Loyola University Chicago Law Journal

Volume 27
Issue 3 *Spring 1996*

Article 8

1996

# *Missouri v. Jenkins*: The Beginning of the End for Desegregation

Chelsey Parkman

# *Missouri v. Jenkins*: The Beginning of the End for Desegregation

## I. INTRODUCTION

Before *Brown v. Board of Education* ("*Brown I*"),[1] schools deprived black children of equal educational opportunities. In general, the educational system consisted of two school systems: one for whites and one for non-whites.[2] Although the United States Supreme Court, in *Plessy v. Ferguson*,[3] required that separate facilities be equal, under the separate educational systems, blacks received an inferior education.[4] In some states, black schools received only thirty percent of the per student funding given to white schools.[5] Moreover, white institutions were issued higher quality books and materials than those issued in black institutions.[6] Black schools also received substandard instruction and supervision.[7]

Changing the quality of education in black schools to equal the quality of education in white schools, however, would not have adequately addressed the problem of inferiority in minority schools.[8] In *Brown I*, the Supreme Court recognized the extreme importance of education.[9] The Court's decision reached beyond the tangible differences between black and white schools. The Court could not rely on tangible differences because, under the reasoning of *Plessy*, such differences no longer existed.[10] Instead, the Court recognized that separate educational facilities, even if equal, generate feelings of inferiority that may affect the "hearts and minds [of blacks] in a way unlikely ever

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

2. *See infra* notes 47-54 and accompanying text.

3. 163 U.S. 537, 544-48 (1896).

4. *See infra* notes 50, 53, and accompanying text.

5. *See infra* part II.A.

6. *See infra* note 53 and accompanying text.

7. *See infra* note 53 and accompanying text.

8. *Brown I*, 347 U.S. at 493-94 (noting that there are some "'qualities which are incapable of objective measurement but which make for greatness'") (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)); *see infra* notes 63-65 and accompanying text.

9. *See infra* notes 63-64 and accompanying text (explaining that the *Brown I* Court looked at the effect of segregation when justifying school integration).

10. *Brown I*, 347 U.S. at 492-94 (looking beyond the tangible differences to discern the actual effect of segregation on children).

to be undone."[11] The Court found that segregated educational facilities were inherently unequal.[12]

After the *Brown I* decision, many blacks challenged the constitutionality of segregated school systems.[13] In the more than forty years since the *Brown I* decision, school authorities and district courts have been implementing school desegregation plans.[14] Once the courts found a constitutional violation, school authorities initiated desegregation plans.[15] If found inadequate, the district courts exercised their discretion in implementing their own desegregation orders and decrees.[16]

In most instances, school authorities failed to implement effective desegregation plans.[17] Consequently, district courts often used their broad discretion to implement desegregation measures.[18] Because so many district courts became involved in desegregation matters, today it

---

11. *Id.* at 494.

12. *Id.* at 495.

13. *See, e.g., infra* part II.D-E.

14. *See, e.g., infra* part II.D-E. Forty years after *Brown I* mandated desegregation, children in the inner city continued to attend single-race schools. Deborah E. Beck, Note, Jenkins v. Missouri: *School Choice as a Method for Desegregation an Inner-City School District*, 81 CAL. L. REV. 1029, 1029-30 (1993) (analyzing Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985) (holding that segregation caused a reduction in student achievement), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987)).

15. The Supreme Court instructed the school districts to make a prompt and reasonable start toward desegregating schools. Brown v. Board of Educ., 349 U.S. 294, 300 (1955) [hereinafter *Brown II*]. School authorities have the primary responsibility for assessing and solving the problem of segregation. *Id.* at 299. *See also* ALBERT P. BLAUSTEIN & CLARENCE C. FERGUSON, JR., DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 172 (2d ed. 1962) (analyzing desegregation cases). The *Brown II* Court feared interfering with the domain of local authorities. Beck, *supra* note 14, at 1038. Therefore, the Court issued only guidelines to lower courts so local authorities could retain discretion in fashioning appropriate remedies. *Id.*

16. The Court gave district courts the power to enter any decrees that would be most effective and just. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 164. The district courts had the task of fashioning remedies to cure the ills of segregation. J. Skelly Wright, *De Facto School Desegregation: An Examination of the Legal and Constitutional Questions Presented, in* DEFACTO SEGREGATION AND CIVIL RIGHTS: STRUGGLE FOR LEGAL AND SOCIAL EQUALITY 24 (Oliver Schroeder, Jr. & David T. Smith eds., 1965) [hereinafter DEFACTO SEGREGATION].

17. Daniel J. McMullen & Irene H. McMullen, *Stubborn Facts of History—The Vestiges of Past Discrimination in School Desegregation Cases*, 44 CASE W. RES. L. REV. 75, 76 (1993) ("It is difficult to determine precisely how many school districts across the country remain involved in litigation over their constitutional duty to desegregate previously de jure segregated public schools, but they number, conservatively, in the hundreds.").

18. *See infra* notes 101-02 and accompanying text.

is difficult to discern how many school districts still remain under the authority of the district courts.[19]

The Supreme Court's recent decision in *Missouri v. Jenkins*[20] makes it clear that the district courts must now begin to relinquish their authority to school officials.[21] In *Jenkins*, the Supreme Court limited the power of the district courts to rectify problems caused by school segregation.[22] Thus, the Court's decision effectively overrules long-standing precedent allowing district courts broad discretion in fashioning desegregation remedies.[23]

This Note first reviews the Civil Rights Act,[24] focusing on the Act's impact on school segregation.[25] This Note then examines the history of school desegregation cases.[26] Next, this Note discusses the facts and opinions of *Jenkins*.[27] Then this Note critically analyzes the *Jenkins* decision and the new constitutional limits it places on district courts in light of the Supreme Court's past decisions.[28] Finally, this Note addresses the impact of the Supreme Court's decision in *Jenkins*,[29] and concludes that the *Jenkins* decision, by resurrecting the rationales from *Plessy v. Ferguson*, will significantly limit the federal district courts' power to eliminate the effects of segregation.[30]

19. *See supra* note 17.

20. 115 S. Ct. 2038 (1995).

21. *See infra* part III.B.

22. *Jenkins*, 115 S. Ct. at 2054.

23. *See id.* at 2088 (Souter, J., dissenting) (stating that, under the reasoning of Hills v. Gautreaux, 425 U.S. 284, 296 (1976), a district court "may indeed subject a governmental perpetrator of segregative practices to an order of relief with intended consequences beyond the perpetrator's own subdivision . . . so long as the decree does not bind the authorities of the other government units that are free of violation and segregative effects"). *See infra* notes 110-11 and accompanying text for a discussion of the *Gautreaux* Court's holding.

24. Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-2000 (1994)).

25. *See infra* part II.A.

26. *See infra* part II.B-E.

27. *See infra* part III.

28. *See infra* part IV.

29. *See infra* part V.

30. *See infra* part V.B.

## II. BACKGROUND

### A. *Federal Protections: The Civil Rights Act and the Fourteenth Amendment*

After the Civil War, many white citizens refused to recognize blacks as free citizens. In fact, in many states, blacks had no right to purchase land or participate in certain occupations.[31] Hence, blacks did not enjoy the same rights as whites. The Civil Rights Act of 1866 guaranteed to citizens of every race the same rights enjoyed by white citizens.[32] The Civil Rights Act marked the beginning of the promise of equal rights for blacks.[33] The Act, however, did not forbid all forms of racial discrimination.[34] Rather, the Act contained a list of rights guaranteed to former slaves that states could not take away.[35] The Act countered "Black Codes"[36] adopted by the Southern states

31. In some states, blacks had no right to purchase land on which they lived and farmed. Slaughter House Cases, 83 U.S. 36, 70 (1872). Moreover, many blacks were excluded from certain occupations and were not permitted to testify in a court of law in cases where white men were parties. *Id.*

32. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-2000 (1994)). The Act states:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

*Id. See also* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 955 (1995) (analyzing how the Civil Rights Act of 1866 helped frame the Fourteenth Amendment).

33. McConnell, *supra* note 32, at 957-58.

34. *Id.* at 958.

35. *Id.* (stating that although the Act exclusively required equality with respect to certain specified rights, these specified rights did not include political rights).

36. Black Codes were "laws [that] saddled Negroes with 'onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value.'" Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426 (1968) (quoting *Slaughter House Cases*, 83 U.S. at 70). Black Codes imposed special controls over blacks. John H. Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1141 (1990). In some states, blacks could not appear in the town as anything other than menial servants. *Slaughter House Cases*, 83 U.S. at 70.

which prohibited former slaves from owning land or holding certain jobs.[37]

Although never challenged in court, original supporters of the 1866 Act questioned its constitutionality and sought to pass a constitutional amendment to alleviate their fears.[38] The Fourteenth Amendment[39] cured what the supporters perceived to be constitutional problems with the Act by providing a firm constitutional basis for the Civil Rights Acts of 1866.[40] The Fourteenth Amendment, however, surpassed the boundaries of the Act, encompassing a broader range of rights.[41]

---

37. Congress enacted the 1866 Act to "confer citizenship, to ensure the elimination of overt discrimination through acts of slavery, to render void state discriminatory laws, especially the Black Codes, and, most importantly, to eradicate the badges of slavery." Cynthia A. Leiferman, Comment, *Private Clubs: A Sanctuary for Discrimination?*, 40 BAYLOR L. REV. 71, 89-90 (1988). The elimination of discriminatory laws, however, was not the sole purpose for the enactment of the Act. Franklin, *supra* note 36, at 1141. The Act focused on the white private landowner violations of the fundamental rights of blacks. *Id.* When the Act was introduced to Congress, these fundamental rights were not specifically defined. *Id.* Representative Wilson, however, the introducer of the bill, declared that "[w]hatever these great fundamental rights are, we must be invested with power to legislate for their protection or our Constitution fails in the first and most important office of government." *Id.* at 1142 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. James F. Wilson)).

38. McConnell, *supra* note 32, at 958 ("From its inception, however, the 1866 Act was plagued with doubts as to its constitutionality."). Congressmen and scholars challenged the Civil Rights Act of 1866 because of its vagueness. Frederick M. Lawrence, *Civil Rights And Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2131 (1993). The Act lacked precision in terms such as "rights, privileges, and immunities." *Id.* Moreover, scholars felt that the vagueness of the 1866 Act would flood the courts with litigation. *Id.* In 1870, supporters of the Civil Rights Act of 1866 relied on the powers of the Fourteenth Amendment to re-enact the Act because of the constitutional criticism leveled against it. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 87.

39. U.S. CONST. amend. XIV, § 1. Section 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.* The last lines of the first section of the Fourteenth Amendment set out the Equal Protection Clause. Specifically, the Equal Protection Clause states "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* "The purpose of this provision was to secure to non-white citizens the same laws for the protection of property and personal security as the state had enacted for white citizens, since without such protection none of the civil rights of non-white citizens would have been of much value." HERMINE H. MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT: JUDICIAL EROSION OF THE CONSTITUTION THROUGH THE MISUSE OF THE FOURTEENTH AMENDMENT 150-51 (1977).

40. McConnell, *supra* note 32, at 960.

41. *Id.* at 960-61. One scholar has noted:

The Fourteenth Amendment sought to secure absolute equality among blacks and whites before the law.[42] Upon initial interpretation, however, the Supreme Court severely limited the scope of the Fourteenth Amendment, finding that it did not guarantee blacks the right to use the same facilities as whites.[43] In 1896, the Supreme Court held, in *Plessy v. Ferguson*,[44] that maintaining separate facilities for different races is not a *per se* violation of the Equal Protection Clause of the Fourteenth Amendment.[45] Under this "separate but equal" doctrine,

---

> [T]he Fourteenth Amendment did not enumerate a list of protected rights, as did the 1866 Act. Rather, it provided that '[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'. If we accept [the] equation of 'civil rights and immunities' to the phrase 'privileges or immunities,' the Amendment contains a provision identical to the clause of the 1866 bill that was dropped on account of being too broad.

*Id.* at 961 (quoting U.S. CONST. amend. XIV, § 1).

42. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 96. In interpreting the Fourteenth Amendment, however, the Supreme Court in *Plessy* stated that the Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

43. *Plessy*, 163 U.S. at 550-51. At the time of ratification, most states did not interpret the Fourteenth Amendment as a prohibition on segregation. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 65. Segregated schools existed before and after the ratification of the Amendment. *See supra* note 14. Five states did outlaw segregated schools upon the ratification of the Amendment. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 64. Some never had segregated schools, while others abolished segregation long before the ratification of the Fourteenth Amendment. *Id.* The states' maintenance of non-segregated schools was unrelated to the Fourteenth Amendment. *Id.* In adopting the Fourteenth Amendment, Congress may not have intended to outlaw segregation in the public school system. *Id.* at 65.

In 1865, however, Andrew Jackson Rogers, a Democrat from New Jersey, recognized that the Fourteenth Amendment would give Congress the power to compel black and white children to attend the same school, and objected to the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 59.

44. 163 U.S. 537 (1896). In *Plessy*, the Supreme Court held that requiring blacks and whites to ride in separate rail cars on the train did not violate the Fourteenth Amendment's Equal Protection Clause. *Id.* at 548-49.

45. *Id.* at 544-48. The Court adopted the reasoning of Chief Justice Shaw, a Massachusetts judge, who explained that:

> "[A]ll persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

*Id.* at 544 (quoting Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849) (holding

the *Plessy* Court reasoned that states could satisfy the Clause by providing substantially equal facilities, even though those facilities may be separate.[46]

The *Plessy* Court's "separate but equal" doctrine allowed white schools to deny admission to blacks.[47] As a result, two separate school systems existed, one for white students and one for non-white students.[48] Blacks did not receive an equal education under this system.[49] For instance, school boards spent a fraction of the money used to educate white students on schools educating black students.[50] Additionally, in some areas, black students had to walk for miles to reach rickety school houses, while white students enjoyed the luxury of school bus transportation.[51] Moreover, with few resources, black

---

that the law does not require the state to allow blacks to attend school with whites)). The *Plessy* Court "classified the right to ride an unsegregated train and attend an unsegregated school as inherently *social*." BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 99. Therefore, under the reasoning of *Plessy*, "'[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.'" *Id.* (quoting *Plessy*, 163 U.S. at 547-49).

46. *Plessy*, 163 U.S. at 547-49.

47. *Id.* at 544 (citing *Roberts*, 59 Mass. at 198, where the Supreme Judicial Court of Massachusetts held that a school committee has the power to designate separate schools for black children and to prohibit their attendance in white schools). "Though fair on its face, the separate-but-equal doctrine had been implemented, in the fifty-eight years since the Court legitimized it, in a manner that blatantly deprived Negroes of equal educational opportunities." RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 712 (1994).

48. Deborah Mayo-Jeffries, *Discrimination In the Education Process Based On Race*, 21 N.C. CENT. L.J. 21, 21 (1995). One commentator has noted that "Ohio and the Old Northwest denied Negro children access to white public schools and forbade Negro migration, intermarriage, suffrage, and black jurors." Harvey Wish, *A Historian Looks at School Segregation, in* DEFACTO SEGREGATION, *supra* note 16, at 81, 81.

49. Mayo-Jeffries, *supra* note 48, at 21.

50. *Id.* For example, in Mississippi, schools attended by only black students received 30% of the funding given to white schools. Mayo-Jeffries, *supra* note 48, at 21. Also, in 1951, Topeka, Kansas had 4 elementary schools for blacks, but it had 18 elementary schools for whites. KLUGER, *supra* note 47, at 375. One-hundred thousand people resided within the city limits; 7.5% of those citizens were black. *Id.* at 372. Moreover, in Kansas, no restaurants served blacks and only one colored motel existed. *Id.* at 375. Blacks were forced to retreat into their own world. *Id.* Commentators have noted that "[i]n 1912, per capita expenditure for Negro schools was $1.71, as compared to the figure of $15 for all schools." BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 103. Scholars did not consider such treatment as evidence of inequality because the Supreme Court had previously held that it was not feasible to demand identical school facilities because absolute duplication would be impossible. *Id. See also* Cummings v. Board of Educ. 175 U.S. 528, 542 (1899) (finding that school authorities possessed the power to allocate school funds the way they deem most appropriate even if such allocation denies black children of certain benefits). The doctrine of separate but equal meant only substantial equality. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 100-01.

