CONSTITUTIONAL LAW—REMEDIAL AUTHORITY—ALTHOUGH HAVING BROAD DISCRETION TO FASHION SCHOOL DESEGREGATION ORDERS, IMPLEMENTING A REMEDIAL DECREE AIMED AT MAKING THE VIOLATING DISTRICT MORE ATTRACTIVE TO STUDENTS IN SURROUNDING SUBURBS EQUALED AN INTERDISTRICT SOLUTION WHICH IN THE ABSENCE OF AN INTERDISTRICT VIOLATION EXCEEDED THE REMEDIAL AUTHORITY OF THE DISTRICT COURT—*Missouri v. Jenkins*, 115 S. Ct. 2038 (1995).

The essentially contradictory phrase of "separate but equal" developed by the United States Supreme Court in *Plessy v. Ferguson*[1] at one time made segregated education not only possible but mandatory, and has left lasting effects on the public school systems of the United States.[2] Segregated school districts were not officially declared unconstitutional until fifty-eight years later when the Supreme Court in *Brown v. Board of Education* (*Brown I*)[3] declared separate but equal to be inherently unequal.[4] Overruling *Plessy* did not solve the problems associated with seg-

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[1] 163 U.S. 537 (1896)

[2] *See* Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color- Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 766 (1996). *Plessy v. Ferguson* held that providing separate facilities for the different races did not violate the Equal Protection Clause of the Fourteenth Amendment. *See Plessy*, 163 U.S. at 548. The Court reasoned that under the "separate but equal" doctrine no Fourteenth Amendment violation would be found if the states maintained substantially equal facilities, even though these facilities would be separate. *See id.* at 546-47. As a result, a dual school system developed that permitted white schools to deny entrance to black students. *See id.* at 544; Chelsey Parkman, Note, Missouri v. Jenkins: *The Beginning of the End for Desegregation*, 27 LOY. U. CHI. L.J. 715, 721 (1996). Blacks were not equally educated under this system of separate facilities. *See* Parkman, *supra*, at 721-22 (noting that black students attended deteriorating schools that were receiving only a portion of the funds used to educate white students, were located miles away without their students receiving the benefit of bus transportation enjoyed by white students, and were equipped to provide instruction in only the basic disciplines).

[3] 347 U.S. 483 (1954) (hereinafter *Brown I*).

[4] *See id.* at 495. In *Brown I*, the Supreme Court held that official segregation violated the Equal Protection Clause of the Fourteenth Amendment. *See id.*; *infra* note 26 (setting forth the relevant text of the Fourteenth Amendment). The *Brown I* Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place." *Brown I*, 347 U.S. at 495. The Court specifically noted "[s]eparate educational facilities are inherently unequal." *Id.* This language overruled the *Plessy* Court's support of the "separate but equal" doctrine. *See id.* at 494-95. The holding in *Brown I* was based on findings that dual school systems had intangible effects on black students and also adversely affected their "hearts and minds in a way unlikely ever to be undone." *Id.*

regated education and merely served as the genesis of a lengthy and complex process, the end result of which was to have black and white children educated together in schools that were not racially identifiable.[5] Initiating the first desegregation programs was a slow process due to resistance from states and local school districts to court orders, minimal leadership from state legislatures, and a lack of meaningful initiative from the courts.[6] Supreme Court involvement resulted from this leisurely movement toward unitary[7] school system status.[8] Additionally, Congress

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at 493-94. For additional discussion of *Brown I* see *infra* note 45. Subsequently, the Court decided *Brown v. Board of Education* (*Brown II*), which addressed the best methods of implementing and enforcing federal court judgments requiring the elimination of segregatory school systems. *See Brown II*, 349 U.S. 294, 299 (1955); *infra* notes 44-52 and accompanying text for a thorough treatment of the holding of *Brown II*.

[5] *See* Richard Delgado & Jean Stefancic, *The Social Construction of* Brown v. Board of Education: *Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 548-49 (1995) (proposing that *Brown I* failed to have much impact on areas outside of school desegregation and even less effect than hoped in that area); *see also* Robert F. Drinan, S.J., *Civil Rights-The Next Thirty Years*, 29 U.S.F. L. REV. 875, 877 (1995) (commenting that *Brown I*, although considered to have bridged the chasm between the races, did not serve as a decision that freed African-Americans from the last remains of slavery); Carter M. Stewart & S. Felicita Torres, Recent Development, *Limiting Federal Court Power to Impose School Desegregation Remedies*, 31 HARV. C.R.-C.L. L. REV. 241, 243 (1996) (declaring that the anticipated transformation in school policy emanating from *Brown* was slow to emerge).

