evidence fell far short of establishing that such vestiges had been eliminated to the extent practicable. *Id.* According to the court, these tests, explained in *Freeman v. Pitts* and *Board of Education v. Dowell*, answered the State's argument that establishment of quality education programs fulfills the requirements for unitary status. *Id.* For a further discussion of *Dowell* and *Freeman*, see *supra* notes 59-75 and accompanying text.

100. *Id.* at 766. The Eighth Circuit noted that the district court's orders reflected an awareness of this fact. *Id.*

101. Jenkins v. Missouri, 19 F.3d 393 (8th Cir. 1994). In its appeal for rehearing, the State presented the same arguments as in the previous case, but added an

whether the district court adopted a student achievement goal, using standardized test scores as the only basis for determining whether the plan remedied past discrimination.[102] A sharply divided Eighth Circuit denied the State's request for rehearing en banc, holding that the district court's order did not indicate that it had considered only test results in denying the State's application for unitary status.[103] Furthermore, the majority in *Jenkins* argued that its holding coincided with the original goal of the district court, which involved remedying serious and pervasive constitutional violations causing a system-wide reduction in student achievement in KCMSD schools.[104]

The dissent in *Jenkins* conceded that academic improvement in the KCMSD had been "less than dramatic" since the district court initiated the desegregation plan in 1985.[105] Nonetheless, Judge Beam, writing for the

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important argument concerning the district court's use of a "student achievement goal." Brief for Appellant at 13, Jenkins v. Missouri, 19 F.3d 393 (8th Cir. 1994) (Nos. 90-2238, 91-3636, 92-3194, 92-3200, 93-3274). For a further discussion of the State's original arguments, see *supra* notes 96-100 and accompanying text.

102. *Jenkins*, 19 F.3d at 395. For a discussion of the Eighth Circuit's adjudication of this issue, see *supra* notes 96-100 and accompanying text.

103. *Id.* at 396; *see* Jenkins, 11 F.3d at 766 (stating that "success of quality of education programs must be measured by their effect on the students, particularly those who have the been victims of segregation"). Writing for the Eighth Circuit majority, Senior Circuit Judge Gibson immediately sought to assail the lengthy dissent, which concluded that test scores were adopted as the *only* basis for determining the remedy of past discrimination. The majority countered this contention, arguing that within the realm of quality education programs, test scores must be considered a *relevant factor* in the equation when deciding whether to relieve a school district of judicial supervision. *Jenkins*, 19 F.3d at 395.

104. *Jenkins*, 19 F.3d at 395-96 (citing Missouri v. Jenkins, 639 F. Supp. 19, 24 (W.D. Mo. 1985)). For a further discussion of the original goals of the district court in *Jenkins*, see *supra* notes 83-95 and accompanying text. The Eighth Circuit in *Jenkins* relied heavily on the Supreme Court's ruling in *Freeman v. Pitts*. *Id.* at 396. In particular, the majority referred to the portion of *Freeman* addressing quality education programs in the local school district. *Id. Freeman* had held that the school district did not achieve unitary status with respect to these programs. *Id.* (citing Freeman v. Pitts, 503 U.S. 467, 482-83 (1992)). For a further discussion of the quality education program in *Freeman*, see *supra* note 56. The court further relied on *Freeman* for the principle that school districts must eliminate vestiges of discrimination to the extent practicable. *Id.* at 396 (citing *Freeman*, 503 U.S. at 498). For a further discussion of this aspect of *Freeman*, see *supra* note 55 and accompanying text. The majority used these principles to refute the position of the dissent that the Constitution does not guarantee a particular level of education. *Id.* Finally, the Eighth Circuit majority justified the district court's holding, referring to its prior support of judicial discretion in desegregation cases: "The choice of remedies to redress racial discrimination is a 'balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Id.* (quoting Jenkins v. Missouri, 855 F.2d 1295, 1299 (8th Cir. 1988)). The court also noted that *Freeman* advocated this rationale, which supported a district court's *discretion* to order an incremental withdrawal of its supervision. *Id.* For a further discussion of *Freeman*'s discussion concerning a district court's ability to incrementally withdrawal its supervision, see *supra* notes 70-74 and accompanying text.

105. *Id.* at 401 (Beam, J., dissenting).

dissent, argued that the district court, through its approval of the eighth year budget, "imbedded a student achievement goal measured by annual standardized tests into its test of whether the KCMSD has built a high-quality educational system sufficient to remedy past discrimination."[106] Judge Beam concluded that victims of discrimination may be guaranteed equal opportunity within high-quality educational programs, but never to *levels of educational achievement* under particular circumstances.[107]

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106. *Id.* at 400 (Beam, J., dissenting). The dissent conceded that whether the KCMSD actually achieved unitary status with respect to its quality education programs remained an open question. *Id.* (Beam, J., dissenting). However, the dissent argued that imbedding a student achievement goal "creates a hurdle to the withdrawal of judicial intervention from public education that has no support in the law." *Id.* (Beam, J., dissenting). Furthermore, Judge Beam questioned whether the goals of the original desegregation plan had been achieved. *Id.* at 402 (Beam, J., dissenting). To help illustrate Judge Beam's perspective on this issue, his comments in a footnote are illuminating. Beam stated:

> Although the magnet schools and several other innovative programs are part of the enhanced educational system in the KCMSD and are part of the calculus which must now be considered in deciding unitary status in this case, I do not agree that the novel and expensive undertakings in Kansas City are a necessary part of a constitutionally sufficient effort, even one designed to eradicate the vestiges of discrimination. While *Milliken II* validated compensatory and remedial programs designed to, over time, free a public school system from the effects of de jure racial segregation, something *much less* than the present Kansas City program would clearly pass constitutional muster.

Id. at 402 n.5 (Beam, J., dissenting) (emphasis added). The dissent continued that the stated remedial goal involved providing the KCMSD schools with educational programs comparable to those in the suburban Kansas City school districts. *Id.* (Beam, J., dissenting) (citing *Jenkins*, 855 F.2d at 1301). An "AAA" rating indicated achievement of this goal. *Id.* (Beam, J., dissenting). The dissent argued that the evidence clearly established that this goal "has long since been greatly exceeded and can now be easily maintained without many of the present activities." *Id.* (Beam, J., dissenting).

In examining this question, Judge Beam argued that education does not constitute a right afforded explicit protection under the Constitution and that *Swann* disclaimed any right to specific degrees of racial balance in schools. *Id.* at 402 (Beam, J., dissenting).

107. *Id.* (Beam, J., dissenting) (emphasis added). The dissent contended that the Constitution does not require such a level of achievement and furthermore, that student achievement does not set the standard for determining partial unitary status. *Id.* at 404 (Beam, J., dissenting). Judge Beam further argued that requiring standardized test scores to reach a certain level would force a school system to be responsible for demographic factors such as segregated housing patterns, poverty, street violence, drug usage, criminal activity and lack of parental involvement. *Id.* at 403 (Beam, J., dissenting).

Judge Beam cited an Omaha, Nebraska case analogous to the circumstances in *Jenkins*. *Id.* (Beam, J., dissenting). In the Omaha case, the court declared a school district unitary after it satisfied the directives of a court ordered desegregation plan. *Id.* (Beam, J., dissenting). After the declaration of unitary status, however, the district court discovered a gap in mathematic achievement between minority and majority students. *Id.* (Beam, J., dissenting). Judge Beam quoted the testimony of a social worker in the case who stated: "If any plan to close the mathematics proficiency gap [in Omaha] is to succeed, . . . it must address the fact that many of the 15,000 babies who will be born in the Omaha area this year will be

Ultimately, the dissent concluded that it could not decide, without further information, that the KCMSD's quality education programs were unitary.[108] The dissent explained, however, that when the district court addressed the State's request for a declaration of unitary status, it adopted a measure, standardized test results, which the Constitution did not require or permit.[109] This component of the district court's decision provided the basis for the dissent's willingness to rehear the court's earlier decision en banc.[110]

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born out of wedlock to teen-age mothers." *Id.* (Beam, J., dissenting) (citing Harold W. Anderson, *Fundamental Lesson in Math Proficiency*, OMAHA WORLD-HERALD, Feb. 13, 1994, at 19-A). Judge Beam contended that these factors exceed a school district's control and therefore should not be considered when judging the success of a desegregation plan. *Id.* at 403. (Beam, J., dissenting). Judge Beam further asserted that using test results to appraise a desegregation order's success goes well beyond the "practicality and requirements of the Constitution." *Id.* (Beam, J., dissenting).

Finally, the dissent in *Jenkins* relied on *Freeman v. Pitts* for the argument that the quality of education programs in the KCMSD are unitary. *Id.* at 403 (Beam, J., dissenting). The dissent argued that the Supreme Court in *Freeman* did not address whether quality of education is one of the factors that must be free from racial discrimination prior to a declaration of unitary status. *Id.* (Beam, J., dissenting) (citing Freeman v. Pitts, 503 U.S. 467, 485 (1992)). For a further discussion of *Freeman*, see *supra* notes 56-58 and accompanying text.

The dissent explained that although the *Freeman* court addressed scores on several standardized tests, the minority students in *Freeman* did very well on these tests. *Id.* at 403 (Beam, J., dissenting) (citing *Freeman*, 503 U.S. at 483). Nonetheless, the dissent argued that the *Freeman* district court found that specific quality education programs concerning teacher qualifications, library books and other educational resources were not yet in place. *Id.* (Beam, J., dissenting). For a further discussion of *Freeman*'s quality of education programs, see *supra* note 56 and accompanying text. The dissent contended that a lack of educational expectations, not test score results, motivated the district court in deciding *Freeman*. *Id.* at 403 (Beam, J., dissenting). For a further discussion of the *Freeman* Court's discussion of these factors, see *supra* note 56.

In applying this analysis to the situation in *Jenkins*, the dissent explained that the KCMSD offers more educational opportunity than any other school district in America. *Id.* (Beam, J., dissenting). The dissent further urged the majority to remember that the standard established in *Dowell* for returning a district to local control is "whether the vestiges of past discrimination ha[ve] been eliminated to the *extent practicable*." *Id.* (Beam, J., dissenting) (citing Dowell v. Board of Educ., 498 U.S. 237, 249-50 (1991)). The dissent argued that the words "to the extent practicable" were lost in the majority's opinion. *Id.* (Beam, J., dissenting). For a further discussion of *Dowell*, see *supra* notes 59-67 and accompanying text.

Finally, the dissent echoed the words of Justice Kennedy in *Freeman*:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system . . . . It is the duty of the State and its subdivisions to ensure that [the effects of de jure segregation] do not shape or control the policies of its school systems. Where control lies, so too does responsibility.

Id. (Beam, J., dissenting) (citing Freeman, 503 U.S. at 490).

108. *Id.* at 404 (Beam, J., dissenting).

109. *Id.* (Beam, J., dissenting).

110. *Id.* (Beam, J., dissenting). The dissent, however, offered a warning to the State of Missouri, stating:

IV. ANALYSIS: *MISSOURI V. JENKINS*

A. *Narrative Analysis: The Supreme Court Explores the Practicality of the KCMSD Desegregation Remedy and Student Achievement Goal*

The Supreme Court in *Jenkins* granted certiorari to consider two fundamental issues: (1) whether the district court exceeded its constitutional authority when it granted salary increases to virtually all the KCMSD's employees, and (2) whether the district court properly relied upon student achievement test scores in determining the unitary status of the KCMSD's quality education program.[111] In answering these questions, the Court decided whether the district court's desegregation remedy fell within the constitutional boundaries explained in the Court's progeny of desegregation cases.

1. *The Majority Opinion: Rejecting the District Court's Desegregation Plan as an "Interdistrict Remedy"*

The Court's opinion, written by Justice Rehnquist, first addressed the Court's ability to review the scope of the district court remedy, despite its denial of certiorari for the same issue in 1990.[112] The Court concluded that no unfairness or imprudence occurred in deciding issues previously before the Court when properly briefed and relevant to the present con-

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> If the state's claim carries with it the unstated idea that having put the elements of a quality education program in place it may now take its money and exit, stage left, leaving the KCMSD to finish the scene alone, I believe that partial unitary status is not at hand. But, if an equal opportunity to receive a quality education is now permanently available to each student in the KCMSD . . . then unitary status has been reached and control should be relinquished by the federal courts to the state and local governments.

Id. (Beam, J., dissenting).

111. Missouri v. Jenkins, 115 S. Ct. 41 (1995).

112. Missouri v. Jenkins, 115 S. Ct. 2038, 2047 (1995). In 1988, the Court failed to grant certiorari on the State's challenge to the district court's remedial authority. Missouri v. Jenkins, 490 U.S. 1034 (1988). In *Jenkins*, however, the Court stated that a challenge to the scope of the district court's remedy was fairly included within the questions presented. *Jenkins*, 115 S. Ct. at 2047. The Court justified this decision by contending that the questions presented for review were inextricably related to the desegregation remedy as a whole. *Id.* at 2047-48 (citing United States v. Mendenhall, 446 U.S. 544, 551-52 n.5 (1980) (opinion of Stewart, J.) ("Where the determination of a question 'is essential to the correct disposition of the other issues in the case, we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari.'")).