51. Mayo-Jeffries, *supra* note 48, at 21. Black parents had to petition for school bus

schools were able to provide students with only rudimentary training.[52] In contrast, white schools had greater resources, resulting in a better education for white students.[53] In some states, the only funds allocated for black schools consisted of those allocated for teachers' salaries.[54]

*Plessy* did not adequately address the problems encountered by blacks.[55] For example, even though the *Plessy* decision required separate black educational facilities to be equal, it did not address the problem of distant facilities.[56] Therefore, even if black schools had been otherwise equal to white schools, the black schools were often far from the homes of black children.[57] School districts did not provide black children with adequate transportation to get to these distant and inferior facilities.[58]

### *B. The Turning Point:* Brown I

To counteract such unequal conditions, blacks and some concerned whites set out on a journey to "dismantle the dual public school system."[59] In 1951, one black man in particular decided that instead of lying idle while his daughter attended a segregated school, he would challenge in court the constitutionality of the dual educational system in his county.[60] His efforts resulted in the landmark decision, *Brown I*,[61]

---

transportation for their children. *Id.*; *see* KLUGER, *supra* note 47, at 13-15.

52. Mayo-Jeffries, *supra* note 48, at 21.

53. *Id.* In most instances, black children walked by white schools on their way to distant and inferior segregated black schools. Wish, *supra* note 48, at 86. Black children crowded "in improvised day schools, night schools, and overworked Sunday schools, convinced that reading and writing were evidence of a real free status." *Id.* Moreover, blacks attended physically inferior schools compared to those of whites. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 105-06. In addition, the quality of instruction, school supervision, and the content of the curricula was of substandard quality compared to that of white schools. *Id.* The general view in the South was that education made blacks unfit for the only work they could do successfully, like menial tasks and plantation labor. Wish, *supra* note 48, at 86.

54. Mayo-Jeffries, *supra* note 48, at 21. Moreover, black teachers received 30% less pay than white teachers. *Id.* at 22.

55. *See supra* notes 51, 53, and accompanying text.

56. *See supra* notes 51, 53, and accompanying text.

57. *See supra* notes 51, 53, and accompanying text.

58. *See supra* notes 51, 53, and accompanying text.

59. Mayo-Jeffries, *supra* note 48, at 22.

60. In 1951, Oliver Brown attempted to enroll his daughter in the Sumner school located five blocks from his home in Topeka, Kansas. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 40. Sumner denied his request because the school allowed only white children to attend. *Id.* Mr. Brown's eight-year-old daughter had to walk seven blocks to a bus stop to attend a black school some 20 miles away from her house. *Id.* Thus, Mr. Brown sued the Topeka Board of Education for violating his daughter's Fourteenth

where the Supreme Court ruled that separate educational facilities in the public school system could no longer be considered equal.[62] In *Brown I*, the Court reasoned that segregation of children in public schools solely on the basis of race deprived minority children of equal educational opportunities, even when physical facilities and other tangible factors might be equal.[63] The Court further reasoned that separate facilities generated a sense of inferiority among black students.[64]

---

Amendment right to equal protection. John E. Canady, Jr., Comment, *Overcoming Original Sin: The Redemption of the Desegregated School System*, 27 HOUS. L. REV. 557, 558 (1990). Mr. Brown "was joined by a dozen more colored parents, rallied by the local branch of the NAACP and represented by lawyers from the national organization's main office in New York." KLUGER, *supra* note 47, at 372. Mr. Brown, like other blacks, no longer wanted to be considered a second class citizen, but desired to be considered as whole as white citizens. *Id.* at 395.

61. 347 U.S. 483 (1954). *Brown I* consisted of four cases in which the plaintiffs fought to enjoin the enforcement of state provisions permitting schools to maintain segregation. *Id.* at 486 n.1. *See* Briggs v. Elliot, 103 F. Supp. 920, 922 (E.D.S.C. 1952) (involving black children who brought an action to prohibit a provision in Carendon County requiring separate public school for blacks and whites), *rev'd sub nom. Brown II*, 349 U.S. at 294 (holding that plaintiffs were only entitled to a facility equal to whites); Davis v. County School Bd., 103 F. Supp. 337, 340-41 (E.D. Va. 1952) (involving black high school students who brought an action to forbid Virginia from enforcing a state constitutional provision and a statutory provision requiring segregation of blacks and whites in public schools), *rev'd sub nom. Brown II*, 349 U.S. at 294 (holding that separate school systems were constitutional but requiring black facilities to be equal to whites); Gebhart v. Belton, 87 A.2d 862, 871 (Del. Ch. 1952) (involving black elementary and high school students in New Castle County who brought an action seeking to prohibit enforcement of the Delaware state constitutional provisions that required segregation of blacks and whites in public schools), *aff'd sub nom. Brown II*, 349 U.S. at 294 (ordering the state to equalize black and white schools and allowing blacks admission to a white school until the black school was equalized to the white schools).

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

63. *Id.* at 493. The Court's decision did not merely turn on tangible attributes, but looked to the effect segregation in public schools had on black children. *Id.* at 492. The Court reasoned that because education is the most important function of the state and local government, it must be made available to all on equal terms. *Id.* at 493.

64. *Id.* at 494. The Court relied on the finding in the Kansas case that segregation of white and black children in public schools had a detrimental effect upon black children. *Id.* When social scientists testified in the four state cases consolidated in *Brown I*, they, as experts, testified to the detrimental effect segregation has on black children. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 131. The *Brown I* Court simply adopted the findings of the lower courts that segregation had a detrimental effect on blacks. *Id.* The Court reasoned, as did the lower court in the Kansas case, that separation denoted inferiority among the black children. *Brown I*, 347 U.S. at 494. The Court noted that when the law sanctions segregation, the detrimental impact of segregation is great. *Id.* "A sense of inferiority affects the motivation of a child to learn." *Id. Brown I* focused on the stigmatic injury caused by segregated schools. Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 50 (1992). Such injury produced "an abstract harm that is distinct from any other observable harm." *Id.* In *Brown I*, the Court cited authorities in the form of socio-

The Court finally concluded that "in the field of public education, the doctrine of 'separate but equal' has no place."[65] The Court further explained that "[s]eparate educational facilities are inherently unequal."[66]

Therefore, the Court held, state practices which mandated separate schools for black and white students were unlawful.[67] The decision outlawed public school segregation and pronounced as unconstitutional the educational laws of twenty-one states and the District of Columbia.[68]

### C. *Post* Brown I

While *Brown I* outlawed segregated schools, the opinion did not explain how to implement desegregation plans.[69] In *Brown v. Board of Education* ("*Brown II*"),[70] the Court attempted to state, in general terms, how a school system should be desegregated, and what kinds of remedies should be available to plaintiffs.[71] The *Brown II* Court gave federal district courts authority over school districts, including the power to determine if school districts violated *Brown I*.[72] *Brown II* allowed federal district courts to retain this authority until school systems became sufficiently integrated.[73] *Brown II* authorized courts to create a system of determining public school admission policies on a

---

logical and psychological treatises on the subject of segregation that supported this view. *Brown I*, 347 U.S. at 494 n.11. *See also* BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 130 (analyzing the social scientists' data in *Brown I*).

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

66. *Id.* (rejecting the idea set forth in *Plessy* as it applies to education). It is not quite clear why the nine justices came to this conclusion. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 140. This conclusion is open to three different interpretations:

> (1) that public school segregation is constitutionally invalid because it is 'unreasonable'; or (2) that public school segregation is invalid *per se*, but that segregation by race might be constitutionally justified in fields other than education; or (3) that all classification by race is unconstitutional *per se*, and that segregation in public education is thus merely an example of such invalidity.

*Id.*

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

68. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 160.

69. In *Brown I*, the Court handed down a decision but refrained from formulating any decree necessary to implement the decision. *Id.* at 160-61. A year passed before blacks were able to attend white schools. *Id.*

70. 349 U.S. 294 (1955); *see supra* note 15.

71. *Id.* at 300-01.

72. *Id.* at 299-301. The *Brown II* Court acknowledged that school authorities may experience a variety of problems in transforming school districts into districts that are in constitutional compliance. *Id.*

73. *Id.* at 301.

non-racial basis.[74] Nonetheless, the Court gave school authorities the primary responsibility of solving segregation problems.[75]

The guidelines set out by the *Brown II* Court proved to be less than perfect.[76] First, the *Brown II* solution did not allow courts to exercise authority until someone filed suit.[77] This hurdle slowed the remedial process.[78] Second, the *Brown II* Court handed down a decision which was almost as vague as the *Brown I* decision.[79] The *Brown II* Court did not give the district courts clear guidance on how to fashion remedies.[80] Instead of giving concrete guidelines, the *Brown II* Court relied on common sense in fashioning equitable doctrines for determining remedies for past segregation.[81] These equitable doctrines gave federal district courts tremendous flexibility in fashioning remedies.[82] The Court "recognized the inequality implicit in intentional segregation, and made it clear that the *stigmatic injury* to black children caused by such segregation [was] the harm to be remedied."[83] Segregation

74. *Id.* at 300-01.

75. *Id.* at 299-301.

76. For example, the *Brown II* Court stated that district "courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." *Id.* at 294. The Court further stated that district courts are to be guided by traditional attributes of equity. *Id.* at 300.

77. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 224.

78. Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 308 (1992) (noting that *Brown II* implied that relief could be delayed, and recognizing that even though relief may never come to the individual litigants in *Brown I*, those litigants would ultimately benefit). Remedies were delayed for a year and, in some instances, delayed even further at the discretion of the district courts. BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 161.

79. The *Brown II* decision added more ambiguity by mandating, without instruction, that school systems "'admit [blacks] to public schools on a racially nondiscriminatory basis with all deliberate speed.'" Brian K. Landsberg, *The Randolph W. Thrower Symposium Desegregation Law: The Changing Vision of Equality in Education*, 42 EMORY L.J. 821, 825 (1993) (quoting *Brown II*, 349 U.S. at 301).

80. *Id. See* Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 638 (arguing that *Brown II* lacked specific relief orders). By failing to instruct the district courts, the Supreme Court adopted "a course of compromise and delay." BLAUSTEIN & FERGUSON, JR., *supra* note 15, at 170.

81. *Brown II*, 349 U.S. at 300. Under equitable principles, federal district courts had the power to fashion just remedies. *See supra* note 76 and accompanying text. *See also* Landsberg, *supra* note 79, at 825 (noting that "*Brown II*'s most important positive contribution was its reliance on [an] equitable doctrine as an adjunct to constitutional law"). The *Brown II* decision laid the foundation for the later perception that "equitable relief would have to address the systemic violation with a systemic remedy." *Id.*

82. *Brown II*, 349 U.S. at 300 (stating that the lower courts should use equitable principles in fashioning remedies, which calls for "practical flexibility in shaping . . . remedies").

83. John C. Casais, Note, *Ignoring the Harm: The Supreme Court, Stigmatic Injury and the End of School Segregation*, 14 B.C. THIRD WORLD L.J. 259, 267 (1994)

challenges brought after *Brown II* compelled the Supreme Court to determine what remedies sufficiently vindicated the rights of young school children.[84]

### *D. The Road Toward Recovery*

The Supreme Court further clarified *Brown II* in subsequent cases. For example, in *Green v. County School Board*,[85] the Supreme Court held that district courts should measure the efficiency of a school's desegregation plan by the plan's effectiveness.[86] Nevertheless, despite the *Green* decision, school authorities continued to drag their feet and defy integration decrees.[87]

In *Swann v. Charlotte-Mecklenburg Board of Education*,[88] the Court stated a new objective in reviewing the constitutionality of a school system: the Court asked whether authorities had eliminated all "vestiges" of state-imposed segregation from public schools.[89] The Court did not specify, however, what aspects of education constitute

---

(emphasis added). The Court relied on equality of the mind and heart rather than equal school facilities. KLUGER, *supra* note 47, at 711. Scholars have noted: "'The Court's opinion read more like an expert paper on sociology than a Supreme Court opinion.'" *Id.* (quoting James Reston, *A Sociological Decision*, N.Y. TIMES, May 18, 1954). The *Brown II* opinion seemed to have met Justice Warren's belief that opinions should be "'short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory.'" *Id.* (quoting Reston, *supra*). The Court, however, dismissed the historical evidence surrounding the adoption of the Fourteenth Amendment with regard to segregated schools, and failed to note that "the overall purpose of the three Civil War Amendments" was to "provide full citizenship to blacks." *Id.* at 711-12.

84. Casais, *supra* note 83, at 267 ("Initially, the Court considered a school district's obligations fulfilled upon admission of students to its schools without regard to race.").

85. 391 U.S. 430 (1968). New Kent County in Virginia adopted a "freedom-of-choice" provision which allowed students from grades second through seventh to choose what school they wanted to attend. *Id.* at 433-35. No white student ever chose a black school. *Id.* at 441. Although 115 black students enrolled in a formerly all-white school, 85% of the black students attended an all-black school. *Id.*

86. Landsberg, *supra* note 79, at 825. In 1968, the Court defined school authorities' obligations. *Id.* For example, in *Green*, "the Court disapproved of a formerly de jure segregated school system's freedom of choice plan that had left the schools substantially segregated." *Id.* (citing *Green*, 391 U.S. at 435).

87. *Id.* (noting that little progress was made in areas where dual school systems had historically been maintained by operation of state laws). In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court noted that "[o]ver the 16 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971).

88. 402 U.S. 1 (1971). In *Swann*, after the school board provided an unsatisfactory desegregation plan, the district court ordered the school board to adopt one of the three plans submitted to it by experts. *Id.* at 6-14.

89. *Id.* at 15.

"vestiges."[90] Hence, the lower courts interpreted the *Swann* decision in many different ways.[91] The courts found vestiges to include, among other things, inadequate facilities and poor testing and teaching methods.[92]

The *Swann* Court also held that once a constitutional violation was found, school authorities had an affirmative duty to take all necessary steps to convert dual public school systems into unitary ones.[93] According to *Swann*, school authorities could not simply adopt race neutral practices in order to bring a school into constitutional compliance,

---

90. Generally, vestige is defined as the visible traces or remains of something that no longer exists. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE UNABRIDGED 2547 (1993). The Supreme Court has never defined the phrase "vestiges of past discrimination." However, the Supreme Court has recognized existing residential segregation, quality of education, and every possible aspect of school operation as possible vestiges. *See* McMullen & McMullen, *supra* note 17, at 82-85. *See generally* Freeman v. Pitts, 503 U.S. 467, 495-96 (1992) (stating that "[t]he vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the de jure violation being remedied," and noting that stubborn facts about the past wrongs against the black race persist and remain in our society and in our school system); *Swann*, 402 U.S. at 18 (stating that the remedial responsibilities of the school board include eliminating invidious racial distinctions with respect to matters such as transportation, supporting personnel, extracurricular activities, the maintenance of buildings, and the distribution of equipment).

91. Casais, *supra* note 83, at 274-75.

92. *See* McMullen & McMullen, *supra* note 17, at 85-98 (noting that courts have considered racial composition of students, student assignments, use of transportation, residential segregation, facility and staff, school curriculum, early childhood education, testing and grouping extracurricular activities, discipline facilities, and other factors in determining if school authorities have taken all possible steps in eliminating the vestiges of segregation).

93. *Swann*, 402 U.S. at 15 (quoting *Green*, 391 U.S. at 437-38). *See also* Board of Educ. v. Dowell, 498 U.S. 237, 246 (1991) (noting that "unitary" is used to describe a school system "which has been brought into compliance with the command of the Constitution," while the term "dual" is used to denote a school system which has engaged in intentional racial segregation); Casais, *supra* note 83, at 274-75 (noting that "[t]he Supreme Court has made it clear that lower courts must measure the unitariness of a school district by examining all aspects of the school system's operations—student assignments, faculty, staff, transportation, extracurricular activities, and facilities"); *id.* at 278 (stating that "[s]teps must be taken to desegregate the school system and remove all vestiges of prior de jure segregation that will otherwise continue to inflict the stigmatic injury identified by *Brown I*"); Landsberg, *supra* note 79, at 825-826 (explaining that a dual system is a system that is part white and part black, while a unitary system is one that is non-racial); Celia M. Ruiz, *Equity, Excellence and School Reform: A New Paradigm For Desegregation*, 101 ED. L. REP. 1, 7-8 (1995) (stating that in order to prove that its system is unitary, a district needs to show: "(1) that it has 'complied in good faith with the desegregation decree since it was entered,' and (2) that 'the vestiges of past discrimination [have] been eliminated to the extent practicable,'" and noting that such rules are difficult to apply) (quoting *Dowell*, 498 U.S. at 249).

but had to "make every effort to achieve unitariness."[94] Additionally, school authorities bore the burden of showing that the remedy chosen was not driven by iniquitous motives.[95] While *Swann* placed heavy burdens on school authorities, the decision armed the district courts with broad equitable powers to remedy past wrongs once a violation had been established.[96]

In addition to mandating unitary school systems, the *Swann* Court "acknowledged a difference between de jure and de facto segregation."[97] De jure segregation is segregation mandated by law.[98] In contrast, de facto segregation is segregation that occurs without legal authority.[99] The *Swann* Court held that regardless of the type of segregation, where a system evidences a history of statutory segregation, school authorities bear the burden of eliminating vestiges of such discrimination.[100]

---

94. *Swann*, 402 U.S. at 28. Plans that fail to consider race may also "fail to counteract the continuing effects of past school segregation." *Id.* *See* Casais, *supra* note 83, at 278 (stating that racially neutral practices occur when school authorities do not consider race when ordering school assignments).