[6] *See* Stewart & Torres, *supra* note 5, at 243. Segregated school systems took advantage of the tepid standard set forth in *Brown II* to "make a prompt and reasonable start toward full compliance," often implementing no new policies. *Id.*; *see, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 432-33 (1968) (continuing segregatory practices even after the *Brown* decisions); United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 228 (1969) (criticizing local school boards for failing to take any effective steps to bring about desegregation in the public school system for the 10-year period after *Brown I*).

[7] When referring to school systems affected by segregatory practices, the courts have utilized "dual" to describe a school district which has participated in de jure segregation by race, and "unitary" to denote a school district which has rectified the violation and is currently adhering to constitutional provisions. *See* Board of Educ. v. Dowell, 498 U.S. 237, 246 (1991); Brian K. Landsberg, *Equal Educational Opportunity: The Rehnquist Court Revisits* Green *and* Swann, 42 EMORY L.J. 821, 825-26 (1993) (noting that a dual system has definite black and white components, while a unitary system is non-racial); Freeman v. Pitts, 503 U.S. 467, 487 (1992) (recognizing that although the term "unitary district" is incapable of fixed meaning, it is often defined as a district that is complying with constitutional requirements); Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1108 (1990) (explaining that unitary status is not to be considered by looking at a particular moment in time but, rather, is a "general state of being").

[8] *See, e.g., Brown II*, 349 U.S. at 301 (requiring that the desegregation process move forward "with all deliberate speed"); Copper v. Aaron, 358 U.S. 1, 15 (1958) (speaking out against the known and intense resistance to the *Brown II* ruling in the South); Goss v. Bd. of Educ., 373 U.S. 683, 689 (1963) (expressing impatience with the lag in implementing *Brown II*); Griffin v. County Sch. Bd., 377 U.S. 218, 234 (1964)

was frustrated with the delays associated with the integration process and passed the Civil Rights Act of 1964.[9]

The desegregation process has been accomplished successfully in the rural areas and small towns of the South, but metropolitan areas nationwide continue to remain predominantly black.[10] The opportunity to easily desegregate schools was present years ago when cities and their respective school districts were not so racially identifiable.[11] This has long since passed and the district courts currently dealing with segregated school systems[12] are commonly faced with demographic population shifts

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(declaring that in the face of a decade of inaction "[t]he time for mere 'deliberate speed' has run out"); *Green*, 391 U.S. at 439 (abandoning the deliberate speed standard and stressing that a plan must be implemented that "promises realistically to work *now*"); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-18, at 1489-90 (2d ed. 1988) for a more detailed discussion of the Court's impatience with the slow implementation of desegregation policies in dual school systems. Judicial intervention was necessary in these instances because even with all the faults associated with school desegregation adjudication, it was not possible to imagine a constitutional system where none of the branches of government were prepared to proclaim and enforce constitutional rights. *See* Howard I. Kalodner, *Overview of Judicial Activism in Education Litigation, in* JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 3, 3 (Barbara Flicker ed., 1990)

[9] *See* TRIBE, *supra* note 8, § 16-18, at 1490 n.21. The Court's action in *Brown* and in subsequent cases exposing racial injustice helped to instigate the enactment of the Civil Rights Act of 1964. J. Skelly Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, in DE FACTO SEGREGATION AND CIVIL RIGHTS: STRUGGLE FOR LEGAL AND SOCIAL EQUALITY 4, 25 (Oliver Schroeder, Jr. & David T. Smith eds., 1965); *Green*, 391 U.S. at 433 n.2; for a thorough treatment of the 1964 Civil Rights Act see LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 46-58 (1976); *see also* Barbara Flicker, *The View from the Bench: Judges in Desegregation Cases, in* JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 365, 370 (Barbara Flicker ed., 1990) (noting that although actions taken by the executive and legislative branches of government helped many remedial plans to succeed, the Supreme Court provided the impetus which propelled the district courts). The 1964 Act required school districts to initiate good faith attempts to desegregate by delineating specific guidelines and by empowering the government to refuse federal contributions to school districts that continued to discriminate against blacks. *See* Stewart & Torres, *supra* note 5, at 244 (citing 42 U.S.C. §§ 2000c-6, 2000d-1 (1988); *see generally* James R. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967); *School Desegregation and the Office of Education Guidelines*, Note, 55 GEO. L.J. 325 (1966); *The Courts, HEW, and Southern School Desegregation*, Comment, 77 YALE L.J. 321 (1967).