Justice Souter, writing for the dissent in *Jenkins*, argued that the Court's decision to review the entire scope of the district court's remedy was unfair and imprudent. *Id.* at 2073-74 (Souter, J., dissenting). In essence, Justice Souter argued that the Court did not indicate or give proper "warning" that it would address the constitutionality of the *entire* remedy. *Id.* (Souter, J., dissenting). For a complete discussion of Justice Souter's dissenting opinion, see *infra* notes 181-213 and accompanying text.

troversy.[113] Justice Rehnquist believed that the Court needed to analyze the district court's *desegregation plan* to determine whether the district court's approval of *salary increases* exceeded the district court's remedial authority.[114]

The Court began its analysis of the district court's desegregation plan by defining the limits on a district court's remedial power to fashion a desegregation remedy.[115] The Court specifically noted that the nature and scope of a desegregation remedy must directly address the relevant constitutional violation in a particular school district and should not con-

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113. *Id.* at 2048. The Court said that its resistance to the State's efforts to challenge the scope of the remedy in 1990 neither approved nor disapproved of the Eighth Circuit's conclusion that the district court's remedy was proper. *Id.* at 2047 (citing Missouri v. Jenkins, 495 U.S. 33, 53 (1990) (granting certiorari to review manner in which district court had funded desegregation remedy)). The Court reiterated this point, noting that "'[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" *Id.* (quoting United States v. Carver, 260 U.S. 482, 490 (1923)).

114. *Id.* at 2047. Thus, the Court viewed the remedy's *overall* scope as an issue subsidiary to the question of whether the district court's approval of salary increases was proper. *Id.* More specifically, the Court wrote:

> Given 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. We conclude that a challenge to the scope of the District Court's remedy is fairly included in the question presented.

Id. (citations omitted).

115. *Id.* at 2048. The Court quoted *Swann v. Charlotte-Mecklenburg Bd. of Educ.* for the proposition that district courts may not use desegregation remedies for purposes beyond their scope:

> "Elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of the school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination."

Id. (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-23 (1971)). For a further discussion of the Court's holding in *Swann*, see *supra* notes 34-40 and accompanying text.

The *Jenkins* Court specifically noted that three years after its holding in *Swann*, in *Milliken I*, the Court found that a district court exceeded its remedial authority when it fashioned an overly broad desegregation remedy: "[I]n *Milliken I*, . . . we held that a District Court had exceeded its authority in fashioning interdistrict relief where the surrounding school districts had not themselves been guilty of any constitutional violation." *Jenkins*, 115 S. Ct. at 2048 (citing *Milliken I*, 418 U.S. 717, 746-47 (1974)). For a further discussion of the Court's holding in *Milliken I*, see *supra* notes 41-47 and accompanying text.

The Court contended that *Milliken I* supported the notion that lacking an *inter*district violation and *inter*district effect, no basis exists for a desegregation remedy calling for an interdistrict remedy. *Jenkins*, 115 S. Ct. at 2048 (emphasis added).

cern surrounding districts innocent of constitutional wrongdoing.[116] Furthermore, the Court explained that its holding in *Freeman v. Pitts* outlined the necessary showing for partial or complete relief from a desegregation order.[117] This showing depends upon a demonstration that the victims of discriminatory conduct have achieved the position they would have occupied in the absence of that conduct.[118]

In applying this analysis to the KCMSD desegregation plan, the Court questioned whether Judge Russell Clark adopted both an interdistrict remedy where no interdistrict violation existed and set forth the desegregation remedy's appropriate scope.[119] "[T]he proper response by the District Court should have been to eliminate to the extent practicable the vestiges of prior *de jure* segregation within the KCMSD: a system-wide reduction in student achievement and the existence of 25 racially identifiable schools with a population of over 90% black students."[120] Justice Rehnquist argued, however, that the district court and court of appeals had consistently promoted a remedy focused on "desegregative attractiveness" coupled with "suburban comparability," rather than focusing on eliminating desegregation to the "extent practicable."[121] The Court held that its resolution

116. *Id.* at 2049. The Court summarized the three-part test articulated in *Milliken*. *Id.* First, the nature of a desegregation remedy must be determined by the nature and scope of the constitutional violation. *Id.* Second, the desegregation plan must be remedial in nature, designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of the discrimination. *Id.* Third, district courts must carefully consider the interests of states and local authorities in managing their own affairs. *Id.* (citing *Milliken II*, 433 U.S. 267, 280-81 (1977)).

117. *Id.* The Court cited *Freeman*'s three-part test, which stated the relevant factors that must inform a court's discretion when considering the partial or complete withdrawal of its supervision: (1) whether there has been full and satisfactory compliance with the desegregation plan in those parts of the system where supervision is to be withdrawn; (2) whether retention of judicial control is necessary or practical to achieve compliance with the desegregation plan's other components and (3) whether the school district has demonstrated, to the victims of discrimination, a good faith commitment to the court's desegregation decree. *Id.* (citing Freeman v. Pitts, 503 U.S. 467, 491 (1993)). For a further discussion of the *Freeman* test, see *supra* note 56 and accompanying text.

118. *Jenkins*, 115 S. Ct. at 2049. This standard also requires eventual restoration of state and local control of a school system that complies with the Constitution. *Id.* (citing *Freeman*, 503 U.S. at 489).

119. *Id.* at 2050. The Court noted that the district court and court of appeals found no interdistrict constitutional violation that would support an interdistrict remedy. *Id.* *See also* Missouri v. Jenkins, 495 U.S. 33, 37 n.3 (1990) ("The District Court also found that none of the alleged discriminatory actions had resulted in lingering interdistrict effects and so dismissed the suburban school districts and denied interdistrict relief.").

120. *Jenkins*, 115 S. Ct. at 2050 (citing Jenkins v. Missouri, 639 F. Supp. 19, 24, 36 (W.D. Mo. 1985)). For a further discussion of the district court's original desegregation goals, see *supra* notes 85-92 and accompanying text.

121. *Id.* According to Justice Rehnquist, the district court had set out to create a school district that was equal to or superior to the surrounding suburban school districts. *Id.*

of the salary-order issue would be framed within the context of this remedy.[122]

After setting forth the framework for its analysis, the Court undertook the task of applying that analysis to the KCMSD remedy.[123] The Court began this task by stating that the purpose of "desegregative attractiveness" in the KCMSD involved attracting non-minority students not enrolled in the KCMSD.[124] The Court further recognized that the district court met this goal through the creation of magnet schools, and contended moreover, that the remedial programs essentially made the KCMSD a magnet district.[125] Essentially, the Court disliked the district court's intention to attract nonminority students from outside the KCMSD schools. According to the majority, this *inter*district goal exceeded the scope of the *intra*district violation originally identified by the district court.[126]

The Court based its conclusion regarding the district court's authority upon precepts set forth in *Milliken I*.[127] As discussed earlier, *Milliken I* held that a desegregation remedy requiring mandatory interdistrict reassignment was improper when no interdistrict violation occurred.[128] Under this rule, even where a school district has ninety percent minority students, an interdistrict remedy will not apply so long as the state's racial discrimination did not extend to surrounding school districts.[129] The

122. *Id.*

123. *Id.* at 2051.

124. *Id.* The Court described this remedy as including "an elaborate program of capital improvements, course enrichment, and extracurricular enhancement not simply in the formerly identifiable black schools, but in schools throughout the district." *Id.* For a further discussion of these programs, see *supra* note 87 and accompanying text.

125. *Id.* at 2051. For a further discussion of magnet schools, see *supra* note 88 and accompanying text. The Court noted its previous acceptance of magnet schools as an intradistrict remedy for encouraging voluntary movement of students within a school district in a manner that aids desegregation on a voluntary basis, without requiring busing or adjustment of district lines. *Id.* The Court further recognized magnet schools as an attractive intradistrict remedy because they promote desegregation, while also limiting the withdrawal of non-minority students that often accompanies mandatory student reassignment. *Id.*

126. *Id.* The Court believed that the District sought to achieve *indirectly* what it admittedly lacked the remedial authority to mandate directly: the interdistrict transfer of students. *Id.* *See* Jenkins v. Missouri, 639 F. Supp. 19, 38 (W.D. Mo. 1985) ("'[B]ecause of restrictions on this Court's remedial powers in restructuring the operations of local and state government entities,' any *mandatory* plan which would go beyond the boundary lines of the KCMSD goes far beyond the nature and extent of the constitutional violation [that] this Court found existed.").

127. *Jenkins*, 115 S. Ct. at 2051. For a further discussion of *Milliken I*, see *supra* notes 41-47 and accompanying text.

128. *Id.*; *Milliken I*, 418 U.S. 717, 745 (1974).

129. *Jenkins*, 115 S. Ct. at 2051. The Court cited to Justice Stewart's concurrence in *Milliken* to illustrate a situation where an interdistrict remedy might be appropriate:

> Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines; by transfer of school units between districts; or by purposeful, racially dis-

Court concluded that the district court breached this rule when it fashioned the KCMSD's desegregation plan, "creat[ing] a magnet district of the KCMSD in order to serve the *inter*district goal of attracting nonminority students from the surrounding suburban school districts (SSDs) and redistributing them within the KCMSD."[130]

The Court in *Jenkins* proceeded to redefine its holding in *Milliken I* and further explain how the Court's progeny of desegregation cases since *Milliken I* contradicted the district court and court of appeals' decisions in *Jenkins*.[131] In doing so, the Supreme Court rejected the argument that "desegregative attractiveness" represents a justifiable goal in light of "white flight" from the KCMSD to the SSDs.[132] The Court based this rejection upon the fact that the district court made no delineation between the cause and effect of white flight.[133]

Moreover, the Court argued that *Freeman* requires that any vestiges of segregation must have a causal link to the de jure segregation remedied.[134] In the Court's view, the district court's reliance on white flight as a justification for the desegregation remedy in *Jenkins*, therefore, constituted an improper exercise of discretion because no causal link existed between the state-imposed segregation and white flight.[135]

However, the Court's most substantial difficulty with the district court's "desegregative attractiveness" goal involved the accompanying no-

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criminatory use of state housing or zoning laws, then a decree calling for the transfer of pupils across district lines or for restructuring of district lines might well be appropriate.

Id. at 2051-52 (quoting *Milliken I*, 418 U.S. at 755 (Stewart, J., concurring)). Thus, lacking an interdistrict violation, a desegregation plan that invokes an interdistrict remedy is improper. *Jenkins*, 115 S. Ct. at 2052.

130. *Id.* The Court held that this remedy was beyond the district court's broad remedial authority. *Id.* (citing *Milliken II*, 433 U.S. 267, 280 (1977)).

131. *Id.*

132. *Id.* For a definition and further discussion of white flight, see *supra* note 81 and accompanying text.

133. *Id.* at 2052-53. The Court contended that the lower courts' findings as to white flight lacked both internal consistency and consistency with the principle that white flight may result from desegregation itself, not de jure segregation. *Id.* at 2052. The Court also rejected the United States' amicus curiae brief, which claimed that the de jure segregation in the KCMSD caused Caucasian students to leave the KCMSD. *Id.* This departure coincided with the district court's conclusion that the suburban districts did nothing to cause the white flight and therefore could not be included in a mandatory interdistrict remedy. *Id.* (citing Amicus Curiae Brief for the United States at 19 n.2., Missouri v. Jenkins, 115 S. Ct. 2038, 2052 (1995)).

The Court concluded, however, that the district court did not make sufficient findings of interdistrict violations to justify a significant interdistrict remedy, and moreover, that the district court explicitly recognized the lack of significant interdistrict effects from de jure segregation. *Id.* at 2053 (citing Jenkins v. Missouri, 807 F.2d 657, 672 (8th Cir. 1986) (affirming district court's finding of no interdistrict violation or effect)).

134. *Id.*

135. *Id.*

tion that the district court had limitless authority to engineer further remedies.[136] The Court coupled this concern with the potentially limitless duration of the district court's involvement in the desegregation remedy.[137] This prospect especially troubled the Court due to the great importance of restoring state and local control of a school system that operates in compliance with the Constitution.[138] Thus, the Court concluded that the district court's order of salary increases, grounded in remedying the vestiges of segregation through improvement of the "desegregative attractiveness" of the KCMSD, did not represent an acceptable intradistrict desegregation remedy.[139]

The *Jenkins* Court next turned to the district court's order requiring the continued funding of the KCMSD's quality education programs based upon student achievement levels at or below national norms at many grade levels.[140] The Court explicitly rejected this test as inappropriate for determining whether a previously segregated school system has achieved partial unitary status.[141] The majority reasoned that the district court's responsibility involves determining whether reduced student achievement attributable to prior de jure segregation has been remedied, to the extent practicable—not the achievement, through the indefinite extension of quality education programs, of an undefined level of academic success.[142]

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136. *Id.* at 2054. Indeed, the Court noted that the pursuit of "desegregative attractiveness" could not be reconciled with the Court's cases placing limitations on courts' remedial authority. *Id.* The Court wrote:

> It is certainly theoretically possible that the greater the expenditure per pupil within the KCMSD, the more likely it is that some unknowable number of nonminority students not presently attending schools in the KCMSD will choose to enroll in those schools. Under this reasoning, however, every increased expenditure, whether it be for teachers, noninstructional employees, books or buildings, will make the KCMSD in some way more attractive, and thereby perhaps induce nonminority students to enroll in its schools. But this rationale is not susceptible to any objective limitation.