95. Casais, *supra* note 83, at 278. *See also* United States v. Fordice, 112 S. Ct. 2727, 2744 (1992) (O'Connor, J., concurring) (stating that "[w]here the State can accomplish legitimate educational objectives through less segregative means, the courts may infer lack of good faith; 'at least it places a heavy burden upon the [State] to explain its preference for an apparently less effective method'") (quoting *Green*, 391 U.S. at 439). The mathematical ratios of the racial composition of a school can be used as a guideline in reshaping a desegregation remedy. *See generally* Maria A. Perugini, Comment, Board of Education of Oklahoma City v. Dowell: *Protection of Local Authority or Disregard for the Purpose of* Brown v. Board of Education*?*, 41 CATH. U. L. REV. 779, 790 (1992) (analyzing *Swann*, 402 U.S. 1).

96. Casais, *supra* note 83, at 278. *But see* Christopher W. Nelson, Comment, Missouri v. Jenkins: *Judicial Taxation and the Funding of School Desegregation*, 26 NEW ENG. L. REV. 529, 535 (1991) (noting that although district courts have broad remedial power, as a result of *Swann*, a district court may invoke such power only if local school authorities fail in their affirmative duty to convert a dual school system to a unitary ones).

97. Robert L. Steele, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591, 604 (1993) (analyzing *Swann*). *See also* Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (emphasizing that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate").

98. BLACK'S LAW DICTIONARY 425 (Revised 6th ed. 1990).

99. Ruiz, *supra* note 93, at 4. For example, de facto segregation is present where a school district discriminates not by following unconstitutional laws, but by its use of various techniques such as the manipulation of student attendance zones, school site selection, and school policies that create or maintain segregated schools throughout the school district. *Keyes*, 413 U.S. at 192.

100. *Swann*, 402 U.S. at 15-16, 18. *See also* Ruiz, *supra* note 93, at 5 n.23:

> "[W]e have held that where plaintiffs prove *that a current condition of segregation* exists within a school district where a dual system was *compelled or authorized by statute* at the time of our decision in *Brown v. Board of*

The *Brown II* and *Swann* cases resulted in federal courts retaining a tremendous amount of authority over public school systems.[101] Three years after *Swann,* however, the Court quickly removed much of the remedial authority it granted to the district courts. In *Milliken v. Bradley* ("*Milliken I*"),[102] the Supreme Court established an absolute limitation on the district courts' exercise of their equitable powers. The Court held that the scope of a district court's remedial powers is defined by the nature and extent of the constitutional violation.[103] The Court recognized two types of violations: intradistrict and interdistrict.[104] The Court defined an intradistrict violation as a violation which occurs within one school district,[105] and an interdistrict violation as a violation which crosses school district boundaries.[106]

In *Milliken I,* the Court held that these two violations were mutually exclusive.[107] As a result, where a violation occurred in only one district, the Court refused to allow a remedy affecting a group of districts.[108] Likewise, the Court stated that before a district court could impose remedies affecting other districts, the district court had to find a

---

*Education, (Brown I),* the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.'"

*Id.* (quoting *Keyes,* 413 U.S. at 200) (citations omitted) (emphasis added).

101. The *Brown II* decision set the standard of equitable authority in fashioning remedies. *See supra* notes 71-84 and accompanying text. The *Swann* decision stated that federal district courts were to retain authority over school districts until the district became sufficiently integrated. *See supra* notes 88-100 and accompanying text.

102. Milliken v. Bradley, 418 U.S. 717 (1974) [hereinafter *Milliken I*]. In *Milliken I,* the district court attempted to desegregate the Detroit school system by imposing desegregation orders on the Detroit school system and outlying suburban districts. *Id.* at 722-36.

103. *Id.* at 744 (citing *Swann,* 402 U.S. at 16).

104. *See id.* at 741-47 (addressing for the first time the validity of a remedy mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district). The *Milliken I* Court found that an interdistrict remedy may be appropriate when the racially discriminating acts of one district cause segregation in adjoining districts. *Id.* at 745.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* The Court stated that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Id.* Interdistrict remedies are appropriate, however, where a constitutional violation directly causes interdistrict segregation. *Id.* The Court reasoned that desegregation remedies are designed, as all remedies are, to restore the victims of discriminating conduct to the position they would have occupied in the absence of such conduct. *Id.* at 746. Once a district court finds a constitutional violation, the court need only tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." *Id.* at 744.

constitutional violation within one district that produces a significant effect in another.[109]

In a subsequent case, the Court distinguished *Milliken I* and held that in some instances district courts have the judicial authority to impose remedies that affect districts that have not participated in constitutional violations.[110] This remedial authority should exist, the Court held, so long as decrees have no segregative effect and are not binding on districts free from violations.[111]

These seemingly conflicting decisions left open the question of when a court may look beyond the boundaries of a school district found to be unconstitutionally segregating students and impose a remedy affecting other districts.[112] Consequently, in 1977, the Supreme Court attempted to define in more detail the scope of the district courts' remedial power. After examining previous decisions, the Court, in *Milliken v. Bradley* ("*Milliken II*"),[113] constructed a three-part test formulated to guide courts in exercising their remedial authority.[114] First, the remedy specified in the decree must be related to the violation.[115] Second, the decree must be remedial in nature, and narrowly

109. *Id.* at 744-45. The Court explained that "an 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." *Id.* at 745. *See also* Casais, *supra* note 83, at 265 (noting that the Court limited the remedy that may be imposed to only those school districts where segregation has been shown and "prohibited district courts from implementing remedies calling for the perpetual balancing of student assignments at particular levels").

110. Hills v. Gautreaux, 425 U.S. 284, 296 (1973). The *Gautreaux* case is a public housing case as opposed to a school desegregation case. Nevertheless, *Gautreaux* analyzed the scope of the federal courts' authority to fashion remedies in segregation cases in general. *Id.* at 294-95.

111. *Id.* The *Gautreaux* Court explained that the *Milliken I* decision stood for the proposition that "there had to be an interdistrict violation or effect before a federal court could order the crossing of district boundary lines." *Id.* at 296. The Court reasoned that the *Milliken I* Court found the district court's desegregation order impermissible "not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred," but rather because the order "contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation." *Id.*

112. *Compare id.* at 296 (allowing the district court to fashion a remedy that affected districts that had not participated in a constitutional violation) *with Milliken I*, 418 U.S. at 745 (refusing to allow the district court to impose remedies that affected suburban school district that did not participate in constitutional segregation violations).

113. Milliken v. Bradley, 433 U.S. 267 (1977) [hereinafter *Milliken II*].

114. *Id.* at 280-81. See *supra* notes 59-111 and accompanying text for a discussion of earlier opinions on which the *Milliken II* Court relied.

115. *Id.* at 280. The *Milliken II* Court derived this factor from the Court's holding in *Swann*. The *Milliken II* Court, like the *Swann* Court, refused to give the district courts unlimited power in fashioning remedies. *Id.* at 281-82. The *Milliken II* Court noted that

designed to restore victims of segregation to the position they would have occupied if such discriminating behavior had never existed.[116] Third, federal courts must consider the interest of state and local authorities in managing their own affairs.[117]

Under *Milliken II*, the Court gave remedial and compensatory education programs new prominence as a desegregation remedy.[118] Moreover, the focus on remedies shifted from the racial population of schools to improving educational performance.[119] The *Milliken II* de-

---

"the well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal court decrees must directly address and relate to the constitutional violation itself." *Id.* Notably, the federal courts exceed their jurisdiction if their decree is aimed at eliminating a condition that does not violate the Constitution, does not flow from such a violation, or is imposed on "governmental units that were neither involved in nor affected by" segregation. *Id.* at 282 (citing Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976) and *Milliken I*, 418 U.S. 717, 744-45 (1974)).

116. *Id.* at 280. *See also Milliken I*, 418 U.S. at 746 (holding that, because the disparate treatment of white and black students occurred only within the Detroit school system, the district court did not possess the authority to issue decrees requiring cross-district transportation of students). Hence, district courts will exceed their remedial authority if they fashion remedies for a condition that does not violate the Constitution or impose remedies upon governmental units not involved in or affected by the constitutional violation. *Milliken II*, 433 U.S. at 282.

117. *Milliken II*, 433 U.S at 280-81. *Milliken II* reiterated the principle that district courts are to oversee school systems until past wrongs are remedied to the extent practicable. *Id.* at 281.

118. Chip Jones, Freeman v. Pitts: *Congress Can (and Should?) Limit Federal Court Jurisdiction in School Desegregation Cases*, 47 SMU L. REV. 1889, 1905 (1994) (analyzing *Milliken II*). After *Milliken II*, the district courts began to shift their focus from white flight to educational programs. *Id.* at 1905-06.

In addition to constructing a clear test as a guide to the federal courts, *Milliken II* recognized that, in some instances, a remedy does not have to be directly related to a constitutional violation, but needs only to address the consequences of the constitutional violation. *See Milliken II*, 433 U.S. at 287 (noting that, even though the desegregation plan chosen was not particular to race, the decree was aptly tailored to remedy the consequences of the constitutional violation); Ruiz, *supra* note 93, at 12 (stating that in *Milliken II* the Court's rationale was that: "1) 'the need for educational components flowed directly from constitutional violations by officials;' 2) 'imbalanced student assignments could 'manifest and breed other inequalities' and; 3) '*pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures*'") (quoting *Milliken II*, 433 U.S. at 282, 283) (emphasis added).

119. Jones, *supra* note 118, at 1905-06. *See also* Ruiz, *supra* note 93, at 12, which states that:

> [S]ince *Milliken II*, courts have considered the "consequences of the constitutional violations" to require remedial or compensatory programs in both strictly academic subjects such as reading and in "human relations," including in service training and special counseling to assist students, parents, and faculty [to] deal with "the various pressures which arise as a result of desegregation."

cision broadened the scope of the district courts' power.[120] The decision did not discuss, however, the point at which districts courts are to determine that segregation no longer exists, such that they must relinquish their power to local authorities.[121]

### *E. Restoring the Power over the Schools to School Authorities*

In *Freeman v. Pitts*,[122] the Supreme Court established guidelines to assist federal courts in determining how they should relinquish their authority to school officials.[123] The Court first noted that district courts did not have to relinquish immediately all of their authority,[124] and could instead elect to order an incremental or partial withdrawal of court supervision.[125]

The *Freeman* Court next noted that district courts should exercise discretion when determining whether they should relinquish their authority.[126] The Court suggested that district courts consider whether the school district has fully complied with the original desegregation decree, whether retention of judicial control is necessary to achieve compliance with the decree in other areas, and whether the school district has demonstrated a good faith commitment to the court's decree and to those provisions of the law and constitution originally violated.[127]

---

*Id.* (quoting Evans v. Buchanan, 582 F.2d 750, 770-771 (3d Cir. 1978)).

120. Jones, *supra* note 118, at 1905.

121. *Id.*

122. 503 U.S. 467 (1992).

123. *Id.* at 489-92. The *Freeman* Court noted that "'local autonomy of school districts is a vital national tradition.'" *Id.* at 490 (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977)). The Court explained that state entities become directly responsible and accountable for discrimination and racial hostility within the school system. *See also Milliken II*, 433 U.S. at 280-81 (stating that the federal courts, in devising a remedy, must take into account the interests of state and local authorities in managing their own affairs with the Constitution).

124. *Freeman*, 503 U.S. at 490-91. A district court may decide not to return full control of the school to school authorities where it finds that a school system is in compliance only in some areas of the court's supervised desegregation plan. *Id.* at 491. Or, a district court may decide to return control to school authorities only in the areas of compliance. *Id.*

125. *Id.* at 491. *See infra* part IV.B for the application of *Freeman* to a recent case; *see also* Board of Educ. v. Dowell, 498 U.S. 237, 249-250 (1991) (holding 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 the vestiges of past discrimination had been eliminated to the extent practicable").

126. *Freeman*, 503 U.S. at 491.

127. *Id.* Moreover, the elements of a unitary system—faculty staff, transportation, and extra curricular activities—set forth in Green v. School Bd., 391 U.S. 430, 435 (1968), need not be rigidly viewed. *Id.* at 492-93.

Despite this potential for school officials to regain authority, the Court also noted that district courts may nonetheless reassert their control in the face of new constitutional violations.[128] Thus, the *Freeman* Court generally discussed the district courts' discretion to retain or relinquish authority over school districts.[129] In application, however, the *Freeman* decision provided the lower federal courts with little guidance in determining when to relinquish their authority.[130] This void required the Supreme Court to clarify the point at which it becomes appropriate for the courts to restore authority to local officials.[131]

## III. DISCUSSION

### *A. The Facts and the Lower Courts' Opinions in Jenkins*

In 1977, students of the Kansas City Missouri School District (the "School District"), brought suit against the State of Missouri, the School District, and other defendants.[132] The plaintiffs alleged that Missouri and others generated and maintained racial segregation in the schools.[133] The School District brought a cross claim against Missouri

---

In *Freeman*, the Court required school systems seeking release from judicial control to implement plans which would eradicate the vestiges of past discrimination and to affirmatively commit to comply with remedial decrees in good faith. *Id.* at 491. "A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new *de jure* violation and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future." *Id.* at 498. A history of good faith demonstrates that school authorities are headed towards permanent compliance with the desegregation decree. Landsberg, *supra* note 79, at 852. *See also* Morgan v. Nucci, 831 F.2d 313, 321 (1st Cir. 1987) (explaining that "[a] finding of good faith reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual"). Conversely, a lack of good faith will support continued intervention by district courts. *Freeman*, 503 U.S. at 499.

128. Federal courts have power to deal with future problems upon a showing that either school authorities or some other state agency has deliberately attempted to alter the racial composition of the schools. *Id.* at 492.

129. *Id.* at 491-92.

130. *See* Casais, *supra* note 83, at 295 (pointing out this ambiguity).

131. *See* Missouri v. Jenkins, 115 S. Ct. 2038 (1995).

132. *Id.* at 2042. The original plaintiffs in the suit included the School District, the school board, and the children of two school board members. *Id.* The district court, however, realigned the School District as a nominal defendant, and present and future School District students were certified as a class of plaintiffs. *Id.* The other defendants included some surrounding suburban school districts and federal agencies. *Id.*

133. *Id.* Specifically, plaintiffs alleged that the State of Missouri, surrounding school districts, and various federal agencies caused racial segregation in the School District. *Id.* Subsequently, the claims against surrounding suburban school districts and the federal defendants were dismissed. *Id.*

for its failure to abolish the vestiges of its prior segregated school system.[134] After lengthy litigation, the federal district court found both Missouri and the School District liable for an intradistrict violation.[135] The district court determined that, prior to 1954, "Missouri mandated segregated schools for black and white children."[136] In addition, the district court found that the State and the School District failed to satisfy their affirmative obligation to eliminate the vestiges of past State-imposed segregation.[137]

Finding that the State of Missouri and the School District had failed to convert the dual school system to a unitary one, the district court issued its first remedial order in June of 1985.[138] This order's primary goal was the elimination of all vestiges of state-imposed segregation.[139] The district court determined that segregation "caused a systemwide reduction in student achievement in the [school district],"[140] and identified twenty-five schools within the school district that had enrollment levels of ninety percent or more black students.[141] The

---

134. *Id.*

135. Jenkins v. Missouri, 593 F. Supp. 1485, 1503 (W.D. Mo. 1984) (finding that the State and School District failed to eliminate the vestiges of previous suggested school systems). Specifically, the district court found that the State and the School District "operated a segregated school system within the [School District]." *Jenkins*, 115 S. Ct. at 2042. *See also* Jenkins, 593 F. Supp. at 1503 ("In the past the state has taken positive actions which were discriminatory against blacks."). The district court also noted that:

> [The State] mandated separate schools for blacks and whites; it established separate institutions for teaching black school teachers; it established and maintained a separate institution for higher education for blacks at Lincoln University, it provided that school boards in any town, city or consolidated school district could establish separate libraries, public parks and playgrounds for blacks and whites . . . ; it made it a crime for a person 1/8 Negro blood to marry a white person . . . ; and its courts enforced racially restrictive covenants.

*Id.*

136. *Jenkins*, 115 S. Ct. at 2042 (quoting *Jenkins*, 593 F. Supp. at 1490, which took judicial notice of the fact that, before 1954, Missouri mandated segregated school systems for blacks and whites).

137. *Id.* (citing *Jenkins*, 593 F. Supp. at 1504). Having created a dual system, the School District and the State of Missouri had, and continue to have, an obligation to dismantle that system. *Jenkins*, 593 F. Supp. at 1505. The School District and Missouri failed to comply with that constitutional obligation. *Id.*

138. Jenkins v. Missouri, 639 F. Supp. 19, 23 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987) (implementing a desegregation plan).

139. *Id.*

140. *Id.* at 24.

141. *Id.* at 33. The court relied on testimony that, according to the Iowa Test of Basic Skills, of the 50 schools in the District, only a small number performed at or above the national average in reading and mathematics. *Id.* at 24. Testimony revealed that "this situation is correctable and that the schools in the [District], when provided with ade-

district court ordered the School District to restore its schools to the highest classification awarded by the Missouri Department of Elementary and Secondary Education,[142] and to reduce the student-to-teacher ratio.[143] The district court also ordered the creation of programs geared towards the expansion of educational opportunities for all the students in the school district.[144] The district court "implemented a state-funded effective schools program that consisted of substantial yearly cash grants to each of the schools within the [school district]."[145]

In a subsequent order issued in November of 1986, the district court held Missouri and the School District responsible for funding a capital improvement plan and comprehensive magnet school program.[146] The

---

quate resources, sufficient staff development, and proper teaching methods, can attain educational achievement results more in keeping with the national norms." *Id.* Even though the district court found a lower level of school achievement, it made "no particularized findings regarding the extent that student achievement had been reduced or what portion of that reduction was attributable to segregation." *Jenkins*, 115 S. Ct. at 2042.

142. *Jenkins*, 639 F. Supp. at 26. The Missouri State Department of Elementary and Secondary Education ("DESE") conducts yearly evaluations of schools in order to provide guidance and support in developing quality education. *Id.* DESE classifies schools according to the quality of the schools' educational programs and the merit of the programs. *Id.* In addition, DESE classifies according to the services offered by the schools such as instructor qualifications, class size, and instructional information. *Id.* AAA, the highest classification, "communicates to the public that a school system quantitatively and qualitatively has the resources necessary to provide minimum basic education to its students." *Id.* In order to achieve AAA classification an elementary school must have 13 certified librarians; teachers are to devote no more than 310 minutes a day teaching, except for librarians and guidance counselors, who may devote 360 minutes a day to teaching; art and music must be scheduled and taught at least 60 minutes a week; and there should be one counselor for every 1500 students. *Id.* at 26-28.

143. *Jenkins*, 115 S. Ct. at 2042-43. The district court found that "achieving reduced class size is an essential part of any plan to remedy the vestiges of segregation." *Jenkins*, 639 F. Supp. at 29. The district court reasoned that reduction in class size guarantees individual attention and instruction, as well as attracting non-minority students. *Id.*

144. *Jenkins*, 115 S. Ct. at 2043. For example, the district court ordered full-day kindergarten, expanded summer school, both before-school and after-school tutoring, and an early childhood development program. *Jenkins*, 639 F. Supp. at 30-33.

145. *Jenkins*, 115 S. Ct. at 2043. "Under the 'effective schools' program, the State was required to fund programs at the 25 racially identifiable schools as well as the 43 other schools within the [District]." *Id.* In an effort to continue improving educational programs, the district court also required the School District to combat deterioration by improving the District's facilities. *Id.* at 2044. The district court found it irrelevant that the conditions of the facilities could not be linked to unlawful segregation. *Id.* The court primarily focused on remedying the vestiges of segregation and maintaining schools that would attract non-minorities. *Id.*

146. *Id.* at 2043. The district court's plan provided that "every senior high school, every middle school, and one-half of the elementary schools" would be converted to a magnet school. *Id.* A magnet school is a school which offers high-quality and highly

district court believed that a magnet school program would provide a better educational environment and greater educational opportunities.[147] These better opportunities could, in turn, attract non-minority students, who had abandoned or avoided the School District, from private schools, as well as draw other non-minorities from the suburbs.[148] Additionally, as part of the desegregation plan for the School District, the district court, in 1987, ordered salary assistance for virtually all instructional and non-instructional employees.[149]

As a result of the district court's plan, the School District attempted to comply with the orders, and during the 1987-1988 school year, the State eventually awarded the School District an "AAA" rating, the highest classification, and found that the School District had in fact greatly exceeded the highest requirements.[150] By the 1988-1989 school year, the School District had implemented each of the district court's orders.[151]

Missouri challenged the district court's orders requiring it to fund salary increases and instructing it to fund remedial quality education programs.[152] The State argued that any order requiring it to fund salary increases went beyond the authority of the district court.[153] In

---

specialized curriculums in addition to the basic curriculum. Stell v. Board of Pub. Educ., 724 F. Supp. 1384, 1388 (S.D. Ga. 1988). Magnet schools aid school desegregation and are usually designed to attract outside students on a voluntary basis from all parts of a school district without manipulating attendance zones. *Id.*

147. *Jenkins*, 115 S. Ct. at 2043. The district court believed that an integrated environment would benefit all of the District students. *Id.*

148. *Id.*

149. *Id.* at 2044. Initially, the district court ordered salary increases only for teachers. *Id.* However, the district court later ordered salary assistance for almost all the School District employees, both instructional and non-instructional. *Id.* Such salary increases have cost the District and Missouri over $200 million. *Id.*

150. *Id.* at 2043. At a May 1992 hearing, Dr. Terrance Steward of the Missouri Department of Elementary and Secondary Education testified that "'Kansas City School District [now] exceeds what's available in all the suburban school districts in almost every area of classification.'" Jenkins by Agyei v. Missouri, 19 F.3d 393, 401 (8th Cir. 1994) (Beam, J., dissenting from denial of rehearing) (quoting Joint Appendix A, Vol. V at 1012, Jenkins v. Missouri, 11 F.3d 755 (8th Cir. 1993) (Nos. 90-2238, 91-3634, 92-3194, 92-3200), *rev'd*, 115 S. Ct. 2038 (1995)), *rev'd sub nom.* Jenkins v. Missouri, 115 S. Ct. 2038 (1995).

151. *Jenkins by Agyei*, 19 F.3d at 401 (Beam, J., dissenting from denial of rehearing).

152. *Jenkins*, 115 S. Ct. at 2045. Missouri argued that under *Freeman*, it was no longer required to fund programs because "it had achieved partial unitary status," and therefore the district court was required to relieve it from funding educational programs. *Id.* at 2045. The quality education programs included magnet schools and summer schools. *Id.* at 2043. *See supra* notes 122-131 and accompanying text for a discussion of *Freeman*.

153. *Id.* at 2047. *See also* Jenkins by Agyei v. Missouri, 13 F.3d 1170, 1172 (8th

particular, the State challenged the order requiring them to increase the salaries of non-teacher personnel, including maintenance workers and cooks.[154]

The district court found no support for Missouri's challenges and reasoned that the goal of higher quality education warranted the salary increase.[155] Moreover, the district court determined that in order to eliminate the vestiges of segregation, the School District must improve its desegregative attractiveness.[156] The district court, however, failed to specifically address Missouri's position that the School District had achieved partial unitariness in accordance with *Freeman*.[157] Nevertheless, the district court ordered Missouri to continue funding the magnet programs, as well as the salary increases.[158]

---

Cir. 1993) (rejecting Missouri's argument that "low teacher salaries do not flow from any earlier constitutional violations by the State"), *rev'd sub nom. Jenkins*, 115 S. Ct. at 2038. Missouri argued such an order violates Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), which requires remedial action to correct the vestiges of prior segregation and no more. *Jenkins*, 115 S. Ct. at 2048 (citing *Milliken II*, 433 U.S. at 267, and *Swann*, 402 U.S. at 1).

154. *Jenkins by Agyei*, 13 F.3d at 1172, 1174. The district court believed that the salary increases for the School District's personnel constituted an essential component of its desegregation orders. *Id.* at 1172. The district court reasoned that "high quality teachers, administrators and staff must be hired to improve the desegregative attractiveness" of the School District. *Id.*

155. *Jenkins*, 115 S. Ct. at 2045. "'[H]igh quality personnel are necessary not only to implement specialized desegregation programs intended to "improve educational opportunities and reduce racial isolation," but also to "ensure that there is no diminution in the quality of its regular academic program."'" *Id.* (citations omitted).

156. *Id.* The district court focused primarily on making the School District more attractive in hopes of stopping white flight. *Id.*

157. *Id.* "The District court did not address the State's *Freeman* argument." *Id.* The Eighth Circuit stated:

> "The [district] [c]ourt's goal was to integrate the Kansas City, Missouri, School District to the *maximum degree possible*, and all these other matters were elements to be used to try to integrate Kansas City, Missouri schools so the goal is integration. That's the goal. And a high standard of quality education. The magnet schools, the summer school programs are tied to that goal, and until such times as that goal has been reached, then we have not reached the goal . . . . The goal is to integrate the Kansas City, Missouri, School district."

*Jenkins*, 115 S. Ct. at 2045-46 (quoting *Jenkins by Agyei*, 11 F.3d at 761). Under *Freeman*, a district court should consider whether a school district has fully complied with the desegregation order; whether retention of judicial control is necessary; and whether the school district acted in good faith. *See supra* part II.E.

158. *Jenkins*, 115 S. Ct. at 2045. The district court reasoned that because its goal was to eliminate the vestiges of past discrimination and, in so doing, improve the desegregative attractiveness of the District, its order requiring Missouri to fund salary increases would stand. *Id.* In addition, the district court mandated that Missouri continue funding the quality education programs for the 1992-1993 school year, even though the program did not confront the State's argument. *Id.*

On appeal, the Eighth Circuit affirmed the district court's opinion, stating that the district court did not err in ordering salary increases or in declining to give a reason for its decision regarding funding of quality educational programs.[159] The court determined that Missouri achieved little success in remedying the harms of segregation.[160] The court determined that, at most, Missouri had hardly begun to eliminate the vestiges of past discrimination.[161]

The Eighth Circuit also rejected Missouri's unitary status argument.[162] The court ruled that the State's obligation was to integrate the District.[163] The magnet schools, the summer school programs, and

---

159. *Jenkins by Agyei*, 11 F.3d at 761. The Eighth Circuit reasoned that the district court needed only to rule on the ultimate facts necessary to reach a decision in the case and did not have to make specific findings on all facts. *Id.* The court also justified the district court's failure to give specific reasons for its ruling. *Id.* The Eighth Circuit reasoned that the district court indirectly addressed Missouri's *Freeman* argument. *Id.* The court derived this reasoning from the district court's order, which anticipated a gradual withdrawal of the district court's control. *Id.* "[T]he court's order indicated that the magnet school plan had been substantially successful, that future areas for improvement still existed, and the court was looking forward to the day when a gradual phase-out would be considered." *Id.* at 762.

160. *Id.* at 765. "[T]he State is [not] entitled to be released upon accomplishment of any particular objective without also considering whether retention of judicial control was necessary or practicable . . . ." *Id.*

161. *Id.* The Eighth Circuit also defined those vestiges as white flight and decreased student achievement. *Id.* at 764. Specifically, the Eighth Circuit noted that:

> The district court found that segregation in [the School District] caused departure of the whites in the system to private schools and to the suburbs. During the years between *Brown I* and trial, the enrollment of [the School District] shifted from predominately white to predominately black. In the 1958-59 school year, blacks constituted 22.5% of [the School District] enrollment, but by 1983-84 enrollment was 67.7% black and white enrollment had dropped 80% . . . . [B]ut the district court found in 1984 that [the School District] had still not completely dismantled the dual system.

*Id.* at 764. Therefore, the court reasoned that the remedy demanded not only compensation to victims but also reversal of white flight through superior educational opportunities. *Jenkins by Agyei*, 13 F.3d at 1172 (affirming the District Court's June 30, 1993 and July 30, 1993 orders). The court explained the remedy:

> The goals of the remedial programs were: (1) to compensate the victims by improving the education given them; (2) to enhance the programs so as to reverse the white flight pattern, winning back white students from private and suburban schools, and thus ending the racial isolation of the victims; and (3) to use the magnet schools as a way of bringing about voluntary redistribution of children within the [School District] itself.

*Jenkins by Agyei*, 11 F.3d at 764.

162. *Jenkins by Agyei*, 11 F.3d at 764-65. The court reasoned that it 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 effects of segregation, in order to determine if the District achieved partial unitary status. *Id.* The injury is the vestiges of the once state-mandated dual school system. *Id.*

163. *Id.* at 767. "The goals of the remedial programs are to improve the educational

other programs all related to that obligation.[164] Because Missouri failed to satisfy this obligation, the court refused to consider the State's other arguments.[165] The court found that even though Missouri achieved some improvement, the School District did not reach its maximum potential because the District's students' scores fell at or below the national norms.[166]

The State then petitioned for *certiorari* to the Supreme Court.[167] The Court granted the petition in order to address two questions: (1) whether the district court went beyond its remedial authority when it granted salary increases to virtually all instructional and non-instructional employees; and (2) whether the district court properly relied upon student achievement scores when it declined to find that Missouri had achieved partial unitary status regarding the quality education programs.[168]

### *B. The Supreme Court's Majority Opinion*

In *Missouri v. Jenkins*,[169] the Supreme Court reversed the decision of the Eighth Circuit and reversed the district court's order requiring Missouri to fund salary increases and quality education programs.[170]

---

lot of the victims of unconstitutional segregation, to regain some portion of the white students who have fled the District and retain those that are still there . . . ." *Id.*

164. *Id.* at 768.

165. *Jenkins*, 115 S. Ct. at 2046.

166. *Id.* Because the students had failed to achieve the national norms, the court reasoned that the vestiges of segregation had not been eliminated to the greatest extent practicable. *Id.* The district court stated that, with respect to quality education:

> [The] implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the systemwide reduction in student achievement, have been eliminated to the greatest extent practicable. The success of quality education programs must be measured by their effect on the student, particularly those who have been victims of segregation.

*Jenkins by Agyei*, 11 F.3d at 765-66.

167. Missouri v. Jenkins, 115 S. Ct. 41 (1994).

168. *Jenkins*, 115 S. Ct. at 2046. When this case was previously before the Supreme Court, the Court held that the judiciary could impose relief to ameliorate unconstitutional conditions in education, penitentiaries, housing, and other public policy areas, and that the judiciary could require local officials to increase taxes needed for financing relief. Missouri v. Jenkins, 495 U.S. 33, 57 (1990). *See generally* Theodore M. Shaw, Missouri v. Jenkins: *Are We Really a Desegregated Society?*, 61 FORDHAM L. REV. 57, 59-60 (1992) (discussing whether society has really changed its attitude towards segregated schools since *Brown I*).

169. 115 S. Ct. 2038 (1995).

170. *Id.* at 2056. The Supreme Court stated: "The District Court's pursuit of the goal of 'desegregative attractiveness' results in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools within the [School District] that we believe it is beyond the admittedly broad discretion of the District Court." *Id.* at 2055. The Court found the district court remedy, desegregative attractive-

The Court held that the district court went beyond its remedial powers when it fashioned a novel remedy for the School District,[171] and remanded the case back to that court, ordering the district court to concentrate on restoring control of the School District to the State.[172]

Chief Justice Rehnquist began the Court's opinion by stating that the Court must first analyze the permissible scope of the district court's remedial power, an issue not presented to the Court for review.[173] The Court rejected the parties' argument that, as it was not a question presented to the Court for review, the parties did not have proper notice of the issue.[174] The Court defined the questions presented for review to include a challenge of the scope of the district court's remedial authority.[175] In deciding this issue, the Supreme Court ultimately considered

---

ness, to be too far removed to adequately address the vestiges of past State mandated segregation. *Id.* at 2047-56.