Id.

137. *Id.* The Court noted that

> [e]ach additional program ordered by the District Court—and financed by the State—to increase the "desegregative attractiveness" of the school district makes the KCMSD more and more dependent on additional funding from the State; in turn, the greater the KCMSD's dependence on state funding, the greater its reliance on continued supervision by the District Court.

Id.

138. *Id.*

139. *Id.* Ultimately, the Court viewed the district court's "desegregative attractiveness" goal as creating too many imponderables, thus placing the remedy beyond the district court's broad discretion. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 2055. The Court maintained that although the district court had determined that de jure segregation caused a system-wide reduction in student achievement, it never identified the incremental effect that segregation had on

In accordance with this holding, the Court directed the district court to apply the three-part test set forth in *Freeman* in determining the KCMSD's unitary status, and moreover, instructed the district court to "sharply limit, if not dispense with, its reliance" on test scores to measure the district's unitary status.[143] The Court further noted that numerous external factors independent of de jure segregation can potentially affect both racial composition of the KCMSD schools and minority students' academic achievement.[144] Thus, the Court held, the district court's use of academic goals unrelated to the effects of "legal segregation" improperly postpones the operation of an independent KCMSD.[145]

2. *O'Connor's Concurrence: Determining the Proper Scope of the KCMSD Desegregation Remedy*

In what appeared to be a direct response to Justice Souter's dissenting opinion, Justice O'Connor's concurring opinion examined the practical effect of the district court's desegregation remedy.[146] Justice O'Connor began by reiterating Justice Rehnquist's sentiment that no unfairness existed in the Court's resolution of the "desegregative attractiveness" issue.[147] Justice O'Connor then reasoned that the Court's opinion coincided with both Supreme Court precedent and the district court's originally stated desegregation goals.[148]

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minority student achievement, nor did it allude to the quality education programs' precise goals. *Id.*

143. *Id.*

144. *Id.* at 2056. The Court asserted that these factors do not influence the remedial analysis so long as they are not the result of de jure segregation. *Id.* For a further discussion of demographics and de jure segregation, see *infra* note 154 and accompanying text.

145. *Id.* In support of this contention, the Court noted that minority students in kindergarten through grade seven had always attended "AAA-rated" schools, and that minority students in the KCMSD who previously attended schools rated below AAA received remedial education programs for seven years. *Id.*

146. *Id.* at 2060 (O'Connor, J., concurring). For a discussion of Justice Souter's dissenting opinion, see *infra* notes 181-213 and accompanying text.

147. *Id.* at 2057 (O'Connor, J., concurring). Justice O'Connor argued that the State's opening brief placed the respondents on notice of its argument concerning desegregative attractiveness. *Id.* at 2056. The respondents received further notice through the lower courts' explicit reliance on the need for desegregative attractiveness and suburban comparability in the KCMSD. *Id.* at 2057 (citing Jenkins v. Missouri, 13 F.3d 1170, 1172 (8th Cir. 1993) ("The significant finding of the court with respect to the earlier funding order was that the salary increases were essential to comply with the court's desegregation order, and that high quality teachers, administrators, and staff must be hired to improve the desegregative attractiveness of [the] KCMSD.")); Jenkins v. Missouri, 11 F.3d 755, 767 (8th Cir. 1993) ("In addition to compensating the victims, the remedy in this case was also designed to reverse white flight by offering superior education opportunities."). Thus, Justice O'Connor concluded that the Court did not transgress any "bounds of orderly adjudication in resolving a genuine dispute that [was] properly presented for its decision." *Jenkins*, 115 S. Ct. at 2057.

148. *Jenkins*, 115 S. Ct. at 2057. In particular, Justice O'Connor addressed Justice Souter's argument that the Court's holding conflicted with the Court's

Justice O'Connor specifically criticized the dissent's reliance on *Gautreaux v. Hills*.[149] Justice O'Connor maintained that *Gautreaux*, which concerned HUD's administrative practice in remedying discrimination in public housing, corresponded with the Court's holding in *Milliken I*, because *Gautreaux* did not concern a case of interdistrict relief in the same sense as *Milliken I* and other desegregation cases.[150] In essence, Justice O'Connor differentiated between the two instances because the Court in *Gautreaux* found that drawing a remedial line at the city limits would be "arbitrary and mechanical," while in *Jenkins* the KCMSD's boundaries served as the proper confines for the district court's remedial plan.[151]

Justice O'Connor buttressed her argument by noting the Eighth Circuit's past holding, that no significant interdistrict effects existed in the suburban Kansas City school districts. In particular, Justice O'Connor employed this holding to profess the notion that neither the legal responsibility, nor the causal effects of the KCMSD's racial segregation, transgressed its boundaries—and therefore, a *Gautreaux*-style regional plan was an inappropriate remedy for the KCMSD's de jure segregation.[152] Finally, Justice

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holding in *Hills v. Gautreaux*, 425 U.S. 284 (1976). *Jenkins*, 115 S. Ct. at 2057. Justice O'Connor noted that in *Gautreaux*, the Court held that no per se rule exists that federal courts lack authority to order parties violating the Constitution to undertake remedial efforts beyond the municipal boundaries where the violation occurred. *Id.* (citing *Gautreaux*, 425 U.S. at 298). Furthermore, Justice O'Connor argued that this holding corresponded with the Court's holding in *Milliken I*. *Id.* Specifically, Justice O'Connor contended that the holding flowed from *Milliken I*'s rule that a court may permit an interdistrict remedy upon a showing that a constitutional violation occurred within one district that has a significant segregative effect in another district. *Id.* Moreover, Justice O'Connor concluded that *Gautreaux* did not eliminate *Milliken I*'s requirement that such interdistrict remedies may only occur upon a showing that intradistrict violations produced *significant* interdistrict effects. *Id.* (emphasis added) ("[I]f anything, our opinion repeatedly affirmed that principle.").

149. *Id.* at 2058. *See Gautreaux*, 425 U.S. at 292-94 (holding interdistrict remedy appropriate where intradistrict constitutional violation has significant interdistrict effects). For a discussion of the dissent's arguments concerning *Gautreaux*, see *infra* notes 210-13 and accompanying text.

150. *Jenkins*, 115 S. Ct. at 2058.

151. *Id.* (citing *Gautreaux*, 425 U.S. at 300). In *Gautreaux*, "the relevant geographic area for purposes of the respondents' housing options [was] the Chicago housing market, not the Chicago city limits." *Id.* The fact that the Housing and Urban Development's administrative practice involved treating the Chicago metropolitan area as an undifferentiated whole buttressed this conclusion. *Id.*

152. *Id.* at 2059. Justice O'Connor expressed dissatisfaction with Justice Souter's argument that white flight to the suburban school districts could justify an interdistrict remedy. *Id.* Justice O'Connor wrote that "[w]hatever effects [the] KCMSD's constitutional violation may be ventured to have had on the surrounding districts, those effects would justify interdistrict relief only if they were 'segregative beyond the KCMSD'". *Id.* For Justice O'Connor, white flight could not be corrected through an interdistrict remedy. Rather, Justice O'Connor discussed a situation where white flight would summon the need for an interdistrict remedy:

> Such segregative effect may be present where a predominately black district accepts black children from adjacent districts, . . . or perhaps even where the fact of intradistrict segregation actually causes whites to flee

O'Connor expressed displeasure with the district court's "underlying goal" of desegregative attractiveness, arguing that the district court may only attempt to reverse white flight if it results from the constitutional violation.[153] Relying on previous findings that neither interdistrict violations nor significant interdistrict effects existed outside the KCMSD, Justice O'Connor held that the district court could not order remedies that cure regional demographic trends going beyond the nature and scope of the constitutional violation.[154] In essence, Justice O'Connor viewed such attempted remedies as beyond the nature and scope of the constitutional violation, and thus, an abuse of the district court's discretion.[155]

3. *Thomas' Concurrence: Quality Education or the Attainment of Unspecified Goals?*

Justice Thomas' concurring opinion in *Jenkins* illustrated his disdain for the notion that a predominately African-American school district must be inferior.[156] In fact, Justice Thomas' opinion did not offer an alternative substantive ground for the Court's opinion, but rather provided Jus-

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> the district, . . . for example, to avoid discriminatorily underfunded schools—and such actions produce regional segregation along district lines. In those cases, where a purely intradistrict violation has caused a significant interdistrict segregative effect, certain interdistrict remedies may be appropriate. Where, however, the segregative effects of a district's constitutional violation are contained within that district's boundaries, there is no justification for a remedy that is interdistrict in nature and scope.

Id. at 2059-60 (O'Connor, J., concurring) (citations omitted).

153. *Id.* at 2060 (O'Connor, J., concurring). In contrast, if restoring the KCMSD to unitary status *indirectly* reversed the departure of nonminority students from the KCMSD, then the reversal would not influence the legal inquiry into the district court's desegregation plan. *Id.* (O'Connor, J., concurring).

> 154. *Id.* (O'Connor, J., concurring). Justice O'Connor specifically stated: This case, like other school desegregation litigation, is concerned with "the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds." Those myriad factors are not readily correctable by judicial intervention, but are best addressed by the representative branches; time and again, we have recognized the ample authority legislatures possess to combat racial injustice.

Id. (O'Connor, J., concurring) (citations omitted). Justice O'Connor concluded that courts, unlike legislatures, do not have discretion to determine what legislation is needed to secure the guarantees of the Fourteenth Amendment—especially in areas such as education, "'where States historically have been sovereign.'" *Id.* at 2061 (O'Connor, J., concurring) (quoting United States v. Lopez, 115 S. Ct. 1624, 1632-33 (1995)).

155. *Id.* (O'Connor, J., concurring) ("Indeed, in the local school desegregation context, federal courts are specifically admonished 'to take into account the interests of state and local authorities in managing their own affairs.'" (quoting *Milliken II*, 433 U.S. 267, 281 (1977)).

156. *Id.* (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominately black must be inferior.").

tice Thomas with the opportunity to embark on a lengthy discourse about African-American inferiority, federalism and equitable desegregation remedies.[157]

Justice Thomas laid the groundwork for this argument by restating the general principle that racial imbalance does not *necessarily* indicate a constitutional violation: "[i]t should by now be clear that the existence of one-race schools is not by itself an indication that the State is practicing segregation."[158] As Justices Rehnquist and O'Connor noted in their opinions, Justice Thomas attributed continuing racial isolation in the KCMSD to demographic factors such as voluntary housing choices and other private decisions, not to vestiges of unconstitutional state imposed segregation.[159] Justice Thomas argued that such vestiges of segregation must be "clearly traceable" and have a "causal link" to the de jure constitutional violation.[160] Justice Thomas observed that as state-imposed segregation recedes farther into the past, racial imbalances result from demographic shifts, which exceed the federal courts' control.[161] Thus, when a district court holds a state liable for state-imposed discrimination, it must demonstrate a real connection between high minority student enrollments and unconstitutional state action.[162] Moreover, Justice Thomas suggested placing a new burden on federal courts addressing school desegregation

157. *Id.* (Thomas, J., concurring). Justice Thomas argued that two principles in the Court's desegregation jurisprudence contributed to the "unfortunate situation, in which a District Court has taken it upon itself to experiment with the education of the KCMSD's black youth." *Id.* at 2062. (Thomas, J., concurring). First, Justice Thomas maintained that the Court's desegregation cases do not support the theory that African-American students suffer an unspecified psychological harm from segregation. *Id.* (Thomas, J., concurring). Justice Thomas criticized this theory because it rests upon "questionable social science research rather than constitutional principle." *Id.* (Thomas, J., concurring). Second, Justice Thomas admonished the federal courts' exercise of virtually unlimited equitable powers to remedy these alleged constitutional violations. *Id.* (Thomas, J., concurring). According to Justice Thomas, this unlimited discretion abused federalism and the separation of powers. *Id.* (Thomas, J., concurring).

158. *Id.* (Thomas, J., concurring). Justice Thomas noted that before finding unconstitutional segregation, plaintiffs must prove a current condition of segregation resulting from intentional state action. *Id.* (Thomas, J., concurring) (citing Keyes v. School Dist. No. 1, 413 U.S. 189, 205-06 (1973)). Without this purposeful state action, the segregation is only de facto, and cannot justify a finding of unconstitutional segregation. *Id.* (Thomas, J., concurring).

159. *Id.* at 2062-63 (Thomas, J., concurring).