171. *Id.* at 2054. The Court held that the goal of desegregative attractiveness, to be achieved through salary increases and indefinite funding of quality educational programs, was not narrowly tailored to address the past segregation in the School District. *Id.*

172. *Id.* at 2056. On remand, the Court ordered the district court to "apply . . . [the] three-part test from *Freeman v. Pitts*," *id.* at 2055; "consider that many goals of its quality education plan already have been attained," *id.* at 2056; and "bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'" *Id.* (quoting Freeman v. Pitts, 503 U.S. 467, 489 (1992)).

173. *Jenkins*, 115 S. Ct. at 2047. The Court stated that:

> Proper analysis of the District Court's orders challenged here, then, must rest upon their serving as proper means to the end of restoring the victims of discriminating conduct to the position they would have occupied in the absence of that conduct . . . "and control of a school system that is operating in compliance with the Constitution."

*Id.* at 2049 (quoting Freeman, 503 U.S. at 489).

174. *Id.* at 2047. The Court stated that its prior decision in Missouri v. Jenkins, 495 U.S. 33, 53 (1990), should have put all parties on notice that the Court had not affirmed the validity of the district court's remedy, and that "at least four Justices of the Court questioned that remedy." *Id.*

175. *Id.* "An analysis of the permissible scope of the District Court's remedial authority is necessary for a proper determination of whether the order of salary increases is beyond the District court's remedial authority, . . . and thus, it is an issue subsidiary to our ultimate inquiry." *Id.*

The Court determined that consideration of the district court's remedial authority was essential to correct disposition of the issues presented. *Id.* The Court also reasoned that the district court was aware that Missouri challenged its remedial authority and had ample opportunity to brief the issue. *Id.* Missouri had consistently maintained that the Court should not approve the district court's order requiring Missouri to fund salary increases because it impermissibly extends the scope of the district court's remedial authority. *Id.* at 2048. *See also Jenkins by Agyei*, 11 F.3d at 766 ("The State argues first that the salary increase remedy sought exceeded that necessary to remedy the constitutional violations, and alternatively, that if the district court had lawful authority to impose the in-

whether the district court's orders properly "'restore[d] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'"[176]

In considering the scope of the district court's remedial authority, the Court found no constitutional violation affecting more than one school district.[177] The Court instead found that the violation occurred within a single district.[178] The Court explained that the goal of the district court, non-minority attractiveness, constituted a remedy that would improperly affect districts which did not participate in the violation.[179]

Consequently, Missouri argued that the district court also exceeded its remedial authority when it ordered salary increases to achieve an interdistrict goal.[180] The Court agreed with the State's argument after examining the district court's goal of crafting the School District into one "equal to or superior to the surrounding" suburban school districts.[181] The Court found that salary increases to employees, instructional employees or otherwise, would make the School District more attractive and contribute to the impermissible goal of inducing non-minorities students from outside the School District to enroll in schools within the District.[182] The Court stated that the district court should

---

creases, it abused its discretion in doing so . . . .").

176. *Jenkins*, 115 S. Ct. at 2049 (quoting *Milliken I*, 418 U.S. at 746).

177. *Id.* at 2050. "[T]he District Court has found, and the Court of Appeals has affirmed, that this case involved no interdistrict constitutional violation that would support interdistrict relief." *Id. See also Jenkins*, 495 U.S. at 37, n.3 (stating that the district court found that "none of the alleged discriminatory actions had resulted in lingering interdistrict effects and so dismissed the suburban school districts as and denied interdistrict relief"); and *id.* at 76 (Kennedy, J., concurring in part and concurring in judgment) (stating that "there was no interdistrict constitutional violation that would support mandatory interdistrict relief").

178. *Jenkins*, 115 S. Ct. at 2050. *See supra* notes 104-06 and accompanying text (discussing interdistrict and intradistrict violations).

179. *Jenkins*, 115 S. Ct. at 2052. The Court explained that an interdistrict violation is a violation that causes segregation between adjoining districts: "The District Court's pursuit of 'desegregative attractiveness' is beyond the scope of its broad remedial authority." *Id.*

180. *Id.* at 2049. "The State argues that the order approving salary increases is beyond the District Court's authority because it was crafted to serve an 'interdistrict goal,' in spite of the fact that the constitutional violation in this case is 'intradistrict' in nature.'" *Id.*

181. *Id.* at 2050.

182. *Id.* at 2054. The Court found that instead of focusing on attracting non-minorities, the district court should have designed a remedial plan that would redistribute the students within the District in order to eliminate racially identifiable schools within the District. *Id.* at 2051. The remedy imposed by the district court was too far removed from the problem of racially identifiable schools in the School District. *Id.*

have focused on eliminating, to the extent practicable, the vestiges of prior de jure segregation within the District, not on drawing non-minorities from outside the district.[183]

The Court next considered whether the district court exceeded its remedial power when it crafted the School District into a "magnet" school district.[184] The Court found the district court's magnet school program to be impermissible because it focused primarily on attracting non-minorities from outside the District.[185] The Court reasoned that the district court created a magnet school program to achieve the goal of transferring non-minority students from outside districts to the violators' District.[186]

The Court also reviewed the propriety of the district court's order requiring continued funding for quality education programs.[187] The Court agreed with the State's argument that the required funding of such programs until students meet national norms is unjustified.[188] The Court reasoned that comparing the scores of School District stu-

183. *Id.* at 2050-51. The Court found that the School District was designed to attract non-minority students, not to end racial identification within the School District. *Id.*

184. *Id.* at 2051-52. The Court noted that in the district court's pursuit of "desegregative attractiveness," it converted "every senior high school, every middle school, and one-half of the elementary schools . . . into 'magnet' schools." *Id.* at 2051. The Court questioned the reasonableness of such an order. *Id.*

185. *Id. See also Jenkins,* 639 F. Supp. at 38 (restating the district court order that "'because 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 School District] goes far beyond the nature and extent of the constitutional violation this Court found existed") (quoting its Jan. 25, 1985 order).

186. *Jenkins*, 115 S. Ct. at 2052 ("[T]he [d]istrict [c]ourt has done just that: created a magnet district . . . in order to serve the *inter*district goal of attracting nonminority students from the surrounding [suburban school districts] and redistributing them within the [School District].").

In her concurrence, Justice O'Connor distinguished Hills v. Gautreaux, 425 U.S. 284 (1976), which appeared to advocate the use of broad judicial remedies to eliminate segregation. *Jenkins*, 115 S. Ct. at 2058 (O'Connor, J., concurring). *See supra* notes 110-11 and accompanying text for a discussion of *Gautreaux*. Justice O'Connor explained that *Gautreaux* involved different facts and therefore was not controlling. *Jenkins*, 115 S. Ct. at 2058 (O'Connor, J., concurring). The *Gautreaux* case involved remedies imposed upon a federal agency and did not involve stable geographical areas. *Gautreaux*, 425 U.S. at 292 n.9. *See also supra* part II.D (explaining post-*Brown I* analysis of school desegregation plans). Nonetheless, the *Jenkins* Court stated that its holding was consistent with *Gautreaux*, in that *Gautreaux* did not obligate the district court to subject a constitutional violator to measures beyond the geographical boundaries of its violation. *Jenkins*, 115 S. Ct. at 2053. "Our decision today is fully consistent with *Gautreaux*. A district court seeking to remedy an *intra*district violation that has not 'directly caused' significant interdistrict effects, (citation omitted), exceeds its remedial authority if it orders a remedy within an interdistrict purpose." *Id.*

187. *Jenkins*, 115 S. Ct. at 2055.

188. *Id.*

dents to national norms was not an appropriate test to determine whether the District had become sufficiently desegregated.[189] The Court noted that improved test scores are not necessarily required for Missouri to achieve "partial unitary status"[190] in regard to the quality education programs.[191] The Court further suggested that the district court no longer rely on this factor.[192]

Because the Supreme Court disagreed with the district court orders, the Court ordered the district court to reconsider whether the State had sufficiently desegregated its school districts.[193] The Court further ordered the district court to remember that its end purpose was to restore the control of the school system to local authorities.[194]

### *C. The Concurring Opinions*

#### 1. Justice O'Connor's Concurring Opinion

Justice O'Connor agreed with the majority opinion in substance. In a separate concurring opinion, she addressed the scope of the federal courts' remedial power in the context of desegregation cases and explained how the Court's decision in *Jenkins* remained consistent with its prior decisions.[195]

First, Justice O'Connor explained that *Hills v. Gautreaux*[196] did not invalidate the predicates of *Milliken I*, requiring district courts to first find a segregative effect before implementing remedies that affect

189. *Id.* at 2056. "Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the [School District] will be able to operate on its own." *Id.* The Court noted that external factors beyond the control of the School District will affect student achievement. *Id.*

190. *Id.* at 2055. *See* Freeman v. Pitts, 503 U.S. 467, 487 (1992) ("'[C]ourts have used the term '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.'") (quoting Board of Educ. v. Dowell, 498 U.S. 237, 245-46 (1991)).

191. *Jenkins*, 115 S. Ct. at 2055.

192. *Id.* at 2055-56. The Court recommended that the court limit or dispense with its reliance on the factor of increased educational achievement and consider goals already obtained. *Id.* at 2056. In this case, the Court noted that Missouri attained many of the goals of the district court's quality education plan. *Id.* For example, the Court noted that the District provided "facilities and opportunities not available anywhere else in the country." *Id.* Moreover, the School District received an AAA rating for the previous eight years. *Id.*

193. *Id.* at 2055. *See also Dowell*, 498 U.S. at 246 (stating that the school board is entitled to a precise statement of its obligations under a desegregation decree).

194. *Jenkins*, 115 S. Ct. at 2056 (quoting *Freeman*, 503 U.S. at 489).

195. *Id.* at 2057 (O'Connor, J., concurring).

196. 425 U.S. 284 (1976).

schools outside the boundaries of a violating district.[197] Next, Justice O'Connor refuted the argument that the district court in *Jenkins* understood "interdistrict remedy" to be something other than that defined in *Milliken I*.[198] Under this reasoning, Justice O'Connor rejected the notion that *Milliken I* would require an interdistrict remedy so long as there are significant effects, segregative or otherwise, in non-violating districts.[199] In this case, surrounding districts had not participated in segregation but would have been affected by the district court orders.[200]

Finally, Justice O'Connor agreed with the majority opinion that the district court centered its orders around the goals of desegregative attractiveness and reversal of white flight.[201] She found these goals to be impermissible in light of the scope of the school's constitutional violation.[202] Justice O'Connor suggested that the district court stop providing "palliatives for societal ills" and focus on curing constitutional violations.[203]

---

197. *Jenkins*, 115 S. Ct. at 2057-58 (O'Connor, J., concurring). Justice O'Connor stated that "*Gautreaux* in no way contravenes the underlying principle that the scope of desegregation remedies, even those that are solely intradistrict, is 'determined by the nature and extent of the constitutional violation.'" *Id.* (O'Connor, J., concurring) (quoting *Milliken I*, 418 U.S. at 744). Justice O'Connor explained that *Gautreaux* may not have involved an interdistrict remedy as the term is meant in *Milliken I*. *Id.* at 2058 (O'Connor, J., concurring). She also argued that "*Gautreaux* [does not] dispense[] with the predicates of *Milliken I*." *Id.* (O'Connor, J., concurring). *See also* Jenkins by Agyei v. Missouri, 807 F.2d 657, 672 (8th Cir. 1986) (stating that "*Milliken* and [*Gautreaux*] make clear that we may grant interdistrict relief only to remedy a constitutional violation committed by the [suburban school districts], or to remedy an interdistrict effect in the [suburban school districts] caused by a constitutional violation in [the District]"), *cert. denied*, 484 U.S. 816 (1987).

198. *Jenkins*, 115 S. Ct. at 2059 (O'Connor, J., concurring). Justice O'Connor noted that the district court found and the court of appeals affirmed that there was no constitutional violation outside the District and that there were no interdistrict segregative effects. *Id.* (O'Connor, J., concurring). *See also Jenkins by Agyei*, 807 F.2d at 672 (stating that the court found no significant segregative effects).

199. *See Jenkins*, 115 S. Ct at 2059 (O'Connor, J., concurring). Justice O'Connor argued that interdistrict remedies were appropriate only where the effects beyond the district in question were segregative. *Id.* (O'Connor, J., concurring).

200. *Id.* at 2060 (O'Connor, J., concurring).

201. *Id.* (O'Connor, J., concurring).

202. *Id.* (O'Connor, J., concurring). While Justice O'Connor found white flight to be an unfortunate regional demographic trend, she found that such a remedy went "beyond the nature and scope of the constitutional violation." *Id.* (O'Connor, J., concurring). She noted that the elimination of discrimination inherent in the dual school systems "are not readily corrected 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).

203. *Id.* at 2061 (O'Connor, J., concurring). Justice O'Connor stated: "The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious,

### 2. Justice Thomas's Concurring Opinion

In his concurring opinion, Justice Thomas identified two separate problems with the district court's remedy. He asserted that: (1) the district court mistakenly operated under the theory "that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development;"[204] and (2) the federal courts have exercised "virtually unlimited equitable powers" to remedy alleged constitutional violations.[205]

First, Justice Thomas reasoned that the district court inferred an ongoing constitutional violation based upon evidence of pre-1954 de jure segregation of the School District and present de facto segregation.[206] Justice Thomas noted, however, that such evidence was insufficient to prove continued segregation.[207] Justice Thomas maintained that the existence of predominately black schools alone does not evidence state encouraged segregation.[208] Alternatively, Justice Thomas reasoned that low non-minority enrollment in the School District may evidence voluntary housing choices or other decisions.[209]

---

does not admit of judicial intervention absent a constitutional violation." *Id.* (O'Connor, J., concurring).

204. *Id.* at 2062 (Thomas, J., concurring) (stating that such a theory would cause the courts to rely upon controversial social science data and "rests on an assumption of black inferiority"). Justice Thomas believed that "[i]nstead of focusing on remedying the harm done to those black schoolchildren injured by segregation, the District Court here sought to convert the [District] into a 'magnet district' that would reverse the 'white flight' caused by desegregation." *Id.* at 2061-62 (Thomas, J., concurring). Justice Thomas also stated: "It never ceases to amaze me that the courts are so willing to assume that anything that is predominately black must be inferior." *Id.* at 2061 (Thomas, J., concurring).

205. *Id.* at 2062 (Thomas, J., concurring). Justice Thomas noted that the exercise of such authority by the federal courts has "trampled upon principles of federalism and the separation of powers and has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm." *Id.* (Thomas, J., concurring).

206. *Id.* at 2062 (Thomas, J., concurring) Justice Thomas noted that "[t]he District Court found that in 1954[,] the [School District] operated 16 segregated schools for black students, and . . . 24 schools remained . . . more than 90% black." *Id.* (Thomas, J., concurring). *See supra* part II.B (discussing *Brown I*, which in 1954 prohibited segregation).

207. *Jenkins*, 115 S. Ct. at 2062 (Thomas, J., concurring). Justice Thomas reasoned that because it had been 30 years since the last State official action proving segregation, the district court should have shown more than the presence of schools with high black populations or low test scores as evidence of de facto segregation. *Id.* at 2063. (Thomas, J., concurring). Without such a showing, Justice Thomas reasoned that liability could rest only on a theory that racial imbalances are unconstitutional. *Id.* at 2064 (Thomas, J., concurring).

208. *Id.* at 2062 (Thomas, J., concurring).

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

Justice Thomas argued that prior state-mandated segregation does not always cause racial imbalances.[210] Justice Thomas reasoned that the district court derived its notion that racial imbalances trigger segregation by misinterpreting the Supreme Court's decision in *Brown I*.[211] Justice Thomas asserted that *Brown I* did not promote the principle that racially isolated schools are inherently inferior.[212] Therefore, because the schools in the School District were only racially isolated, Justice Thomas concluded that Missouri's actions no longer offended the Constitution.[213]

Second, Justice Thomas attacked the Supreme Court's earlier decisions allowing the district courts to exercise broad remedial authority in the area of education.[214] Justice Thomas reasoned that district

---

210. *Id.* at 2064 (Thomas, J., concurring). Justice Thomas reasoned that the district court found that "racial imbalances constituted an ongoing constitutional violation that continued to inflict harm on black students." *Id.* (Thomas, J., concurring).