160. *Id.* at 2063 (Thomas, J., concurring). Justice Thomas recognized that these links may be "subtle and intangible," and also recognized that district courts should not confuse the consequences of de jure segregation with results of social forces or private decisions. *Id.* (Thomas, J., concurring).

161. *Id.* (Thomas, J., concurring) (noting that "[i]t is beyond the authority and beyond the practical ability of the federal courts to try to counteract" these social changes).

162. *Id.* (Thomas, J., concurring) ("When a district court holds the State liable for discrimination almost 30 years after the last official state action, it must do more than show that there are schools with high populations or low test scores.").

cases, proposing that courts should explain how social or demographic factors *did not* cause racial isolation in a particular district.[163]

After establishing this basic framework, Justice Thomas began his attack on the inherent inferiority of predominately African-American schools.[164] Justice Thomas argued that this concept stemmed from a misreading of the Court's decision in *Brown I*, where the Court held that segregation stigmatized African-American students by creating a feeling of inferiority in them.[165] According to Justice Thomas, *Brown I* did not say that *racially isolated* schools, a product of de facto separation, are inherently inferior; rather, the *Brown* Court identified de jure segregation as the constitutional violation.[166] Justice Thomas rejected the district court's seeming reliance on these psychological factors because it did not relate to whether government action caused racial discrimination: "[t]he judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences."[167] Most importantly for Justice Thomas, the theory that segregation injures African-Americans because they cannot achieve on their own, invokes a jurisprudence based upon a theory of African-American inferiority.[168]

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163. *Id.* at 2063-64 (Thomas, J., concurring). ("In fact, where, as here, . . . liability comes so late in the day, I would think it incumbent upon the District Court to explain how more recent social or demographic phenomena did not cause the 'vestiges' [of discrimination].").

164. *Id.* at 2064 (Thomas, J., concurring).

165. *Id.* (Thomas, J., concurring). Justice Thomas noted that the district court relied on these psychologic factors when fashioning the original desegregation remedy. *Id.* (Thomas, J., concurring). In particular, Justice Thomas cited the district court's contention that African-American students in the KCMSD would continue to receive an inferior education even after the end of de jure segregation, as long as de facto segregation remained. *Id.* (Thomas, J., concurring). Justice Thomas rejected this rationale: "[s]uch assumptions and any social science research upon which they rely certainly cannot form the basis upon which we decide matters of constitutional principle." *Id.* (Thomas, J., concurring).

166. *Id.* at 2065 (Thomas, J., concurring). Justice Thomas specified *Brown I*'s most basic holding that the government cannot discriminate on the basis of race and that the government must treat citizens as *individuals*, not as members of racial, ethnic or religious groups. *Id.* (Thomas, J., concurring). Apart from any sociological effects, Justice Thomas noted that public school systems that separate any class of students and provide those students with superior resources would violate the Fourteenth Amendment, whether or not those particular students were stigmatized. *Id.* (Thomas, J., concurring).

167. *Id.* (Thomas, J., concurring). Indeed, Justice Thomas suggested that:

> there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment. . . . Because of their "distinctive histories and traditions," black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.

Id. (Thomas, J., concurring) (citations omitted).

168. *Id.* at 2065-66 (Thomas, J., concurring). Justice Thomas held that the point of the Fourteenth Amendment is not to enforce racial integration, but to

Justice Thomas next embarked on a protracted criticism of the district court's overly broad exercise of "equitable discretion."[169] Justice Thomas recognized that federal courts possessed wide-ranging powers to reverse problems such as racial isolation, and that the Supreme Court had allowed these powers to overcome constitutional limits such as federalism and the separation of powers.[170] In *Jenkins*, however, Justice Thomas wrote that "[t]he time has come for us to put the genie back in the bottle."[171] In support of this aspiration, Justice Thomas entered upon a lengthy historical discussion of judicial power and original intent, concluding that the district court's desegregation remedy in the KCMSD represented a flagrant exercise of powers properly allotted the executive and legislative branches.[172]

Moreover, Justice Thomas perceived the KCMSD desegregation plan as an infringement of state and local control of schools—an infringement that effectively deprives state and local governments of their ability to manage one of their most important governmental responsibilities.[173] Fur-

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ensure that differing races are treated equally without regard to their skin color. *Id.* at 2066.

169. *Id.* (Thomas, J., concurring).

170. *Id.* (Thomas, J., concurring). Justice Thomas viewed this overly broad grant of discretion as a primary cause of the district court's approval of massive expenditures in the KCMSD by state and local authorities, without congressional or executive approval. *Id.* (Thomas, J., concurring).

171. *Id.* (Thomas, J., concurring). Justice Thomas argued that the Court's worthy desire to end state-imposed segregation directly caused the belief that federal trial judges have unlimited discretion to develop desegregation remedies once they identify a constitutional violation. *Id.* at 2066-67 (Thomas, J., concurring) (citing *Milliken II*, 433 U.S. 267 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)). For a further discussion of the Court's holding in *Milliken II*, see *supra* notes 48-54 and accompanying text. For a further discussion of the Court's holding in *Swann*, see *supra* notes 34-40 and accompanying text.

Further, Justice Thomas noted that this overly broad grant of equitable power resulted from the Court's effort to overcome widespread resistance to the *Brown* holdings in the 1960s. *Id.* (Thomas, J., concurring). Consequently, Justice Thomas added, the judicial overreaching typified in the KCMSD could be attributed to the Court's prior approval of such extraordinary remedies in the past. *Id.* (Thomas, J., concurring).

172. *Id.* at 2067-71 (Thomas, J. concurring). Justice Thomas used this historical discussion to fortify the notion that the district court's continued control over the KCMSD desegregation plan was unfounded in traditional American jurisprudence. *Id.* at 2069 (Thomas, J., concurring). Among others, Justice Thomas invoked the writings of both Thomas Jefferson and Alexander Hamilton to fortify his argument. *Id.* at 2068-69 (Thomas, J., concurring). Justice Thomas pointed to these founding fathers' arguments that judges should not have arbitrary power, and further, that precedent and established practices should dictate judge's decisions. *Id.* (Thomas, J., concurring) (citing 9 PAPERS OF THOMAS JEFFERSON 71 (J. Boyd. ed., 1954); THE FEDERALIST No. 78 528 (J. Cooke ed., 1961)).

173. *Id.* at 2070 (Thomas, J., concurring). According to Justice Thomas, the "'local autonomy of school districts is a vital national tradition.'" *Id.* (Thomas, J., concurring) (quoting *Dayton I*, 433 U.S. 406, 410 (1977)). In addition, Justice Thomas cited the Court's recent decision in United States v. Lopez, 115 S. Ct. 1624 (1995), where a narrow majority of the Court held that Congress exceeded its

ther, Justice Thomas argued that federal courts do not possess the capability to address everyday educational problems in the same manner as local officials, a shortcoming amplified by courts' limited access to information and resources, and courts' inherent inability to achieve political and public support for their decrees.[174] In applying this analysis to the district court's actions in the KCMSD, Justice Thomas concluded that the district court transcended its judicial boundaries and effectively usurped responsibilities properly exercised in the legislature.[175]

Finally, Justice Thomas criticized the district court for failing to narrowly target its equitable remedies on the specific harm suffered by victims of desegregation in the KCMSD.[176] Specifically, Justice Thomas asserted that raising the test scores of the *entire* district reflects a goal not sufficiently tailored to restoring the victims of desegregation to the position they would have occupied without desegregation.[177] While the district court may order remedies that indirectly benefit nonvictims of segregation, Justice Thomas held that court could *not* order remedies that indiscriminately benefit the whole school district.[178] Rather, Justice Thomas suggested that district courts should design desegregation orders to specifically benefit victims of segregation.[179] In sum, Justice Thomas concluded

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power under the Commerce Clause in enacting the Gun-Free School Zones Act. *Id.* (citing *Lopez*, 115 S. Ct. at 1630-31). The Gun-Free School Zones Act made it a federal offense to possess a gun in a school zone. *Lopez*, 115 S. Ct. at 1630-31. Justice Kennedy noted in his dissent that "it is well established that education is a traditional concern of the states." *Id.* at 1640 (Kennedy, J., dissenting).

174. *Jenkins*, 115 S. Ct. at 2070 (Thomas, J., concurring).

175. *Id.* at 2071 (Thomas, J., concurring). Justice Thomas noted:

> I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.

Id.

176. *Id.* at 2072 (Thomas, J., concurring). Justice Thomas viewed efforts to eliminate "invidious racial distinctions" in areas such as student assignments, transportation, staff resource allocation and activities as the most important aspects of a desegregation plan. *Id.* While these elements of desegregation plans are fairly straightforward, it is often the "compensatory" ingredients that produce abuse of the judiciary's equitable powers. *Id.* (Thomas, J., concurring).

177. *Id.* at 2072-73 (Thomas, J., concurring). Justice Thomas noted: "A school district cannot be discriminated against on the basis of race, because a school district has no race. It goes without saying that only individuals can suffer from discrimination, and only individuals can receive the remedy." *Id.* (Thomas, J., concurring).

178. *Id.* at 2073 (Thomas, J. concurring). Justice Thomas noted: "Not only do such remedies tend to indicate 'efforts to achieve broader purposes lying beyond' the scope of the violation . . . but they also force state and local governments to work toward the benefit of those who have suffered no harm from their actions." *Id.* at 2073 (Thomas, J., concurring).

179. *Id.* (Thomas, J., concurring). Justice Thomas contended that remedies addressing racial discrimination must serve a compelling governmental interest, but must also be narrowly tailored to achieve the sought-after interest. *Id.* (Thomas, J., concurring) (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 509-

that "[e]ven if segregation were present, we must remember that a deserving end does not justify all possible means. . . . At some point, we must recognize that the judiciary is not omniscient, and that all problems do not require a remedy of constitutional proportions."[180]

4. *Souter's Dissent: Debating the Effects of De Jure Segregation*

Justice Souter's dissenting opinion faulted the majority's holding on several grounds.[181] First, Justice Souter argued that the Court's orderly process of adjudication failed, based upon the Court's improper treatment of the issues for review in *Jenkins*.[182] Second, the dissent argued that the majority handled the test score and salary order issues inappropriately because the majority failed to accurately interpret the district court's original desegregation order.[183] Finally, the dissent faulted the majority's treatment of the "interdistrict-intradistrict" debate in relation to the KCMSD.[184]

Justice Souter's first disagreement with the majority concerned the "questions presented" that Justice Rehnquist addressed in his opinion.[185] In essence, Justice Souter believed that the majority opinion improperly

10 (1989)). Accordingly, absent special circumstances, a remedy for de jure segregation should not include educational programs for students not directly affected by the former segregation. *Id.* (Thomas, J., concurring).

Moreover, Justice Thomas urged that courts should not use racial equality as a pretext for attempting to remedy complex social problems, which do not involve the Constitution. *Id.* (Thomas, J., concurring). More specifically, "[f]ederal courts should not lightly assume that States have caused 'racial isolation' in 1984 by maintaining a segregated school system in 1954." *Id.* (Thomas, J., concurring).

180. *Id.* (Thomas, J., concurring).

181. *Id.* at 2073 (Souter, J., dissenting). Justices Stevens, Ginsburg and Breyer joined Justice Souter's dissenting opinion. *Id.* For a further discussion of the majority opinion, see *supra* notes 112-45 and accompanying text.

182. *Id.* at 2073-74 (Souter, J. dissenting). Justice Souter recognized that

> [s]ince . . . the respondent school district and pupils naturally came to this Court without expecting that a fundamental premise of a portion of the District Court's remedial order would become the focus of this case, the essence of the Court's misjudgment in reviewing and repudiating that central premise lies in its failure to have warned the respondents of what was really at stake.

Id. Justice Souter commented that the State's failure to address the precise holding of the majority "infected the Court's decision." *Id.* at 2074 (Souter, J., dissenting).

183. *Id.* at 2078-79, 2081-82 (Souter, J., dissenting).

184. *Id.* at 2083 (Souter, J., dissenting). Justice Souter commented, "the Court's decision that the rule against interdistrict remedies for intradistrict violations applies to this case, solely because the remedy here is meant to produce effects outside the district in which the violation occurred, is flatly contrary to established precedent." *Id.* (Souter, J., dissenting).