211. *Id.* (Thomas, J., concurring). Justice Thomas noted that in *Brown I*, the Court relied upon several psychological and sociological studies proving that de jure segregation generated a feeling of inferiority among black students. *Id.* (Thomas, J., concurring). *See also Brown I*, 347 U.S. 483, 494 (1953). The *Brown I* Court noted that:

> "Segregation of white and colored children in public schools has a detri-mental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

*Id.* (quoting Brown v. Board of Educ., 98 F. Supp. 797 (1951)). The *Brown I* Court also stated that separation "generates a feeling of inferiority as to . . . [the] status [of blacks] in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.*

212. *Jenkins*, 115 S. Ct. at 2064-65 (Thomas, J., concurring). Justice Thomas argued that the *Brown I* Court found the harm related only to de jure segregation. *Id.* (Thomas, J., concurring). "[T]he District Court seemed to believe that black students in the [School District] would continue to receive an 'inferior education' despite the end of de jure segregation, as long as de facto segregation persisted." *Id.* at 2064 (Thomas, J., concurring).

213. *Id.* at 2065 (Thomas, J., concurring). "The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race." *Id.* (Thomas, J., concurring).

214. *Id.* at 2067 (Thomas, J., concurring). Justice Thomas noted that in a prior decision concerning this litigation, the Court approved the continued use of the extraordinary remedies when the need for them had disappeared. *Id.* (Thomas, J., concurring) (citing Missouri v. Jenkins, 495 U.S. 33, 56-58 (1990)). He also noted that under the district courts' broad remedial power, they have "directed or managed the reconstruction of entire institutions and bureaucracies, with little regard for the inherent limitations on their authority." *Id.* (Thomas, J., concurring). *See also* Hutto v. Finney, 437 U.S. 678, 678 (1978) (granting power to district court to manage prisons); Hills v. Gautreaux, 425

courts presently exercise their remedial power inconsistently with the history and tradition of equity.[215] Justice Thomas maintained that federal courts have encroached on the authority of local government with regard to education.[216] Because the federal government cannot adequately address the educational needs of a state, Justice Thomas suggested that federal courts leave such functions to local governments.[217]

---

U.S. 284, 305 (1976) (approving district court's remedial order in the area of public housing).

215. *Jenkins*, 115 S. Ct. at 2067-70. (Thomas, J., concurring). Justice Thomas reasoned that there is no historical record of broad remedial powers. *Id.* at 2069 (Thomas, J., concurring). Specifically, Justice Thomas noted that "[c]ertainly there were no 'structural injunctions' issued by the federal courts, nor were there any examples of continuing judicial supervision and management of governmental institutions." *Id.* (Thomas, J., concurring). Justice Thomas also stated that "we should exercise the power to impose equitable remedies only sparingly, subject to clear rules guiding its use." *Id.* at 2070 (Thomas, J., concurring).

216. *Id.* (Thomas, J., concurring) ("Federal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States."). *See also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) (stating that "local autonomy of school districts is a vital national tradition"); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973) (stating that local control over schools gives local government the freedom to tailor local programs to local needs and "affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence"). Justice Thomas emphasized that:

> A structural reform decree eviscerates a State's discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds to the desegregation plan at the expense of other citizens, other government programs, and other institutions not represented in court. When District Courts seize complete control over the schools, they strip State and local governments of one of their most important governmental responsibilities, and thus deny their existence as independent governmental entities.

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

Specifically, in the present case, Justice Thomas attacked the district court's exercise of the legislative function of taxing the School District and staffing the School District schools. *Id.* at 2070-71 (Thomas, J., concurring). "In this case, not only did the district court exercise the legislative power to tax, it also engaged in budgeting, staffing, and educational decisions, in judgments about the location and aesthetic quality of the schools, and in administrative oversight and monitoring." *Id.* (Thomas, J., concurring). Justice Thomas noted that such functions involve legislative or executive power. *Id.* (Thomas, J., concurring).

217. *Id.* at 2070 (Thomas, J., concurring). Justice Thomas reasoned that "State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricular, and funding choices necessary to bring a school district into compliance with the Constitution." *Id.* (Thomas, J., concurring). Specifically, Justice Thomas noted that federal courts have limited power to effectively oversee local educational programs: "[f]ederal courts simply cannot gather sufficient information to render an effective decree, have limited resources to induce compliance, and cannot seek political and public support for their remedies." *Id.* (Thomas, J., concurring).

### *D. The Dissenting Opinions*

#### 1. Justice Souter's Dissenting Opinion

Justice Souter, focusing on the Court's review of the premises underlying the district court's orders, concluded that the Supreme Court rendered an opinion inconsistent with findings, evidence, and controlling precedent.[218] In examining whether the district court properly considered standardized test scores in deciding if Missouri had obtained partial integration, Justice Souter maintained that, in the instant case, low test scores properly indicated a lack of partial integration.[219] Furthermore, Justice Souter believed that the district court relied on more than just test scores to determine whether Missouri obtained partial unitary status.[220] Justice Souter argued that the district court also relied on Missouri's failure to offer proof of partial unitary status.[221] Justice Souter further argued that Missouri failed to show that it had eliminated, to the extent practicable, the vestiges of prior de jure segre-

---

218. *Id.* 2076-78 (Souter, J., dissenting). Justice Souter stated that "[t]he deficiencies from which we suffer have led the Court effectively to overrule a unanimous constitutional precedent of 20 years standing, which was not even addressed in argument, was mentioned merely in passing by one of the parties, and discussed by another of them only in a misleading way." *Id.* at 2074 (Souter, J., dissenting). *See infra* part V (discussing this view of *Jenkins*).

219. *Jenkins*, 115 S. Ct. at 2074 (Souter, J., dissenting).

220. *Id.* at 2076 (Souter, J., dissenting). Justice Souter argued that none of the district court orders required a certain level of test scores before unitary status could be achieved. *Id.* at 2078 (Souter, J., dissenting). Justice Souter found support for this position in the appellate court decision:

> "When we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered. Test scores, however, must be only one factor in the equation. Nothing in this court's opinion, the district court's opinion, or the testimony of [the School District's] witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs should be ended by a declaration [that] they are unitary."

*Id.* at 2078 (quoting Jenkins by Agyei v. Missouri, 19 F.3d 393, 395 (8th Cir. 1994), *rev'd sub nom.* Jenkins v. Missouri, 115 S. Ct. 2038 (1995)).

221. *Id.* at 2079 (Souter, J., dissenting). *See also* Freeman v. Pitts, 503 U.S. 467, 485 (1992) (stating that "[t]he 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"). Before granting relief from a district court order, a district court must consider if a constitutional violator has fully and satisfactorily complied with the order. *Id.* at 491. Justice Souter noted that "[t]he burden of showing that these conditions to finding partial unitary status have been met rest (as one would expect) squarely on the constitutional violator who seeks relief from the existing remedial order." *Jenkins*, 115 S. Ct. at 2079 (Souter, J., dissenting). Justice Souter concluded that Missouri failed to show its compliance with the three-part *Freeman* test. *Id.* (Souter, J., dissenting).

gation,[222] and failed to demonstrate that it exercised good faith in complying with the district court's orders.[223] In the absence of proof of substantial integration from Missouri, Justice Souter concluded that test scores may properly evidence that the ills of deficiency in student achievement have not been eliminated to the extent practicable.[224]

Justice Souter then addressed the Court's finding that the district court rested its approval of salary increases solely on the objective of attracting non-minority students.[225] Justice Souter maintained that the district court's order regarding salary increases served two distinct purposes: first, drawing non-minority students; and second, raising the level of student achievement.[226] Justice Souter concluded that the

---

222. *Jenkins*, 115 S. Ct. at 2079 (Souter, J., dissenting). Justice Souter noted that Missouri maintained only that it had implemented the required educational programs; Missouri never claimed that implementation of the programs had remedied the reduction in student achievement. *Id.* (Souter, J., dissenting).

223. *Id.* at 2080 (Souter, J., dissenting). Justice Souter reasoned that the record was replete with questions concerning Missouri's effort to desegregate the School District. *Id.* (Souter, J., dissenting). In the district court's April 16, 1993 order, the district court noted that Missouri has been historically opposed to any program designed to desegregate the School District. *Id.* (Souter, J., dissenting). Furthermore, in its order, the district court noted that Missouri never offered a viable or tenable alternative and has been antagonistic to desegregation decrees. *Id.* (Souter, J., dissenting).

224. *Id.* (Souter, J., dissenting). Justice Souter argued that "test scores will clearly be relevant in determining whether the improvement programs have cured a deficiency in student achievement to the practicable extent." *Id.* at 2080-81 (Souter, J., dissenting). Justice Souter noted that the relevancy of test scores is open for judgment that will not prove to be sound until the judgment is supported by the record. *Id.* at 2081 (Souter, J., dissenting).

225. *Id.* at 2081-83 (Souter, J., dissenting). "The Court suggests that the District Court rested its approval of salary increases only on the object of drawing students into the district's schools, . . . and rejects the increases for that reason." *Id.* at 2082-83 (Souter, J., dissenting).

226. *Id.* at 2081 (Souter, J., dissenting). Justice Souter noted that:

> The District Court had evidence in front of it that adopting the State's position and discontinuing desegregation funding for salary levels would result in their abrupt drop to 1986-1987 levels, with the resulting disparity between teacher pay in the district and the nationwide level increasing to as much as 40-45 percent, and a mass exodus of competent employees likely taking place.

*Id.* (Souter, J., dissenting). Justice Souter further noted and quoted the lower court:

> "It is evident that the district court had before it substantial evidence of a statistically significant reduction in the turnover rates for full-time employees, a dramatic increase in the percentage of certified employees selecting [the School District] because of the salary increases, and a significant decline in the number of employees lost to other districts. Further, the court heard testimony that the average performance evaluation for the professional employees increased positively and significantly."

*Id.* at 2082 (Souter, J., dissenting) (quoting Jenkins by Agyei v. Missouri, 13 F.3d 1170, 1172-74 (8th Cir. 1993), *rev'd sub nom.* Jenkins v. Missouri, 115 S. Ct. 2038 (1995)). *See infra* part IV.A.2 analyzing Justice Souter's point.

district court's second purpose alone would justify allowing the district court's orders to remain in effect.[227]

Next, Justice Souter considered the validity of the magnet school program.[228] Justice Souter first argued that, because the question of the validity of the district court's magnet program was not before the Court, neither party properly briefed or argued the issue and that the Court had no authority to decide the issue.[229] Next, Justice Souter stressed that the district court did not define intradistrict violation as the Court did in its decision.[230] Justice Souter reasoned that the record supported the idea that the district court understood the constitutional violation to produce effects stretching beyond District borders.[231] Specifically, Justice Souter argued that these effects were significant even though they did not cause segregation in surrounding districts.[232] With this in mind, Justice Souter concluded that the Court incorrectly

---

227. *Jenkins*, 115 S. Ct. at 2083 (Souter, J., dissenting). Justice Souter noted:

> It seems clear, however, that the District Court and the Court of Appeals both viewed the salary orders as serving two complementary but distinct purposes, and to the extent that the District Court concludes on remand that its salary orders are justified by reference to the quality of education alone, nothing in the Court's opinion precludes those orders from remaining in effect.

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

228. *Id.* at 2083 (Souter, J., dissenting).

229. *Id.* at 2076-77 (Souter, J., dissenting).

230. *Id.* at 2083 (Souter, J., dissenting). Justice Souter stated: "The District Court meant that the violation within the [District] had not led to segregation outside of it, and that no other school districts had played a part in the violation. It did not mean that the violation had not produced effects of any sort beyond the district." *Id.* (Souter, J., dissenting). Justice Souter reasoned that Missouri and the School District committed a constitutional harm that produced significant non-segregation effects in other districts and led to greater segregation in the District. *Id.* (Souter, J., dissenting).

231. *Id.* at 2084-85 (Souter, J., dissenting). Justice Souter reasoned that the School District suffered because of flight to suburban school districts *Id.* (Souter, J., dissenting). Justice Souter noted that:

> While this exodus of white students would not have led to segregation within the [suburban school districts], which have all been run in a unitary fashion since the time of *Brown*, it clearly represented an effect spanning district borders, and one which the District Court and the Court of Appeals expressly attributed to segregation in the [School District].

*Id.* at 2084 (Souter, J., dissenting).

232. Justice Souter argued that these effects were significant "non-segregative" effects as opposed to "segregative" effects. *Id.* at 2084 (Souter, J., dissenting). Justice Souter noted that the district court and the court of appeals found Missouri and the School District's violation caused white flight to surrounding suburban districts and private schools. *Id.* (Souter, J., dissenting). *See also* Jenkins by Agyei v. Missouri 855 F.2d 1295, 1302 (8th Cir. 1988) (stating that the district court found that "the preponderance of black students in the district was due to [Missouri's] and [the School District's] constitutional violations, which caused white flight"), *aff'd in part, rev'd in part, sub nom.* Missouri v. Jenkins, 495 U.S. 33 (1990).

rejected the finding of the district court with respect to the magnet school program.[233]

Finally, Justice Souter addressed the limitation on the equitable powers of the district courts.[234] Justice Souter argued that the limitation placed on district courts in *Milliken I* did not apply in this case.[235] Justice Souter reasoned that *Milliken I* does not propose that "any remedy [which] takes into account conditions outside of the district is an interdistrict remedy."[236] Justice Souter argued that any other reading of *Milliken I* redefines the Court's decision in that case.[237]

---

233. *Jenkins*, 115 S. Ct. at 2084 (Souter, J., dissenting). Justice Souter argued that the Court lacked authority to review the district court's finding of fact in the absence of the showing of error. *Id.* (Souter, J., dissenting). *See, e.g.*, Graver Tank & Mfg. Co., Inc. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949) (stating that "[a] court of law, such as this Court is, rather than a court of correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

Justice Souter further argued that the Court based its decision on the position that integration, not segregation, caused white flight. *Jenkins*, 115 S. Ct. at 2085 (Souter, J., dissenting). Justice Souter argued that this distinction is not significant. *Id.* at 2086 (Souter, J., dissenting).

"[W]hile white flight would have produced significant effects in other school districts, in the form of greatly increased numbers of white students, those effects would not have been segregative beyond the [School District], as the departing students were absorbed to wholly unitary systems." *Id.* at 2085 (Souter, J., dissenting). Justice Souter reasoned that the Court overturned the concurrent factual findings of the district court and court of appeals in the absence of circumstances which would warrant such actions. *Id.* at 2087 (Souter, J., dissenting).

234. *Jenkins*, 115 S. Ct. at 2087 (Souter, J., dissenting). Justice Souter noted that "[a]lthough the fashioning of judicial remedies to this end has been left, in the first instance, to the equitable discretion of the district courts, in *Milliken I* we [the Court] established an absolute limitation on this exercise of equitable authority." *Id.* (Souter, J., dissenting). *See also Milliken I*, 418 U.S. at 745 (stating that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy").

235. *Jenkins*, 115 S. Ct. at 2087 (Souter, J., dissenting). Justice Souter reasoned that in *Milliken I*, the district court subjected school districts that had not participated in the constitutional violation to remedial orders. *Id.* at 2087. *See also Milliken I*, 418 U.S. at 745 (stating that "[t]o approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *Brown II* or any holding of this Court"). *See also supra* notes 102-09 and accompanying text (discussing *Milliken I*).

236. *Jenkins*, 115 S. Ct. at 2088 (Souter, J., dissenting). Justice Souter also argued that "a district court might subject a proven constitutional wrongdoer to a remedy with intended effects going beyond the district of the wrongdoer's violation, when such a remedy is necessary to redress the harms flowing from the constitutional violation." *Id.* (Souter, J., dissenting).

237. *Id.* (Souter, J., dissenting). Souter noted that the Court read *Milliken I* as "forbidding imposition of a remedy on a guilty district with intended consequences in a neighboring innocent district, unless the constitutional violation yielded segregative

Next, Justice Souter argued that the Court's decision was inconsistent with its prior decision in *Gautreaux*.[238] Justice Souter rejected the Court's reasoning distinguishing *Gautreaux*[239] and concluded that the district court's magnet program fell within the scope of its equitable power as recognized in *Gautreaux*.[240]

### 2. Justice Ginsburg's Dissenting Opinion

In a separate dissent, Justice Ginsburg gave a historical account of segregation and discrimination in Missouri. For instance, Judge Ginsburg explained that, from 1724 to 1957, Missouri actively participated in and mandated slavery, discrimination, and segregation.[241] Specifically, Justice Ginsburg noted that, in 1847, Missouri prohibited the creation of schools for blacks,[242] and that when blacks were allowed to receive a public education, they had to do so on a separate but equal basis.[243] Not until 1957 did Missouri repeal laws mandating

---

effects in that innocent district." *Id.* (Souter, J., dissenting).

238. *Id.* (Souter, J., dissenting). Justice Souter noted that in *Gautreaux*, the Court held that "a district court may indeed subject a governmental perpetrator of segregative practices to an order for relief with intended consequences beyond the perpetrator's own subdivision, so long as the decree does not bind the authorities of other governmental units that are free of violations and segregative effects." *Id.* (Souter, J., dissenting). See also supra notes 110-11 and accompanying text (discussing *Gautreaux*).

239. *Jenkins*, 115 S. Ct. at 2089 (Souter, J., dissenting). Justice Souter noted that the *Gautreaux* Court found the remedy permissible not only because of Chicago's wide housing market area, but also because the trial court could order a remedy in the market without binding a governmental unit innocent of the violation and free of its the effects. *Id.* (Souter, J., dissenting). Justice Souter also reasoned that in *Gautreaux*, the "District Court's method could include subjecting HUD [United States Department of Housing and Urban Development] to measures going beyond the geographical or political boundaries of its violation." *Id.* (Souter, J., dissenting).

240. *Id.* (Souter, J., dissenting). Justice Souter reasoned that the district court did not subject surrounding suburban districts to any remedial obligations but only sought to improve the operations and quality of the schools in the School District. *Id.* at 2088 (Souter, J., dissenting).

241. *Id.* at 2091 (Ginsburg, J., dissenting). Justice Ginsburg also joined Justice Souter's dissent. Specifically, she noted several facts: in 1724, Louis XV issued the first slave code for Missouri; "[b]efore the Civil War Missouri law prohibited the creation or maintenance of schools for educating blacks;" and in 1865, Missouri passed a series of laws requiring separate public schools for blacks. *Id.* (Ginsburg, J. dissenting). *See e.g., id.* (Ginsburg, J. dissenting) (quoting 1847 Mo. Laws 103: "No person shall keep or teach any school for the instruction of negroes or mulattos, in reading or writing, in this State.").

242. *Jenkins*, 115 S. Ct. at 2091 (Ginsburg, J., dissenting).

243. *See id.* (Ginsburg, J., dissenting) (citing MO. CONST. of 1865, art. IX, § 2; MO. CONST. of 1875, art. XI, § 3). Missouri's constitution required separate schools. *Id.* (Ginsburg, J., dissenting) (citing MO. CONST. of 1865, art. IX, § 2; MO. CONST. of 1875, art. XI, § 3).

segregation.[244]

Justice Ginsburg next indicated that, although the segregation laws had been repealed, in 1985 the district court found that the schools at issue still suffered from the lingering effects of once State-mandated segregation.[245] Justice Ginsburg further indicated that Missouri failed in its affirmative duty to eliminate the effects of its past mandated segregation.[246] Justice Ginsburg noted that the School District suffered greatly and retained a segregated school system that remained over sixty percent black.[247] Based on these facts, Justice Ginsburg argued that the Court had responded too quickly in ordering the district court to relinquish its authority.[248]

## IV. ANALYSIS

In *Jenkins*, the United States Supreme Court incorrectly decided that the district court went beyond its remedial power in fashioning remedies.[249] Furthermore, the Court improperly limited the discretion of

244. *Id.* (Ginsburg, J., dissenting) (citing Jenkins v. Missouri, 593 F. Supp. 1485, 1490 (W.D. Mo. 1984)). Missouri also rescinded similar constitutional provisions in 1976. *Id.* (Ginsburg, J., dissenting).

245. *Id.* (Ginsburg, J., dissenting). The lower court captured the effects of segregation by stating:

> The general attitude of inferiority among blacks produces low achievement . . . which ultimately limits employment opportunities and causes poverty . . . . While it may be true that poverty results in low achievement regardless of race . . . , it is undeniable that most poverty-level families are black . . . . The District stipulated that as of 1977 they had not eliminated all the vestiges of the prior dual system . . . . The court finds the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District.

*Jenkins*, 593 F. Supp. at 1492.

246. *Jenkins*, 115 S. Ct. at 2091 (Ginsburg, J., dissenting). *See also Jenkins*, 593 F. Supp. at 1492 (noting that the school district was "majority white in enrollment until 1970" and stating that the District "could have achieved a mathematical racial balance in its schools until that year"). The Court also noted that the School District operated some segregated schools and some integrated ones. *Id.*

247. *Jenkins*, 115 S. Ct. at 2091 (Ginsburg, J., dissenting); *see* Jenkins, 639 F. Supp. at 35 (stating that the School District "enrollment for 1984/1985 was 36,259 total students with 68.3% of them being Black, 26.7% being non-minority, 3.7% Hispanic, and 1.3% other minority groups"). Because enrollment in some schools within the School District was approximately 90% black, there were not enough white students within the School District to sufficiently integrate the School District. *See supra* note 206 and accompanying text.

248. *Jenkins*, 115 S. Ct. at 2091 (Ginsburg, J., dissenting) ("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 . . . .").

249. *See Jenkins*, 115 S. Ct. at 2046.

the district court in exercising its equitable authority and refused to focus on the true goals of desegregation cases.[250]

This Part reviews the majority's severe limitation on the equitable powers of district courts in desegregation cases.[251] Specifically, this Part analyzes the limitation placed on the scope of the district court's authority,[252] and the *Jenkins* Court's broad emphasis on the district court's goal of desegregative attractiveness.[253] Finally, this Part argues that the Court placed undue emphasis on restoring control of the School District to local authorities and prematurely suggested that the district court relinquish its authority.[254]

### *A. Limitation on the District Court's Remedial Authority*

Despite its past decisions[255] that broadened the remedial authority of the district courts, the United States Supreme Court in *Jenkins* significantly narrowed the scope of that authority. This results in limited authority for the district courts to remedy segregation.[256]

#### 1. The Scope of the District Court's Authority

Under the reasoning of *Brown II*, district courts must rely on equitable doctrines in determining remedies.[257] Moreover, the *Swann* Court expanded the district courts' power by mandating that districts take all necessary steps to remove vestiges of state-imposed segregation.[258] The *Milliken I* Court, however, restricted the power of the district courts by refusing to allow district courts to apply interdistrict remedies to intradistrict violations.[259]

In *Jenkins*, the Court attempted to resolve the issue of the scope of the district court's remedial authority by applying the plain language of

250. *See id.* at 2049-50. The Court found no interdistrict violation and therefore held that the district court's goal of desegregative attractiveness was an interdistrict remedy and beyond the authority of the court. *Id.*

251. *See infra* part IV.A-B.

252. *See infra* part IV.A-B.

253. *See infra* part IV.A.1.

254. *See infra* part IV.B.

255. *See supra* notes 70-121 and accompanying text discussing past decisions.

256. David G. Savage, *Ruling On Affirmative Action: Court Deals Blow To School Desegregation Rules; Education: Justices Say Low Achievement Levels of Minority Schools Don't Justify Long-Term Judicial Control*, L.A. TIMES, June 13, 1995, at A15. "Taken together, the . . . rulings make clear that the justices are willing to end desegregation programs even if black students remain isolated from whites and attend city schools where achievement is low." *Id.*

257. *See supra* note 81 and accompanying text (discussing equitable doctrines).

258. *See supra* note 93 and accompanying text (discussing *Swann*).

259. *See supra* note 108 and accompanying text (discussing *Milliken I*).

its other decisions.[260] The Court correctly recognized that in the absence of an interdistrict harm there can be no remedy that affects outside districts.[261] Nevertheless, the Court mistakenly interpreted this principle as support for the Court's holding that district court could not apply a broad remedy that does not adversely affect other districts to combat a violation.[262]

While it appears from the language of *Milliken I* that interdistrict remedies can be imposed only to combat interdistrict violations, the Court interpreted *Milliken I* to encompass a broad meaning.[263] Although the Court relied on *Milliken I* to support its holding that the district court exceeded its remedial authority,[264] previous interpretations evidence that *Milliken I* did not limit the district courts' equitable power to the extent suggested by the Court.[265] *Milliken I* simply supported the proposition that a district court's remedial orders cannot bind school districts that have not participated in a constitutional violation.[266] The Court's reliance on such a broad reading of the remedy

260. In *Milliken I*, the Court held that in the absence of a interdistrict violation and interdistrict effect, there can not be an interdistrict remedy. *Milliken I*, 418 U.S. 717, 745 (1974). Because the *Jenkins* Court found no interdistrict violation, it refused to allow the district court to implement an interdistrict remedy. *See supra* notes 108-09 and accompanying text.

261. *Jenkins*, 115 S. Ct. at 2050. *See also Milliken I*, 418 U.S. at 745 (stating that without an interdistrict violation there can be no interdistrict remedy). *See also supra* notes 177-79 and accompanying text (explaining why the *Jenkins* Court found that the district court went beyond its remedial power).

262. *Jenkins*, 115 S. Ct. at 2088 (Souter, J., dissenting). "[W]e left open the possibility that a district court might subject a proven constitutional wrongdoer to a remedy with intended effects going beyond the district of the wrongdoer's violation, when such a remedy is necessary to redress the harms flowing from the constitutional violation." *Id.* (Souter, J., dissenting). *See also Milliken I*, 418 U.S. at 744 (stating that "[w]e . . . turn to address, for the first time, the validity of a remedy mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district").

263. *Jenkins*, 115 S. Ct at 2087-90 (Souter, J., dissenting). The Court did not have to rely on its reasoning in *Gautreaux*, as Justice Souter did, in reaching this conclusion. *Id.* (Souter, J., dissenting).

264. *Id.* at 2052-53. The Court noted that the district court failed to meet the test of *Milliken I*, which required a finding of significant interdistrict effects before an interdistrict remedy can be imposed. *Id.* at 2052; *see Milliken I*, 418 U.S. at 745.

265. *See* Hills v. Gautreaux, 425 U.S. 284, 298 (1976) (stating that "[n]othing in the *Milliken* [*I*] decision suggests a *Per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the City where the violation occurred"). *See generally* Ruiz, *supra* note 93, at 8-9 (discussing *Milliken I*).

266. *Gautreaux*, 425 U.S. at 305. The *Gautreaux* Court stated that in *Milliken I* the district court's remedial order was impermissible because of the limits placed on federal courts to interfere with the operation of state and local government not charged with a constitutional violation. *Id.*

limitation is inconsistent with the intent of *Brown II*, which gives district courts broad discretion in eliminating the vestiges of past segregation.[267]

Justice Souter in his dissent argued that the district court's orders should have been upheld, consistent with the Court's logic in *Freeman*.[268] In *Swann*, the Court empowered the district courts with the ability to take every necessary step to eliminate the vestiges of past segregation.[269] The *Jenkins* Court failed to consider the reasonableness of applying an interdistrict remedy to combat an intradistrict violation that affected other districts, even though that effect did not cause segregation within surrounding districts.[270] Likewise, because the Court's prior decisions appeared to advocate the use of broad remedial authority,[271] the *Jenkins* Court set a dangerous precedent by ignoring its prior support of broad remedial powers and instead emphasizing its remedy limitation.

---

267. *See Brown II*, 349 U.S. 294, 299 (1955) (giving courts the authority to consider whether the actions of school authorities constitute good faith implementations). The *Brown II* Court stated that:

> In fashioning and effectuating the 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. These cases call for the exercise of these traditional attributes of equity power.

*Id.* at 300.

268. *Jenkins*, 115 S. Ct. at 2079-88 (Souter, J. dissenting) (citing *Freeman*, 503 U.S. 467, 491 (1992)).

269. Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1, 15-16 (1971) (stating that "a school desegregation case does not differ fundamentally from other cases involving [the] framing of the equitable remedies to repair the denial of a constitutional right"). The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. *See Gautreaux*, 425 U.S. at 297 (noting that, in the event of a constitutional violation, the court should use all reasonable methods available to formulate an effective remedy).

270. *See supra* part III.B. The *Jenkins* Court noted that there was no finding of a constitutional violation and precluded the district court from fashioning an interdistrict remedy. *Jenkins*, 115 S. Ct. at 2052-54. The *Jenkins* Court further stated that "[a] district court seeking to remedy an intradistrict violation that has not 'directly caused' significant interdistrict effects . . . exceeds its remedial authority if it orders a remedy with an interdistrict purpose." *Id.* at 2053-54.

271. *See generally Gautreaux*, 425 U.S. at 297 (noting that district courts have broad remedial authority); Davis v. Board of Sch. Comm'rs, 402 U.S. 33, 37 (1971) (noting that, "[h]aving once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation"); *Swann*, 402 U.S. at 15 (1971) (stating that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad for breadth and flexibility are inherent in equitable remedies"); *Brown II*, 349 U.S. 294 (1955) (noting that, when fashioning remedies, district courts should be guided by traditional notions of equitable remedies).

The *Jenkins* Court seemingly overlooked the original goals of desegregation.[272] Although education is the most important function of the state,[273] the Court refused to allow the district court to retain jurisdiction until blacks in the district received equal education.[274] The Court ignored the fact that test scores properly evidenced the inequality.[275] Also, the Court refused to allow the district court to retain authority over the School District until black children in the School District reached their highest potential, or at least a level equal to that of surrounding school districts.[276] Similarly, because the district court's orders did not bind districts who did not participate in a constitutional violation, the orders should have been upheld.[277]

Accordingly, the *Jenkins* Court departed from twenty years of precedent and failed to examine correctly its past decisions discussing district courts' remedial authority in desegregation cases.[278] The clear purpose of any remedy in a desegregation case is to eliminate, to the extent practicable, all vestiges of past segregation.[279] An examination of the district court's ultimate purpose might have led the Court to uphold the district court's remedial orders on grounds that the district court designed those orders to eliminate the effects of prior State-mandated segregation.[280] For instance, the orders not only required the School District to upgrade the facilities to equal those of surrounding white suburban districts, but also focused on improving the low test scores of blacks within the School District.[281]

District courts do not have limitless power to fashion desegregation remedies and must tailor remedies according to the nature and scope of the violation.[282] Nevertheless, unlike *Jenkins*, the *Brown II* decision

---

272. *See supra* part II.D and note 100 and accompanying text (discussing the goal of desegregation orders).

273. *Brown I*, 347 U.S. 483, 493 (1954).

274. *Jenkins*, 115 S. Ct. at 2055.

275. *Id. But see* Edward Felsenthal, *High Court Decision Seeks to End Federal Judges' Supervision of Programs*, WALL ST. J., June 13, 1995, at A2 (stating that "the school districts' progress in remedying the effects of segregation can't be measured by comparing students' test scores with normal averages").

276. *Jenkins*, 115 S. Ct. at 2055-56; *see Brown I*, 347 U.S. at 493 (explaining that children cannot succeed without an equal education).

277. *Jenkins*, 115 S. Ct. at 2088 (Souter, J., dissenting). In *Jenkins*, the district court's order sought to attract non-minorities into the district; it did not mandate that any other district participate in remedial orders. *Id.* (Souter, J., dissenting).

278. The goal of the district court in desegregation cases is to eliminate all vestiges of state-imposed desegregation. *See Swann*, 402 U.S. at 15.

279. *Id.*

280. *See id.*

281. *See supra* part III.A.