185. *Id.* at 2076 (Souter, J., dissenting). Justice Souter cited the States "questions for review" to buttress his observation. *Id.* (Souter, J., dissenting). Justice Souter characterized both questions presented as focusing on "two discrete issues, . . . fram[ing] no broader, foundational question about the validity of the District Court's magnet concept." *Id.* (Souter, J. dissenting).

focused on the *Milliken* "interdistrict" issue in its opinion because the parties in *Jenkins* did not brief or argue the issue.[186] Rather, Justice Souter argued, the only questions for review included: (1) the extent to which a district court may look at student test scores in determining whether a school district has attained partial unitary status, and (2) whether salary increases reflect a permissible remedy for desegregation.[187] Because the State did not go beyond these issues in its petition for certiorari, Justice Souter argued that the Court should not reach such questions on its own initiative.[188]

After concluding his discussion of the majority's procedural failings, Justice Souter turned to the majority's treatment of the test score issue.[189] Justice Souter noted that this question represents "one of word play, not substance" and that "none of the District Court's or Court of Appeals's opinions or orders require[d] a certain level of test scores before unitary status can be found, or indicates that test scores are the only thing standing between the State and a finding of unitary status as to the KCMSD's *Milliken II* programs."[190]

Indeed, Justice Souter argued, the Eighth Circuit did not treat tests scores as a dispositive issue in its adjudication of the KCMSD's achievement of unitary status.[191] Justice Souter professed that the district court

186. *Id.* (Souter, J., dissenting). Justice Souter cited Supreme Court Rule 14.1 in support of his position that the Court improperly decided the broader issue of the propriety of the State's remedial scheme. *Id.* at 2076-77 (Souter, J., dissenting). Rule 14.1 states that "[o]nly questions set forth in the petition, or fairly included therein, will be considered." *Id.* at 2076 (Souter, J., dissenting). Justice Souter rejected the majority's position that the broader issue is "fairly included in the State's salary question." *Id.* at 2077 (Souter, J., dissenting). Relying upon an earlier definition of "fairly included," Justice Souter stated that the broader issue is not fairly included in the questions presented because it is not central to the Court's resolution of the narrow questions presented for review. *Id.* (Souter, J., dissenting).

187. *Id.* at 2076 (Souter, J., dissenting).

188. *Id.* at 2077 (Souter, J., dissenting). The Court's failure to give notice to the parties of its intention to reach the broader interdistrict issue troubled Justice Souter the most. *Id.* at 2077-78 (Souter, J., dissenting). Justice Souter noted:

> If there is any doubt about the lack of fairness and prejudice displayed by the Court, it should disappear upon seeing . . . how the Court's decision to go beyond [the questions presented] to address an issue not adequately briefed or argued by one set of parties leads it to render an opinion anchored in neither the findings and evidence contained in the record, nor in controlling precedent, which is squarely at odds with the Court's holding today.

Id. at 2078 (Souter, J., dissenting).

189. *Id.* (Souter, J., dissenting).

190. *Id.* (Souter, J., dissenting).

191. *Id.* (Souter, J., dissenting). Justice Souter relied on the Eighth Circuit's denial of an en banc rehearing as evidence of the Eighth Circuit's position regarding the role of test scores. *Id.* (Souter, J., dissenting). Justice Souter quoted a passage from the opinion that squarely addressed the issue: "[t]est scores . . . must be only one factor in the equation [in determining whether past discrimination was remedied]. Nothing in this court's opinion, [or] the district court's opinion

did not enter a finding of partial unitary status simply because the State did not attempt to make the required showing for unitary status set forth in *Freeman*.[192] Thus, the State's failure to meet its burden under *Freeman* led the Eighth Circuit to reject a finding of partial unitary status.[193] Moreover, Justice Souter concluded that while test scores will undoubtedly play a role in the attainment of unitary status, it would be improper to require achievement of a pre-established national average.[194] Thus, the Court should view the test scores in relation to the other facts developed in the unitary status proceedings.[195]

Following his discussion of test scores, Justice Souter turned to the majority's handling of the district court's salary orders.[196] Justice Souter first noted that "the District Court ha[d] consistently treated salary increases as an important element in remedying the system-wide reduction in student achievement resulting from segregation in the KCMSD."[197]

. . . indicates that test results were the only criteria used." *Id.* (Souter, J., dissenting).

192. *Id.* at 2079 (Souter, J., dissenting). In *Freeman v. Pitts*, 503 U.S. 467 (1992), the Court set forth a clear set of procedures for governmental entities to follow when seeking partial termination of a desegregation decree. *Jenkins*, 115 S. Ct. at 2079 (Souter, J., dissenting). First, the government entity must "consider 'whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn.'" *Id.* (Souter, J, dissenting) (quoting *Freeman*, 503 U.S. at 491). Furthermore, Justice Souter noted that full and satisfactory compliance is measured by "'whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.'" *Id.* (Souter, J., disseting) (quoting *Freeman*, 503 U.S. at 492). At that juncture, the district court must assess whether "the 'retention of judicial control is necessary . . . to achieve compliance with the decree . . . and whether the *school district has demonstrated* . . . its good-faith commitment to . . . the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.'" *Id.* (Souter, J., dissenting) (quoting *Freeman*, 503 U.S. at 492) (emphasis added).

193. *Id.* at 2080 (Souter, J., dissenting).

194. *Id.* (Souter, J., dissenting). Justice Souter commented that all parties to the case agreed that it would be error to use the attainment of an average test score equal to, or better than, the national average as the benchmark for achieving partial unitary status. *Id.* (Souter, J., dissenting). The parties realized that other obstacles apart from prior de jure discrimination could factor into a test score average that is below the national average. *Id.* (Souter, J., dissenting). As Justice Souter pointed out, however, student test scores have some relevance in determining whether the school district has been effective in its efforts to cure the defects prior to its judicial intervention. *Id.* at 2080-81 (Souter, J., dissenting).

195. *Id.* at 2081 (Souter, J., dissenting).

196. *Id.* (Souter, J., dissenting).

197. *Id.* (Souter, J., dissenting). The majority did not question the apparent goal, which involved ending the reduction in student achievement. *Id.* (Souter, J., dissenting). In recognizing the propriety of that goal, Justice Souter characterized the remaining inquiry as whether the salary increases had a reasonable relation to achieving the desired favorable result. *Id.* (Souter, J., dissenting). In forming a resolution to that issue, Justice Souter suggested that it would be appropriate to keep in mind the broad discretion of the district court in exercising its equitable discretion. *Id.* (Souter, J., dissenting).

Building upon this notion, Justice Souter recognized that the district court's adoption of limited salary increases stemmed from evidence indicating that discontinuation of desegregation funding for salary levels would result in excessive employee turnover and a potential inability of the KCMSD to meet its desegregative objectives.[198] Finally, Justice Souter criticized the majority for examining the salary orders solely in the context of drawing students into the district's schools, when both the district court and Eighth Circuit viewed the salary orders as serving two complementary but distinct purposes.[199]

In conclusion, Justice Souter addressed the core of the majority's opinion—its contention that the KCMSD desegregation remedy represented an unconstitutional interdistrict remedy.[200] Justice Souter disagreed with the majority's holding on two grounds.[201] First, Justice Souter argued that the district court's original interpretation of the term "intradistrict" differed from the majority's interpretation.[202] While the district court held that de jure segregation did not lead to segregation outside the KCMSD, the district court *did* recognize that the violation had significant effects that spanned district borders.[203] Second, Justice Souter

198. *Id.* at 2081-82 (Souter, J., dissenting). The district court faced evidence that indicated that discontinuing desegregation funding for salary levels resulted in their abrupt drop to 1986-87 levels. *Id.* (Souter, J., dissenting). As a result, the disparity between teacher pay in the KCMSD and the nationwide level would have increased as much as 40-45 percent. *Id.* (Souter, J., dissenting). Because such a drastic salary reduction would inevitably lead to the loss of well-educated and competent teachers, the district court found that the discontinuance of funding for teachers' salaries would impede the accomplishment of the KCMSD's remedial scheme. *Id.* (Souter, J., dissenting).

199. *Id.* at 2083 (Souter, J., dissenting). The two complementary but distinct purposes mentioned by Justice Souter include: (1) raising the level of student achievement and (2) drawing students to the KCMSD schools. *Id.* (Souter, J., dissenting). Justice Souter commented that despite the dual purposes of salary increases the Court overlooked the permissible former basis and rested its rejection of the increases on the latter basis. *Id.* at 2082-83 (Souter, J., dissenting). Furthermore, Justice Souter recognized that to the extent that increases are justified on remand, nothing in the Court's opinion would preclude the salary orders from remaining in effect. *Id.* at 2083 (Souter, J., disseting).

200. *Id.* (Souter, J., dissenting).

201. *Id.* (Souter, J., dissenting).

202. *Id.* (Souter, J., dissenting). Justice Souter asserted that the district court described the KCMSD intradistrict violation to mean that the violation within the KCMSD had not led to segregation outside the KCMSD, and furthermore, that no other school districts played a part in the constitutional violation. *Id.* (Souter, J., dissenting). Justice Souter pointed out that the district court's use of term "intradistrict remedy" did *not* suggest that the violation had not produced effects of any sort beyond the district. *Id.* (Souter, J., dissenting). Justice Souter asserted that the record indicated that the district court understood the interdistrict effect of the violation. *Id.* (Souter, J., dissenting).

203. *Id.* (Souter, J. dissenting). The district court and Eight Circuit based their conclusion regarding the segregative effect on the recognition that "preponderance of black students in the [KCMSD] was due to the State and [the] KCMSD's constitutional violations, which caused white flight." *Id.* at 2084 (Souter, J., dissenting) (quoting Jenkins v. Missouri, 855 F.2d 1295, 1302 (8th Cir. 1988)).

asserted that even if one viewed the KCMSD's situation apart from this first point, the majority's application of the rule against interdistrict remedies for intradistrict violations contradicted established precedent.[204]

In supporting his first argument, Justice Souter contended that while the majority correctly interpreted the record to indicate that the suburban Kansas City school districts did not contribute to desegregation in the KCMSD, this finding coincided with a finding that white flight to the suburban school districts resulted from both the segregative *and* desegregative efforts of the KCMSD.[205] More directly, Justice Souter argued that the Court is on shaky grounds when it assumes that prior segregation and later desegregation are separable in fact as causes of "white flight," that the flight can plausibly be said to result from desegregation alone, and that therefore, as a matter of fact, the 'intradistrict' segregation violation lacked the relevant consequences outside the district required to justify the District Court's magnet concept.[206]

Justice Souter next turned to the majority's allegedly faulty application of Supreme Court precedent concerning the obligation to remedy the effects of prior de jure segregation.[207] Justice Souter re-stated the Court's most recent pronouncement of this obligation, set forth in *Freeman*: "the duty of a former de jure district is to take 'whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'"[208] Justice Souter applied this obligation to *Jenkins* in maintaining that although *Milliken I* limited a district court's ability to craft an interdistrict remedy in the absence of an interdistrict violation, *Milliken I* did *not* hold that "any remedy that takes into account conditions outside of the district in which the constitutional violation has been committed is an 'interdistrict remedy,' and as such improper in the absence of an 'interdistrict violation.'"[209]

To further bolster his argument, Justice Souter relied on the Supreme Court's holding in *Hills v. Gautreaux*. In *Gautreaux*, the Court interpreted *Milliken I* to allow a district court to subject a governmental perpetrator of segregative practices to an order for relief with consequences extending beyond the perpetrator's own subdivision.[210] Justice Souter defended the propriety of this result as long as the decree does not bind the authorities of other governmental units that remain free from violations and segrega-

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Thus, "[t]he existence of segregated schools led to white flight from the KCMSD to suburban districts and to private schools." *Id.* (Souter, J., dissenting).

204. *Id.* at 2085 (Souter, J., dissenting).

205. *Id.* at 2084-86 (Souter, J., dissenting).

206. *Id.* at 2086 (Souter, J., dissenting).

207. *Id.* at 2087 (Souter, J., dissenting).

208. *Id.* (Souter, J., dissenting) (quoting Freeman v. Pitts, 503 U.S. 467, 486 (1992)).

209. *Id.* (Souter, J., dissenting).

210. *Id.* at 2088 (Souter, J., dissenting).

tive effects.[211] Applying this standard to the situation in *Jenkins*, Justice Souter noted that the district court's remedial measures focused only upon the operation and quality of school within the KCMSD, and that the burden properly fell on the proven constitutional violators—the KCMSD and the State.[212] Increasing the KCMSD's attractiveness to students from other districts, and thereby reversing white flight, did not represent an abuse of discretion and coincided with the nature and extent of the constitutional violation.[213]

5. *Ginsburg's Dissent: Remaining True to* Brown *'s Stated Goals*

In addition to joining Justice Souter's dissent, Justice Ginsburg wrote a short dissent to express her views on the KCMSD's remedial desegregation program.[214] Justice Ginsburg essentially faulted the majority opinion for dismissing the effects of de jure segregation in the KCMSD.[215] Justice Ginsburg noted that while remedial programs in the KCMSD existed for seven years, this duration paled in comparison to the 200 year existence of entrenched official discrimination experienced by Missouri's minority residents, prior to 1985.[216] Justice Ginsburg concluded:

> Today, the Court declares illegitimate the goal of attracting nonminority students to the Kansas City, Missouri, School District, and thus stops the District Court's efforts to integrate a school district that was, in the 1984/1985 school year, sorely in need and 68.3% black. Given the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon.[217]

B. *Critical Analysis: Remaining True to the Stated Objectives of a Desegregation Plan*

The Supreme Court's holding in *Jenkins* declared that the district court's desegregation remedy in the KCMSD extended beyond constitutional limitations.[218] This holding, however, contradicts the Court's progeny of desegregation cases and represents a profound step backward in the effort to desegregate the nation's schools. First, the Supreme Court's original holding in *Brown I* and its progeny of desegregation cases decided in the federal courts renounces the Court's holding in *Jenkins*.[219] Second,

211. *Id.* (Souter, J., dissenting).
212. *Id.* at 2089 (Souter, J., dissenting).
213. *Id.* (Souter, J., dissenting).
214. *Id.* at 2091 (Ginsburg, J., dissenting).
215. *Id.* (Ginsburg, J., dissenting).
216. *Id.* (Ginsburg, J., dissenting).
217. *Id.* (Ginsburg, J., dissenting) (citations omitted).
218. *Id.* at 2038-56.
219. *See Brown I*, 347 U.S. 483, 495 (1954) (holding "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational

the majority's argument lacks soundness because it ignores the stated objectives of the district court's original desegregation plan.[220] Third, the majority's decision in *Jenkins* opposes the Supreme Court's decisions in *Milliken I* and *Milliken II*.[221] Fourth, the majority's opinion does not accurately draw on the principles set forth in *Freeman v. Pitts*, the Court's last school segregation case.[222] Finally, the majority erred in rejecting the district court's use of test scores to measure the success of the desegregation plan, and that the district court's salary increase order should not apply.[223]

The principles set forth in the *Brown* cases conflict with the *Jenkins* holding.[224] In *Brown I*, the Supreme Court stated that "separate is inherently *unequal*" when considering a child's education.[225] Thus, the Court properly held that the Equal Protection Clause of the Fourteenth Amend-

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facilities are inherently unequal"). As one commentator noted, this notion that separate being *unequal* invokes the great promise of *Brown I*:

> Through the regular interaction of black and white children, the cultural aspects of hegemony would eventually be overcome. The "stigma" of black inferiority—and of white superiority—would dissipate in part because African-American children would obtain greater facility with the dominant Euro-American criteria of achievement and in part because the dominant criteria of achievement would, over time, become less distinctly Euro-American and more fairly representative of all American cultures.

Hayman & Levit, *supra* note 18, at 705. For a further discussion of the *Brown* decisions and their influences on *Jenkins*, see *infra* notes 224-232 and accompanying text.

220. For a discussion of the argument that the majority's opinion lacks soundness because it ignores the stated objectives of the district court's original desegregation plan, see *infra* notes 233-48 and accompanying text.

221. For a discussion of the argument that the majority's decision in *Jenkins* opposes the Supreme Court's, decisions in *Milliken I* and *Milliken II*, *see infra* notes 250-54 and accompanying text.

222. For a discussion of the argument that the majority's opinion does not accurately draw on the principles set forth in *Freeman v. Pitts*, see *infra* notes 255-62 and accompanying text.

223. For a discussion of the argument that the majority erred in rejecting the district court's use of test scores as a measuring tool and that the district court's salary increase order should not apply, see *infra* notes 263-65 and accompanying text.

224. *Brown I* and *Brown II* served as broad pronouncements on the adverse effect of racial separation on African-American children and what school districts should do to remedy this effect. Devins, *supra* note 20, at 14. *See Brown II*, 349 U.S. 294, 299 (1955) (stating that school authorities have primary responsibility of solving school desegregation problems); *Brown I*, 347 U.S. at 494 (stating that state-imposed segregation has adverse effect on African-American's inherent ability to learn).

The *Brown* Courts' clearest conflict with *Jenkins*, however, is illustrated in *Brown II*'s holding that district courts constitute the most proper forum to deal with school desegregation because of their proximity to local conditions. *Brown II*, 349 U.S. at 299. The Court further held that lower courts should have flexibility in creating remedies and that the courts would be guided by equitable principles. *Id.* at 300.

225. *Brown I*, 347 U.S. at 495.

ment guarantees equal educational opportunity.[226] Subsequently, the Court, in *Brown II*, compelled school boards to eliminate state-imposed dual school systems.[227] The Court recognized that federal district courts constituted the most appropriate forum to administer this process.[228]

Judge Clark echoed *Brown I*'s bold directives when he stated his original goals for the KCMSD's desegregation plan.[229] In addressing the widespread reduction in academic achievement in the KCMSD as attributable

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226. *Id.* In *Brown I*, the Supreme Court re-examined the "separate but equal" doctrine, established in *Plessy v. Ferguson*. *Id.* at 488. See *supra* notes 2, 16-20 and accompanying text. The Supreme Court rejected the application of this doctrine in public schools, and declared that segregation of children in public schools solely on the basis of race denies African-Americans equal protection of the laws under the Constitution. *Id.* at 495. See *supra* notes 2, 16-20 and accompanying text. The Supreme Court thus declared that the existence of dual school systems violated the Constitution and later held that school districts had the duty to desegregate their schools. *See Brown II*, 349 U.S. at 301 (holding that school systems must desegregate with "all deliberate speed"). Presently, as race relations are improving throughout the nation, African-Americans still face the problem originally addressed in *Brown I* over forty years ago. *See* Jackson, *supra* note 1, at 416 (arguing for interdistrict remedies to eliminate vestiges of racial segregation); *see also* Alison Morantz, *Money, Choice and Equity: Major Investments With Modest Returns* 1 (Harvard Graduate School of Education 1994) (finding Kansas City, Missouri's attempt at desegregation has produced only modest gains in racial balance and test scores); Gary Orfield, *Still Separate, Still Unequal* (Harvard Project on School Desegregation 1994) (raising questions about racial integration and finding that large ethnic and racial disparities still exist in academic achievement); Gerald D. Suttles, *School Desegregation and the "National Community,"* in SCHOOL DESEGREGATION RESEARCH 58 (J. Prager et al. eds., 1986) (noting that various school districts in south are resegregating).

Moreover, the Supreme Court, in *Brown I*, recognized the importance of an integrated education to African-American children's overall development and potential success in society. *Brown I*, 347 U.S. at 493. Specifically, the Court noted:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id.

227. *Brown II*, 349 U.S. at 301. For a further discussion of the holding in *Brown II*, see *supra* notes 21-29 and accompanying text.

228. *Id.* at 300-01. For a further discussion of the *Brown II* Court's holding that federal district courts remained the most appropriate forum to oversee desegregation orders, see *supra* note 25 and accompanying text.

229. *See generally* Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985) (designing wide-ranging desegregation plan for KCMSD). For a further discussion of the original desegregation order in *Jenkins*, see *supra* notes 83-85 and accompanying text.

to de jure racial segregation, Judge Clark fashioned a desegregation plan designed to integrate the KCMSD's schools and to improve the quality of education for students in the KCMSD.[230] These goals remain unfulfilled and thus, the district court's remedial supervision of the KCMSD remains unfinished.[231] The majority's opinion in *Jenkins*, therefore, contradicts the original mandate of the *Brown* cases.[232]

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230. *Jenkins*, 639 F. Supp. at 22-56. For an in depth discussion and description of the district court's original desegregation remedy, see *supra* notes 83-89 and accompanying text. Judge Clark explicitly relied on *Brown II* when he explained the source of the court's power to fashion such a remedy. *Id.* at 23. Judge Clark held that:

> The principles that have guided this Court in implementing a desegregation plan for the KCMSD are clear. "In fashioning, and effectuating (desegregation) . . . decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

Id. (quoting *Brown II*, 349 U.S. at 300 (alteration in original)). Judge Clark continued that the goal of the desegregation decree was clear: "The goal is the elimination of all vestiges of state imposed segregation." *Id.*

Finally, the *Brown* decisions support the continuation of these programs because the district court has repeatedly found in subsequent orders that the effects of state-imposed segregation remain in the KCMSD. *See* Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. filed July 30, 1993) (finding that components of desegregation plan were unfulfilled); Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. filed June 30, 1993) (approving salary increases for teachers in KCMSD); Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. filed June 17, 1993) (extending desegregation plan and approving new long range magnet program); Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. filed Apr. 16, 1993) (finding that goals of desegregation plan were not satisfied and ordering extension of desegregation plan); Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. filed Apr. 23, 1990) (approving several adjustments to desegregation plan, but recognizing continued effects of state-imposed discrimination); Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. filed July 25, 1988) (approving request of KCMSD for additional magnet program support).

231. *See* Dennis Kelly, *Money Fails to Desegregate K.C.*, USA TODAY, Apr. 25, 1994, at 01D (discussing that percent of minority students in KCMSD climbed from 73.5 percent to 74.8 percent between 1986 and 1993, and elementary school made modest, though statistically significant gains in academic achievement); Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. filed Apr. 16, 1993) (finding that evidence supports finding of increased racial isolation in elementary schools and that there has been trend of improvement in academic achievement, but has not reached anywhere close to its maximum potential because KCMSD is still at or below national norms at many grade levels).

232. *See Brown II*, 349 U.S. 294, 300 (1955) (granting district courts practical flexibility to shape remedies); *Brown I*, 347 U.S. 483, 495 (1954) (recognizing intentional segregative acts as unconstitutional under Fourteenth Amendment). Taken together, the *Brown* cases established that racial discrimination in public schools represented an evil that required swift disestablishment. *See* Devins, *supra* note 20, at 14 (arguing that *Brown* cases both struck down state-imposed segregation and established remedial structure to eliminate "varied local school problems.").

Second, the majority's reasoning in *Jenkins* was unsound because it ignored the district court's original objectives.[233] The majority in *Jenkins* argued that *Swann v. Charlotte-Mecklenburg Board of Education* and *Milliken I* disclaimed the right to "any particular degree of racial balancing or mixing" in schools and further limited a district court's ability to fashion desegregation remedies.[234] Nevertheless, the majority failed to recognize *Swann*'s holding that *effectiveness* in eliminating vestiges of discrimination constitutes the standard when assessing whether a school district, or aspects of its operations, should be declared unitary.[235] The majority ignored this standard and did not even allege that the desegregation plan had remedied the system-wide *reduction* in student achievement, to the extent practicable.[236]

233. *See* Jenkins v. Missouri, 19 F.3d 393, 400 (8th Cir. 1994) (Beam, J., dissenting) (arguing that district court imbedded student achievement goal to test whether KCMSD has built high-quality education system). The district court, in 1985, found that segregation had caused an actual *reduction* in student achievement and had caused a disproportionate number of African-American students to achieve in the lower ranks. *Jenkins*, 639 F. Supp. at 24-25. Thus, for the state to receive a declaration of unitary status relating to the educational components of the desegregation remedy, it must show that achievement has increased to the level it would have been without the legacy of segregation, and that African-American student achievement has been specifically cured of the harm it suffered due to the State's policy of racial isolation. Brief for Appellee at 22, *Jenkins* 639 F. Supp. 19 (W.D. Mo. 1985) (Nos. 90-2238, 91-3636, 92-3194, 92-3200, 93-3274). For a further discussion of the original district court order in *Jenkins*, see *supra* notes 83-89 and accompanying text.

234. *Missouri v. Jenkins*, 115 S. Ct. 2038, 2048 (1995) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971)). For a further discussion of *Swann*, see *supra* notes 34-40 and accompanying text. For a further discussion of *Milliken I*, see *supra* notes 41-46 and accompanying text.

235. *See Swann*, 402 U.S. at 25 (holding that "a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations."). Indeed, Judge Clark fully recognized *Swann*'s limit on requiring a distinct racial balance within the KCMSD. *See id.* at 24 (holding that district courts may not require particular degree of racial balance or mixing). Rather, when Judge Clark fashioned the original desegregation plan, he did not require any goal for racial balance; instead, he implemented programs to attract majority students to the KCMSD and more specifically to *remedy the system wide reduction in student achievement. Jenkins*, 639 F. Supp. at 23-24.

236. *See Jenkins*, 115 S. Ct. at 2048-49. The Court viewed the appropriate inquiry to be "'whether the [constitutional violator] ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.'" *Id.* at 2049 (quoting Board of Educ. v. Dowell, 498 U.S. 237, 249-50 (1991)). Indeed, even the dissenting judge in the case leading to the Supreme Court's decision in *Jenkins* recognized the KCMSD's failure to satisfy this standard. *See Jenkins*, 19 F.3d at 401 (Beam, J., dissenting) (finding that "indeed, the district court was justified in finding that academic improvement in the seven years since the [desegregation] program had been less than dramatic."). Rather than recognize this result as justification for continuation of the desegregation plan, however, the majority in *Jenkins* argued that student achievement does not set the standard for achieving unitary status. *Jenkins*, 115 S. Ct. at 2049. This conviction effectively ignored the

Moreover, *Green v. County School Board of New Kent County* placed the burden of demonstrating these positive results on the constitutional violator.[237] The majority in *Jenkins* failed to demonstrate that the State carried this burden.[238] In *Green*, the Supreme Court firmly admonished school boards to come forward with effective desegregation remedies.[239] In particular, the Court described several factors involved when evaluating a school district's desegregation plan.[240] Thus, the Court established that school authorities must take affirmative measures to eliminate vestiges of

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fundamental goals of the original desegregation plan, which cited "reduced academic achievement" as the central effect of state-imposed segregation. *Jenkins*, 639 F. Supp. at 24.