282. *Milliken I*, 418 U.S. at 744 (noting that the court is to tailor the scope of the

advocated giving district courts broad discretion in exercising their remedial authority.[283] Thus, in the instant case, the Court mistakenly found that the district court went beyond its remedial power when the district court took all necessary steps to rid the School District of the vestiges of prior State-mandated segregation.[284]

2. Desegregative Attractiveness Versus Quality Education

As Justice Souter emphasized in his dissent in *Jenkins*, the Court failed to examine the validity of the district court's orders in two important areas.[285] First, the majority did not address the issue of whether the district court adequately identified raising the level of student achievement as a goal.[286] The Court instead focused on the district court's goal of achieving non-minority attractiveness and determined such a goal to be inappropriate.[287] Because the district court fashioned its remedy in response to evidence of identified low achievement in the School District as a vestige of past segregation, the Court mistakenly refused to uphold the district court's orders on that basis alone.[288]

Second, the Court incorrectly dismissed the lower court's finding that prior State-imposed segregation caused white flight.[289] The Court

---

remedy to fit the nature and extent of the violation); *Brown II*, 349 U.S. at 300 (stating that courts should use the traditional equitable powers when drafting remedies).

283. *Brown II*, 349 U.S. at 300. *See supra* part II.C (discussing *Brown II*).

284. *See generally* Joan Biskupic, *Desegregation Remedies Rejected; Justices Say School Solutions Must Address Specific Discrimination*, WASH. POST, June 13, 1995, at A1 (discussing *Jenkins*). Biskupic noted that "[t]he Court ruled that desegregation remedies should be tailored to address documented discrimination with a district, rather than to improve its standing among other districts, as the higher spending was intended to do." *Id.*

285. *See Jenkins*, 115 S. Ct. at 2081 (Souter, J., dissenting) (noting that the district court wanted to improve the level of student achievement as well as reduce white flight).

286. *Id.* at 2055. The *Jenkins* Court stated that the goal of desegregative attractiveness was beyond the remedial authority of the district court. *Id. See also id.* at 2082-83 (Souter, J., dissenting) (stating that the Court reasoned that the district court rested its approval of salary increases only on the objective of drawing non-minorities into the district).

287. *Id.* at 2055. The Court noted that such a goal is too far removed from the task of eliminating racial identifiability in the School District. *Id.*

288. *Id.* at 2083 (Souter, J., dissenting) (noting that because the district court's salary increase order served the purpose of improving the level of quality education in the District, the Court's opinion should not have precluded the district court's order from remaining in effect).

289. *Id.* at 2052 n.8. The Court noted that there was evidence that desegregation, not segregation, caused white flight. *Id.* at 2052. The Court noted that "'[d]uring the hearing on the liability issue in this case there was an abundance of evidence that many residents of the [School District] left the [School District] and moved to the suburbs because of the [School District's] effort to integrate its schools.'" *Id.* at 2052 n.8 (quoting App.

seemingly ignored the possibility that, if Missouri had never initially maintained a segregated school system, the schools would not have experienced white flight due to segregation or integration.[290] The Court overlooked the possibility that, without such desegregation orders, the black children of the School District would have never received educational facilities and programs equal to that of surrounding white suburban schools.[291] Hence, regardless of the immediate underlying reason for white flight, the district court correctly tailored the goal of eliminating white flight to remedy the constitutional violation.[292]

### *B. Relinquishing Authority to Local Government*

In *Jenkins*, the Court suggested that the district court apply the *Freeman* test[293] to determine if Missouri had sufficiently integrated its schools.[294] The Court further suggested that the district court consider

---

239). *See also* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972) (noting that desegregation may cause white flight).

290. *Jenkins*, 115 S. Ct at 2091 (Ginsburg, J., dissenting). Justice Ginsburg argued that: "The Court stresses that the present remedial programs have been in place for seven years . . . . But compared to more than two centuries of firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court has been evanescent." *Id.* (Ginsburg, J., dissenting).

Justice Ginsburg noted that, "[g]iven 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." *Id.* (Ginsburg, J., dissenting). *See also* Felsenthal, *supra* note 275, at A2 (noting that Justice Ginsburg read the history of Missouri's segregation practices to justify the remedy proposed by the district court).

291. *Jenkins*, 115 S. Ct. at 2086 (Souter, J., dissenting) (noting that the parties agreed that before the district court's remedial plan, "the schools in the unreformed segregated system were physically a shambles"). *See also* Dennis Farney, *Fading Dream? Integration Is Faltering in Kansas City Schools as Priorities Change*, WALL ST. J., Sept. 26, 1995, at A1. Commentators say that black parents' and black community leaders' "overriding concern is not recruiting more white students, although they would welcome them if they came. Their overriding concern is getting a quality education for their own children." *Id.*

292. *Jenkins*, 115 S. Ct. at 2085 (Souter, J., dissenting). Justice Souter suggested that "[t]here would be no desegregation orders and no remedial plans without prior unconstitutional segregation as the occasion for issuing and adopting them, and an adverse reaction to a desegregation order is traceable in fact to the segregation that is subject to the remedy." *Id.* (Souter, J., dissenting). Justice Souter further stated that it made no difference if segregation or desegregation caused white flight. *Id.* at 2086 (Souter, J., dissenting).

293. *See supra* part II.E and note 127 and accompanying text (discussing the *Freeman* test).

294. *Jenkins*, 115 S. Ct. at 2055. "In reconsidering this order, the District Court should apply our three-part test from Freeman v. Pitts." *Id.* (citation omitted). *See supra* note 172 and accompanying text.

whether all of the district court orders had been implemented.[295] This line of reasoning correctly implies that the district courts are not to retain jurisdiction over the schools for an indefinite period of time.[296] In so finding, however, the Court departed from long-standing precedent stating that no matter what remedial plan is adopted, the court shall retain jurisdiction until it is clear that state-imposed segregation has been completely removed.[297]

The *Jenkins* Court placed undue emphasis on the goal of restoring the control of the School District to local authorities.[298] Although the goal of returning control to local authorities should not be overlooked, the goal of achieving integration is most important and should not be disregarded in an effort to return control of the schools to local authorities.[299] When the court attempts to correct the effects of a dual education system, *every* aspect of that system must be eradicated, including low test scores of minority students.[300] Furthermore, the Court ignored the fact that sometimes the process of removing the effects of segregation is necessarily lengthy.[301] Considering that black children in the School District suffered from inadequate school facilities and inferior education for many years, the Court perhaps failed to give the district court the necessary authority and time to rid the School District of all the effects of prior segregation.[302] *Jenkins* removed judicial supervision before the School District met the goal of desegregation.

---

295. *Jenkins*, 115 S. Ct. at 2055. "The District Court also should consider that many goals of its quality education plan already have been attained: the [School District] now is equipped with 'facilities and opportunities not available anywhere else in the country.'" *Jenkins*, 115 S. Ct. at 2056. (quoting App. to Pet. for Cert. A-115).

296. *Id.* at 2056. "On remand, the District Court must bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'" *Id.* (quoting Freeman v. Pitts, 503 U.S. 467, 489 (1992)).

297. *See* Green v. County Sch. Bd., 391 U.S. 430, 439 (1968); Landsberg, *supra* note 79, at 845.

298. *Jenkins*, 115 S. Ct. at 2090 (Souter, J., dissenting). "The Court stresses that the present remedial programs have been in place for seven years." *Id.* at 2091 (Ginsburg, J., dissenting). *See supra* notes 216-17 and accompanying text.

299. Landsberg, *supra* note 79, at 849. Where segregation laws created dual systems all aspects of those systems must be eradicated. *Id.*

300. *Id.*

301. *Jenkins*, 115 S. Ct. at 2091 (Ginsburg, J., dissenting). Justice Ginsburg noted in her concurring opinion that as early as 1724, Missouri participated in a form of segregation and as late as 1985 the vestiges of prior segregation lingered. *Id.* (Ginsburg, J., dissenting). *See supra* notes 241-48 and accompanying text.

302. *See supra* notes 241-48 and accompanying text.

Finally, the Court, and Justice Souter in his dissent, failed to provide lower federal district courts with a criteria for determining when courts should return authority to local school districts.[303] The Court mistakenly discouraged the federal courts from considering concrete factors, such as improved test scores, when determining if federal courts should relinquish authority.[304] Instead, the Court perhaps encouraged lower courts to consider the physical attributes of the schools even though those attributes will likely deteriorate when funding ceases.[305]

## V. IMPACT

### *A. The Impact of* Jenkins *on Remedial Authority*

The *Jenkins* decision significantly restricts the federal courts in fashioning effective desegregation orders.[306] The *Jenkins* decision prevents district courts from achieving realistic desegregation goals, which can be realized only through the use of broad remedial orders.[307] In cases where purely intradistrict violations are found, district courts must sometimes fashion remedies which will ultimately have some remote effect on outside districts.[308] In the shadow of the *Jenkins* decision, the most appropriate remedies to segregation will be foregone in favor of less effective or ineffective ones.[309]

---

303. Felsenthal, *supra* note 275, at A2. At least one scholar states that the *Jenkins* opinion "is ambiguous about exactly when judges must abandon their role in the process [of desegregation]." *Id.*

304. *Id.* The court explicitly limited the use of test scores in measuring the effectiveness of desegregation programs. *Id.*

305. *Id.* Felsenthal stated that "[t]he opinion makes it clear that schools are required to 'provide equality of opportunity' but not equality of output." *Id.* (quoting Missouri Attorney General Jay Nixon). *See also* Biskupic, *supra* note 284, at A1 (stating that the Court rejected arguments that higher test scores by blacks could indicate that programs had remedied the vestiges of past segregation and remanded the case to determine if the district court should end its jurisdiction over the case).

306. *See supra* note 239 and accompanying text.

307. The *Jenkins* decision is a perfect example of a case where the district court could not significantly achieve a remedy without affecting non-violating districts as well.

308. *Jenkins*, 115 S. Ct. at 2087. *See* Hills v. Gautreaux, 425 U.S. 284 (1976) (holding that *Milliken I* was not a per se bar to fashioning remedies that effect districts outside the boundaries of the violators district).

309. *Jenkins*, 115 S. Ct. at 2038. In *Jenkins*, the School District suffered from "rotted facilities." *Id.* at 2075 (Souter, J., dissenting). The district court found that the "overall condition of the [School District] particularly the interior, is generally depressing and thus adversely effect the learning environment and continues to discourage parents who might otherwise enroll their children in the [School District]." Jenkins v. Missouri, 672 F. Supp. 400, 403 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, Jenkins by Agyei v. Missouri, 855 F.2d 1295 (8th Cir. 1988). The district court also

Further, the *Jenkins* decision prevents district courts from taking all steps necessary to eliminate the lingering effects of historical segregation within a particular district.[310] The dissolution of vestigial segregation is the ultimate goal of remedial desegregation measures.[311] The *Jenkins* Court's reasoning effectively bars district courts from truly desegregating districts that suffer not only from the effect of present-day de facto segregation, but also from the effects of prior de jure segregation, which is the primary target of equal protection law.[312]

The *Jenkins* decision not only limits the remedial authority of district courts, but it also incorrectly prioritizes the restoration of control to local authorities.[313] The *Jenkins* Court de-emphasized the primary objective of the federal district courts to eliminate the effects of segregation to the extent practicable, and instead focused on relinquishing control to the school authorities.

With such a focus, the *Jenkins* Court may have invited challenges to district court orders. Where district court orders have been implemented, states can now argue that they have sufficiently integrated previously segregated districts and should, therefore, be released from their desegregation orders, regardless of whether any vestiges of segregation remain.[314] Thus, school districts are now encouraged to supplant de jure segregation with de facto segregation and to do indi-

---

found that:

> The [School District] facilities still have numerous health and safety hazards, educational and environmental hazards, functional impairments, and appearance impairments . . . . The specific problems include: inadequate lighting; peeling paint and crumbling plaster on ceiling walls and corridors; loose tiles, torn floor coverings, odors resulting from unventilated restrooms with rotted, corroded toilet fixtures; noisy classrooms due to lack of adequate acoustical treatment, etc.

*Id.*

310. *See supra* notes 245-48 and accompanying text. *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1, 15 (1971) (stating that district courts must take all necessary steps to eliminate the lingering effects of segregation).

311. *See Jenkins*, 115 S. Ct. at 2056 (noting that the end purpose, among other things, is to remedy the violation). *See also* Freeman v. Pitts, 503 U.S. 467, 489 (1972) (stating that "[w]e have said that the court's end purpose must be to remedy the violation").

312. *See Jenkins*, 115 S. Ct. at 2056.

313. *See id.* The Court stressed the district court's goal of restoring state and local government control over the schools. *Id. See also* Felsenthal, *supra* note 275, at A2 (stating that "[t]he court is sending a strong signal that it is sick of these cases").

314. *Jenkins*, 115 S. Ct. at 2091 (Ginsburg, J., dissenting). *See also* Farney, *supra* note 291, at A1 (noting that desegregation efforts benefit children because they provide funding for quality education that will otherwise not be provided); Savage, *supra* note 256, at A1 (stating that Chief Justice Rehnquist has consistently argued that school desegregation orders should end once school officials have complied with the orders).

rectly what the Constitution prohibits them from doing directly.[315] To prevent such de facto segregation, courts should be permitted to consider the harms caused by prior state-imposed segregation, such as low test scores and under-funded minority facilities.[316]

### *B. Returning to* Plessy v. Ferguson

Justice Thomas's concurring opinion announces the proposition that separate can now be equal.[317] The focus of the *Jenkins* decision provides states with ammunition to attack the underlying objective of desegregation remedies.[318] *Plessy's* reasoning that the state is entitled to segregate when it suits certain members of the citizenry is once again a viable principle.[319] The *Jenkins* decision discourages federal district courts from taking all necessary steps to rid school districts of desegregation effects.[320] Indeed, states are now encouraged to make facial efforts to cease their de jure segregation, while maintaining covert segregative policies.[321] Thus, *Jenkins* may serve to sentence victims of segregation to eternal separate and unequal status with little hope of a remedy for their unequal treatment.[322]

Even if *Jenkins* does not return the federal district courts to upholding the standard of "separate but equal," it returns the Court to something similar to the post *Plessy* era. Thus, school districts essentially

315. *See* Biskupic, *supra* note 284, at A1 (noting that, after the *Jenkins* decision, the "school systems can gradually free themselves from a judge's supervision orders by [simply] showing that they have taken every practical step and have a good faith commitment to achieving desegregation").

316. *Jenkins*, 115 S. Ct. at 2078-79 (Souter, J., dissenting) (noting that examining test scores is a proper way of determining if the School District removed the vestiges of past segregation).

317. *See* Steven A. Holmes, *Look Who's Saying Separate Is Equal*, N.Y. TIMES, Oct. 1, 1995, at A1 (stating that "[l]ast month though some black members of school boards in Denver and Kansas City, Mo. questioned whether trying to force whites to mix with black children was not only demeaning to blacks but unnecessary to achieve equal academic opportunities"). The article quotes a member of the Kansas City school board as stating that segregation is dead. *Id. See also Jenkins*, 115 S. Ct. at 2061 (Thomas, J., concurring) (stating that predominately black does not denote inferiority and rationalizing that black schools are not necessarily a product of a constitutional violation).

318. Farney, *supra* note 291, at A1 (noting that citizens of Kansas City, Missouri question the district court judge's motive for desegregating the School District).

319. *See supra* note 44-46 and accompanying text (discussing *Plessy*).

320. Savage, *supra* note 256, at A1 (noting that, in the past, student desegregation orders were called off before district courts achieved adequate integration).

321. *Jenkins*, 115 S. Ct. 2090-91 (Souter, J., dissenting) (stating that the *Jenkins* Court transformed the *Milliken I* decision into a arbitrary and mechanical shield for constitutional violators).

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

may be required only to temporarily upgrade facilities, leaving minority children far from receiving equality in education.[323] The Court loses the heart of the *Brown I* decision, that education is the most important function of state government, and allows states to continue providing minorities with meager educational facilities of poor quality.[324]

## VI. CONCLUSION

The Supreme Court's decision in *Missouri v. Jenkins* significantly limits the broad remedial power granted to the district courts. It prevents the district courts from fashioning remedies that adequately address the vestiges of past segregation. Moreover, the *Jenkins* Court provided district courts with little guidance to evaluate the appropriate point at which a state should be released from a court order. The Court's decision does not enumerate criteria for definitively determining what degree of state action constitutes compliance sufficient to restore a state's authority. Additionally, the *Jenkins* holding deviates from prior Supreme Court decisions which generally held that district courts have broad remedial authority. Finally, the Court failed to provide realistic alternative segregation remedies to the ones currently in place and has essentially bound the hands of the federal district courts from doing so themselves.

CHELSEY PARKMAN

323. *See supra* note 256 and accompanying text.
324. *See Brown I*, 347 U.S. 483, 492 (1953).