237. 391 U.S. 430 (1968); *accord* Raney v. Board of Educ. 391 U.S. 443, 449 (1968) (release of jurisdiction merely upon showing that plan was adopted would "be inconsistent with the responsibility imposed on the district court by *Brown II*"). For a further discussion of *Green*, see *supra* notes 30-33 and accompanying text. In *Green*, the Supreme Court held that:

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation . . . . It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness . . . . Moreover, 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.

Green, 391 U.S. at 439 (emphasis added). Thus, *Green* illustrated that elimination of segregation's effects must be demonstrated before a district court should liberate a school district from judicial supervision. *Id.*

238. *Jenkins*, 115 S. Ct. at 2049-50. The State merely argued, on appeal to the Supreme Court, that the district court's orders exceeded constitutional limitations. *Id.* Justice Souter aptly noted this failure in his dissent, expressing the State's failure to even try to make the necessary showing in the litigation leading up to the disputed district court order. *Id.* at 2074 (Souter, J., dissenting); *see also Jenkins*, 19 F.3d at 400-02 (Beam, J., dissenting) (holding that specific level of education is not among rights afforded protection under Constitution). Nonetheless, the proposition that there exists no federal right to a particular level of educational quality remains irrelevant to *Jenkins* because the original desegregation order did not aim to vindicate such a right. Brief for Appellee at 3, Jenkins v. Missouri, 19 F.3d 393 (8th Cir. 1994) (Nos. 90-2238, 91-3636, 92-3194, 92-3200, 93-3274). For a further discussion of the original desegregation order, see *supra* notes 83-89.

239. *See Green*, 391 U.S. at 439 (holding that "burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*").

240. *Id.* at 435 (noting that complete racial identification of system of schools, extending to faculty, staff, transportation, extracurricular activities and facilities is indication that school system is not unitary); *see* Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (describing unitary system as one "within which no person is to be effectively excluded from any school because of race or color"); Brian K. Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 LA. L. REV. 789, 819 (1988) (explaining that racially identifiable schools, school placement and effect of school desegregation on housing patterns are three types of lingering effects relevant to Court's rulings on unitary status). For a further discussion of these factors, see *supra* note 61 and accompanying text.

state-imposed discrimination.[241] Accordingly, the *Jenkins* majority's failure to illustrate the KCMSD's success in eliminating the vestiges of segregation supports the conclusion that the KCMSD did not deserve a declaration of unitary status for its quality education programs.[242]

The majority in *Jenkins* also argued that the district court's ruling concerning the KCMSD lost the words "to the extent practicable."[243] The majority implied that the KCMSD's quality education programs may have achieved their maximum potential in the KCMSD.[244] In discounting the continued below-average student test scores, the majority blamed this result on demographic factors unrelated to the effects of legal segrega-

241. *See Green*, 391 U.S. at 437-38 (holding that "[s]chool boards . . . operating state-compelled dual systems . . . [are] charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"). Furthermore, subsequent cases illustrated that in a proceeding for partial unitary status the burden of proof is on the party attempting to show that a school district meets the requirements. *See* Freeman v. Pitts, 503 U.S. 467, 494 (1992) (holding that school district in violation bears burden of showing that any current racial imbalance is not traceable to prior violation).

242. *See Jenkins*, 19 F.3d at 402-03 (Beam, J., dissenting) (conceding that academic achievement was below national norms in KCMSD, but dismissing this factor as representative of vestiges of past discrimination). The Supreme Court in *Jenkins*, however, declared that the State did not seek a declaration of partial unitary status with respect to the quality education programs. *Jenkins*, 115 S. Ct. at 2055. In this regard, the State's desire concerning unitary status obviously changed in the period between the Eighth Circuit's ruling in April 1994 and arguments before the Supreme Court in January 1995.

243. Jenkins v. Missouri, 115 S. Ct. 2038, 2055 (1995). The majority argued that the district court's statement that the "KCMSD had not reached anywhere close to its 'maximum potential because the District is still at or below national norms at many grade levels'" did not represent the appropriate test in deciding whether a school district has achieved unitary status. *Id.*

244. *Id. See also Jenkins*, 19 F.3d at 403 (Beam, J., dissenting). The dissent in the Eight Circuit case recognized the district court's April 16, 1993 finding that the KCMSD has not reached anywhere close to its maximum potential in quality of education, but argued that the question implicates "'whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.'" *Id.* (quoting Board of Educ. v. Dowell, 498 U.S. 237, 249-50 (1991)). Thus, the dissenting judge seemed to imply that "extent practicable" involves a far lesser standard to meet than the "maximum potential" standard mentioned in the district court's order. Likewise, the Supreme Court in *Jenkins* implied that constitutional compliance may have been achieved in the KCMSD because the district had facilities and opportunities not available anywhere else in the country. *Jenkins*, 115 S. Ct. at 2056.

tion.[245] This analysis, which attempts to separate demographic factors from the vestiges of prior racial discrimination, remains questionable.[246]

Moreover, the majority did not present *any* evidence that the educational programs worked "to the extent practicable" to eradicate the reduced and inequitable student achievement results identified as vestiges of segregation in the original district court order.[247] Although the majority

245. *Jenkins*, 115 S. Ct. at 2056. Likewise, Judge Beam's dissenting opinion in the Eighth Circuit argued that continued below-average test scores resulted from demographic factors "beyond [the school system's] control." *See Jenkins*, 19 F.3d at 402-03 (Beam, J., dissenting). However, just as the Eighth Circuit dissent provided no evidence that supported this conclusion, neither did Justice Rehnquist in *Jenkins*. *Jenkins*, 115 S. Ct. at 2056; *Jenkins*, 19 F.3d at 402-03 (Beam, J., dissenting). Indeed, the Eighth Circuit dissent itself recognized that it cited material outside the record when referring to findings in an Omaha, Nebraska study that noted demographic factors as a cause of low achievement in minority students. *Jenkins*, 19 F.3d at 402-03.

246. *See* Freeman v. Pitts, 503 U.S. 467, 494-95 (1992) (holding that "[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts."). One commentator noted, however, that the Court in *Freeman* declined to consider whether the demographic shifts were inevitable or whether they reflected a vestige of the dual system. Stewart, *supra* note 71, at 229. Stewart further asserted that both sides of the desegregation debate in *Freeman* recognized that residential segregation, in particular, results from private and public decisions. *Id.*; *see also Freeman*, 503 U.S. at 503 (Scalia, J., concurring) (arguing racially imbalanced schools are product of public and private decisions); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 512 (1979) (Rehnquist, J., dissenting) (imbalance in residential housing patterns "result[s] from a melange of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments or a desire to reside near people of one's own race or ethnic background"). Stewart further articulated that the majority in *Freeman* failed to acknowledge the effects that prior de jure segregation in public schools can have on current residential patterns. Stewart, *supra* note 71, at 229. For instance,

> [a] school that, because of the racial makeup of its student population, its faculty, or its staff, is identifiable as a "black" school may influence white families not to settle in that district. And if an identifiably "black" school is one whose quality of education or facilities is demonstrably inferior to that of a "whiter" school, it may be unlikely to attract to that district families who can afford to live elsewhere.

Id. Finally, Stewart noted that historical inequalities in the education that African-American children receive relative to white students can have a significant effect on a community's demographic profile. *Id.* This effect results from African-Americans' decreased earning power, which in turn resulted from the unequal public education the state provided them as children. *Id.* Thus, demographic factors and school segregation are seemingly interdependent. *Id.* at 229-30.

247. *Jenkins*, 115 S. Ct. at 2055-56. Nonetheless, prior Supreme Court decisions distinctly require *success* in the educational components of a desegregation remedy before a school district can obtain a declaration of unitary status. *See Freeman*, 503 U.S. at 485 ("The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system."); *Id.* at 489 (stating that "the court's end purpose must be to remedy the violation"). These holdings coincide with the Court's long-stated requirement that "the [district] court should retain jurisdiction until it is

noted that the KCMSD offered more educational opportunity than any other school system in America, it failed to demonstrate whether these opportunities resulted in improved student achievement, beyond test scores.[248] This improvement represents the hallmark of a desegregation order's success or failure.[249]

Third, the majority's decision in *Jenkins* remains wholly inconsistent with the holdings in *Milliken I* and *Milliken II*.[250] *Milliken I* mandated that desegregation remedies may not extend beyond the district where the constitutional violation exists.[251] Three years later, in *Milliken II*, the Court endorsed a district court's discretion to fashion a remedial desegregation plan for a school district with vestiges of racial discrimination.[252] Thus, *Milliken I* and *Milliken II* authorized district courts to exercise broad discretion when designing remedial desegregation plans for school districts suffering from vestiges of state-imposed segregation.[253] Based on

clear that state-imposed segregation has been *completely removed*." Green v. New Kent County Sch. Bd., 391 U.S. 430, 439 (1968) (emphasis added). Although the majority in *Jenkins*, 19 F.3d at 396, did not explicitly express this view, its reference to its earlier panel decision supported this line of reasoning. *See* Jenkins v. Missouri, 11 F.3d 755, 764 (8th Cir. 1993) ("[T]o determine if KCMSD has achieved unitary status [under *Freeman*], we must consider the constitutional injury, the methods selected to remedy that injury, the goals of the remedy, and the success achieved by the remedy in eliminating the vestiges of the constitutional violations to the extent practicable.").

248. *Jenkins*, 115 S. Ct. at 2056.

249. *Freeman*, 503 U.S. at 490. For a further discussion of this success requirement, see *supra* note 162.

250. *See Milliken II*, 433 U.S. 267, 279-283 (1977) (upholding district court's ability to create remedial educational programs as part of school desegregation remedy); *Milliken I*, 418 U.S. 717, 746 (1974) (holding that desegregation remedies must be limited to district where constitutional violation actually occurred). For a further discussion of *Milliken I* and *Milliken II*, see *supra* notes 41-54 and accompanying text. The district court followed these limitations when it designed the original desegregation plan for the KCMSD. *See* Missouri v. Jenkins, 639 F. Supp. 19, 23-25 (W.D. Mo 1985) (recognizing that scope of constitutional violation limits power to use equitable powers). Indeed, this goal was the underpinning of the magnet school program. *Id.* at 53-54. Realizing that it could not implement an interdistrict remedy, the district court aimed to attract majority students to KCMSD's schools through the establishment of high quality education programs. *Id.* As one commentator noted, "[b]ecause the district court [in *Jenkins*] rejected an interdistrict remedy, the only chance at . . . true integration [was] . . . that . . . lavish new facilities and programs constructed by KCMSD . . . [would] entice a sufficient number of private and suburban school children to transfer into the District." Robert H. Freilich, *Separate But Unequaled: The Need for Interdistrict Relief Based on State Law*, 24 URB. LAW. 637, 647 (1992). For further discussion of the district court's original desegregation plan, see *supra* notes 83-89 and accompanying text.

251. *Milliken I*, 418 U.S. at 746. For a further discussion of *Milliken I*, see *supra* notes 41-46 and accompanying text.

252. *Milliken II*, 433 U.S. at 282. For a further discussion of *Milliken II*, see *supra* notes 47-54 and accompanying text.

253. *See Milliken I*, 418 U.S. at 746 (purpose of desegregation remedy is to restore victims of discriminatory conduct to position they would have occupied in absence of that conduct); *see also Milliken II*, 433 U.S. at 280 (quoting *Milliken I*, 418

these holdings, the majority in *Jenkins* correctly deferred to Judge Clark's discretionary ruling, which extended the programs beyond the 1992-93 school year.[254]

Moreover, the majority opinion in *Jenkins* opposes the doctrine articulated in *Freeman v. Pitts* and *Board of Education v. Dowell* that during the final phases of a desegregation case, the district court should address whether the school board has complied in good faith with the desegregation decree, and whether the plan eliminates the vestiges of past discrimination to the extent practicable. [255]

U.S. at 746) (same). For a further discussion of *Milliken I* and *Milliken II*, see *supra* notes 41-54 and accompanying text.

254. *See* Jenkins v. Missouri, 19 F.3d 393, 396 (8th Cir. 1994) (holding that *Milliken II* quality education components of district court's remedy remain in effect). In addition, the Eighth Circuit's panel decision of November 29, 1993, recognized that the continuation of the *Milliken II* programs corresponded with the district court's discretion and original desegregation goals. Jenkins v. Missouri, 11 F.3d 755, 760-61 (8th Cir. 1993). The Eighth Circuit quoted the remarks of Judge Clark at a hearing on the 1992-93 budget:

> The [c]ourt's goal was to integrate the Kansas City, Missouri, School District . . . and all these other matters were elements to be used to try to integrate the [KCMSD] . . . . That's the goal. And a high standard of quality education. The magnet schools, the summer school program and all these programs are tied to that goal . . . . But when [the State] says no particular goal has been set, I think [it is] in error.

Id. at 761. The Eight Circuit affirmed the accuracy of this statement holding that Judge Clark's continuation of the desegregation plan coincided with the goal of elimination of vestiges of past discrimination, which had not been achieved. *Id.*

255. *See* Freeman v. Pitts, 503 U.S. 467, 491 (1992) (holding that district court has discretion to withdraw its supervision of desegregation case incrementally, that is, on fewer than all components of the remedy, where that approach corresponds with "the purposes and objectives of [the court's] equitable power"). For a further discussion of *Freeman*, see *supra* notes 68-75 and accompanying text.

The dissent used highly conclusory evidence in *Jenkins* regarding whether the district court needed to retain jurisdiction on the educational components in order to achieve the goals of the desegregation plan. *See Jenkins*, 19 F.3d at 402 n.2 (contending that quality of education programs met goals of desegregation plan). Indeed, the dissent apparently adopted the reasoning of the State's witness, who concluded that the educational programs involved "distinct and separate components" and explained that he did not believe that the educational programs tied to the goal of achieving desegregation. Brief for Appellee at 12, Jenkins v. Missouri, 19 F.3d 393 (8th Cir. 1994) (Nos. 90-2238, 91-3636, 92-3194, 92-3200, 93-3274). These remarks ignored the fundamental purpose of the district court's original desegregation plan. *See* Jenkins v. Missouri, 639 F. Supp. 19, 23 (W.D. Mo. 1985) (underscoring interdependence of school desegregation components). For a further discussion of the original desegregation remedy, see *supra* notes 83-89 accompanying text.

The Supreme Court in *Freeman* also reiterated the requirement that the remedy must *work* to eliminate the vestiges of segregation before it is ended. *Freeman*, 503 U.S. at 485 (emphasis added). The Supreme Court's decisions in *Dowell* and *Freeman* also correspond with the Court's long-held requirement, stated in *Green v. New Kent County School Board*, that "the [district] court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." 391 U.S. 430, 439 (1968); *accord* Raney v. Board of Educ., 391 U.S. 443, 449 (1968) (release of jurisdiction upon showing merely that plan was adopted would "be in-

Upon reversing the Eighth Circuit, however, Justice Rehnquist focused almost exclusively on this factor and concluded that the district court's remedy embodied an unconstitutional "interdistrict" remedy.[256] In particular, the majority viewed the magnet school program as an interdistrict remedy that lacked a proper basis on an interdistrict violation.[257]

Despite Justice Rehnquist's lengthy reasoning on this matter, Justice Souter properly dispensed with the majority's reasoning in his dissent.[258] First, while the majority in *Jenkins* repeatedly described the magnet school program as an interdistrict remedy exceeding the boundaries of the KCMSD, the program did not originally aim to draw back Caucasian children who moved to other school districts; rather, the program aimed to draw back children attending private schools within the geographical confines of the KCMSD, whose population remained primarily Caucasian.[259]

Second, Justice Souter properly concluded that prior de jure segregation and later desegregation do not represent separate causes of white flight.[260] Accordingly, if both segregation and early desegregative efforts caused white flight to private and suburban schools, then a desegregation remedy aimed at luring those students back to the KCMSD is proper. The remedy, however, cannot impinge on unitary school districts' ability to function.[261] This holding coincides with the Court's ruling in *Milliken I* and *Milliken II*.[262]

Finally, the *Jenkins* majority mistakenly rejected student test scores as a factor to consider in assessing unitary status.[263] The Supreme Court in

consistent with responsibility imposed on district courts in *Brown II*"). Thus, *Freeman* stands for the position that the burden of proof, in a proceeding for partial unitary status, is on the party attempting to show that a school district meets the requirements set forth in the Court's opinions. *Freeman*, 503 U.S. at 494.

256. Missouri v. Jenkins, 115 S. Ct. 2038, 2049-51 (1995). The majority invoked this discussion through its adjudication of the salary order issue because the State argued that the salary orders served an interdistrict goal. *Id.* at 2049.

257. *Id.* at 2053-54. *See also id.* at 2056-61 (O'Connor, J., concurring) (stating that "desegregative attractiveness goal" transgressed boundaries of appropriate desegregation order).

258. *Id.* at 2083-84 (Souter, J., dissenting).

259. *Id.* at 2083 n.4 (Souter, J., dissenting) (citing Jenkins v. Missouri, 855 F.2d 1285, 1302-03 (8th Cir. 1988). Evidently, therefore, a substantial justification for the magnet program involved the attraction of students *within* the KCMSD, thus exposing the majority's opinion to substantial criticism. *Id.* (Souter, J., dissenting) (emphasis added).

260. *Id.* at 2086 (Souter, J., dissenting).

261. *Id.* at 2087-88 (Souter, J., dissenting).

262. *See Milliken I*, 418 U.S. 717, 737-38 (1994) (stating district court may subject proven constitutional wrongdoer to remedy with intended effects outside district of violation when such remedy needs to redress harms flowing from constitutional violation).

263. *Jenkins*, 115 S. Ct. at 2055 (stating that "the District Court should sharply limit, if not dispense with its reliance on this factor [test scores]"). *See also* Jenkins v. Missouri, 19 F.3d 393, 404 (8th Cir. 1994) (Beam, J., dissenting) (stating that district court relied solely on standardized test results to deny State's request for

Freeman noted that the district court compared African-American and Caucasian students' standardized test scores in reaching its unappealed finding of a failure to achieve unitary status.[264] Indeed, several other district courts have applied the same standard when evaluating the achievements of a remedial desegregation plan.[265]

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partial unitary status; "a measure . . . not required or permitted by the Constitution"). This argument, however, ignores the State's burden of showing that the educational programs worked as fully as practicable to eradicate the reduced and inequitable student achievement results recognized as vestiges of segregation. *See* Jenkins v. Missouri, 639 F. Supp. 19, 24 (W.D. Mo. 1985) ("Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD."). In addition, the State's one witness during the hearing on the educational programs for 1992-93, Dr. Terrance Stewart, testified that the various educational components of the desegregation remedy enhanced the level of educational opportunities available to students in the KCMSD, and that the resources provided equalled or exceeded those available in area Missouri suburbs. Brief for Appellee at 9, Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985) (Nos. 90-2238, 91-3636, 92-3194, 92-3200, 93-3274). However, Dr. Stewart admitted that he did not analyze whether the components resulted in improved student achievement. *Id.* Indeed, one commentator noted that between 1986 and 1993, only modest gains occurred in academic achievement. Morantz, *supra* note 226, at 1.

Furthermore, several commentators have noted the relevance of improved academic test scores to desegregation efforts. *See, e.g.*, Gwendolyn S. Andrey, Note, *The Missing Half of* Missouri v. Jenkins: *Determining the Scope of a Judicial Desegregation Remedy*, 1991 U. CHI. LEGAL F. 253, 258 (1991) (noting that "researchers have found that black students' achievement level has increased after desegregation"); Derrick A. Bell, Jr. *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (stating that public schools should focus on educational achievement of African-American children rather than on school desegregation); Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791, 800-01 (1993) (explaining that district court in *Freeman v. Pitts* not only examined resource allocation, but also examined measures of student academic achievement based upon African-Americans' performance on Iowa Tests of Basic Skills and Scholastic Aptitude Test); Brown, *supra* note 3, at 1142 (arguing that "[i]f the harm resulting from de jure segregation of public schools is viewed as lower educational achievement by African-American school children than by their white counterparts, then in order to determine unitary status, courts should examine objective educational achievement criteria"); Robert Crain, *The Research on the Effects of School Desegregation: Real Estate Prices, College Degrees, and Miscellaneous Other Things*, *in* BROWN PLUS THIRTY: PERSPECTIVES ON DESEGREGATION 42 (Lamar P. Miller, ed., 1986) (noting that many factors come into play when assessing desegregation's effect on African-Americans' academic achievement); Hayman & Levit, *supra* note 18, at 705 (deciphering *Brown I* to promise that "stigma" of African-American inferiority would dissipate "because African-American children would obtain greater facility with the dominant Euro-American criteria of achievement."); Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1117-26 (1984) (contending that for school systems in which it is not possible to obtain integration, court decrees should be directed toward improving educational effectiveness of schools that minority children attend).

264. Freeman v. Pitts, 503 U.S. 467, 483 (1992).

265. *See, e.g.*, School Bd. of Richmond v. Bailes, 829 F.2d 1308, 1312 (4th Cir. 1987) (noting that standardized test scores above the 50th percentile on national scale and only slightly lower than statewide average reflect "a potent indicator that

V. IMPACT

The Supreme Court's decision in *Jenkins* marks a landmark turn in the Court's progeny of desegregation cases. At the same time, however, the Court's decision provides little guidance to federal courts currently supervising desegregation orders. While previous Supreme Court precedent exhibited an allowance for district courts' exercise of equitable discretion in fashioning desegregation orders, the Court's latest decision signals a sharp blow to such courts' ability to oversee imposed desegregation plans. Moreover, the *Jenkins* Court failed to clarify the guidelines for courts to use in assessing unitary status.

In the months since *Jenkins*, courts have embraced the Supreme Court's holding to sharply curtail broad desegregation remedies. Essentially, federal trial courts adopt the *Jenkins* Court's pronouncements that federal supervision of local school systems should be temporary and that constitutional remedies must directly relate to the constitutional violation.[266] These goals, however, ignore what should be the primary goal of any desegregation remedy: the advancement of high quality education for all students—especially where past segregation obstructed the achievement of such an education. Moreover, while the Supreme Court in *Jenkins* separated improvement in student achievement from quality of education, such achievement should remain an important factor in assessing a deseg-

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efforts to eliminate the effects of segregation have been successful"); United States v. City of Yonkers, 833 F. Supp. 214, 220 (S.D.N.Y. 1993) (holding that use of standardized test scores in measuring academic achievement, itself factored in determining whether equal educational opportunity is achieved, is proper); Coalition to Save Our Children v. State Bd. of Educ., 757 F. Supp. 328, 332-33 (D. Del. 1991) (finding that technical compliance with desegregation plan did not eradicate vestiges of segregation, where significant differences between minority and majority student achievement were still evident in student achievement tests, placement of students in special education, absenteeism and suspensions).

266. *See* Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784, 794 (D. Del. 1995) ("'federal supervision of local systems was intended as a temporary measure to remedy past discrimination.'" (quoting *Jenkins*, 115 S. Ct. at 2049)); Knight v. State of Ala., 900 F. Supp. 272, 348 (N.D. Ala. 1995) (any court imposed remedy must "'directly address and relate to the constitutional violation itself'" (quoting *Jenkins*, 115 S. Ct. at 2049)).

In *Coalition*, the district court granted the state board of education's motion for a declaration of unitary status where it found that the defendants complied in good faith with the goals of the original desegregation order. *Coalition*, 901 F. Supp. at 823. The court noted, however, that certain aspects of the original desegregation remedy changed since its original implementation in 1978. *Id.* Accordingly, while the court addressed the high degree of achieved racial balance in the school district, the court's decision lacked a significant analysis of the quality of education. Indeed the court noted that "the focus of the relief has shifted from the desegregation process itself to the fact of a multicultural student body with varying education problems." *Id.* Moreover, the court admitted in a footnote that "[o]ne of the fundamental issues implicitly posed by this litigation is whether the time has come to return the focus of the public school system to matters of quality education rather than social policy." *Id.* at 823 n.52.

regation remedy's success. The holding in *Jenkins* casts doubt on courts' ability to effectively refer to this factor in their evaluations.[267]

Prior to *Jenkins*, desegregation precedent mandated that courts not adhere to strict guidelines when evaluating a school district's desegregation efforts. Rather, federal courts adapted factors suited to the unique constitutional violation under supervision. This analysis ensured that differing circumstances would receive the personalized attention they required.

In finding that the KCMSD desegregation plan's focus on "desegregative attractiveness" via magnet schools constituted an improper interdistrict remedy, the Supreme Court turned a new page in the desegregation chronicles. Although the holdings in *Milliken I* and *Milliken II* limited the ability of courts to impose interdistrict remedies, courts now face sharp limitations in applying desegregation plans that may have any substantial *effects* outside the formerly violative school district. Without question, this holding severely limits courts' ability to oversee desegregation plans where "white flight" has precluded substantial progress in desegregation.

Finally, without the Supreme Court's establishment of a set of criteria for determining unitariness, lower federal courts must continue to exercise broad discretion in desegregation cases. While this state of affairs appropriately allows federal district courts to tailor remedies to the diverse needs of school districts, the fulfillment of the promise of an equal education for the nation's children will be circumscribed until courts can use such factors to achieve established desegregative goals.

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267. *See* Keyes v. Congress of Hispanic Educators, 902 F. Supp. 1274, 1282 (D. Colo. 1995) ("The Supreme Court's opinion in . . . *Jenkins* . . . defeats the plaintiffs' call for compelling additional action to investigate and redress racial disparities in student achievements and participation in special programs for gifted and talented pupils.").