[10] *See* Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 826 (1996); *see also* Delgado & Stefancic, *supra* note 5, at 549 (discussing that many critics have claimed that *Brown I* had a relatively minimal impact in desegregating public schools except in the Deep South).

[11] *See, e.g.*, JoAnn Grozuczak Goedert, Comment, Jenkins v. Missouri: *The Future of Interdistrict School Desegregation*, 76 GEO. L.J. 1867, 1867 (1988).

[12] *See, e.g., id.* Although it is difficult to approximate the number of school districts actively involved in litigation concerning their constitutional obligation to desegregate officially segregated public schools, a conservative estimate is in the hundreds. *See* Daniel J. McMullen & Irene Hirata. McMullen, *Stubborn Facts of History-The Vestiges of Past*

tending to leave the inner-city school districts predominantly black and the surrounding suburban school districts predominantly white.[13] Further judicial involvement is necessary in these instances; however, the remedial process is complicated by questions regarding the scope of a district court's power to remedy past instances of de jure segregation crossing school district lines.[14] To achieve an effective remedy, it would seem that a desegregation plan crossing district borders would be both necessary and the most effective way to remove the racial identifiableness of

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Discrimination in School Desegregation Cases, 44 CASE W. RES. L. REV. 75, 76 (1993); *see also* Michelle S. Simon, *Suspended over the Abyss: A City's Quest for Local Autonomy in Institutional Reform Litigation*, 23 FORDHAM URB. L.J. 663, 668 n.27 (1996) (acknowledging that presently there are over 500 local school systems operating pursuant to court orders to desegregate).

[13] *See, e.g.*, Goedert, *supra* note 11, at 1867. Metropolitan areas around the United States have more than a 75% minority population, and approximately 90% of minority students live in metropolitan areas. *See* Orfield, *supra* note 10, at 826 & n.12. Although outdated, the following statistics from the fall of 1973 show the disparities in the racial populations of inner-city schools: Chicago (58% black); Philadelphia (61%); Detroit (70%); Baltimore (70%); Washington (96%); Cleveland (57%); Memphis (68%); St. Louis (69%); New Orleans (77%); Kansas City, Missouri (56%); Atlanta (81%); Newark (72%); Oakland (62%); Louisville (52%); and Birmingham (62%). *See* GRAGLIA, *supra* note 9, at 281, 341 n.65; Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14 (1971) (perceiving the patterns and structure of communities, the increase in student populations, the relocation of families, and other changes directly affecting school planning to neutralize and negate integration efforts at times). Many factors contribute to this trend, including a notable movement of blacks to urban locales from rural areas and a lower white than black birth rate, but this trend is most likely accelerated by compulsory education. *See* GRAGLIA, *supra* note 9, at 281. James Coleman, the proponent of the "white flight" theory, concluded from a study of the 20 largest cities in the United States that the relevant issue concerned the amount to time it would take before the segregating actions of white flight overcame any successful integration movement resulting in a district that would be comprised of a more segregated population than before. *See id.*; *see also infra* note 144 (discussing the "white flight" theory and opposing views).

Attitudinal changes toward desegregation also may be attributed to the different viewpoints of the federal judiciary appointed since 1980 by both Presidents Reagan and Bush. *See* Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J. 863, 864 (1993). Additionally, the frustration of courts attempting to unsuccessfully solve problems associated with school desegregation may account for changes in the judiciary's attitude. *See* Hansen, *supra*, at 868.

[14] *See* Goedert, *supra* note 11, at 1867-68. De jure segregation is directly mandated or otherwise sanctioned by law. *See* BLACK'S LAW DICTIONARY 293 (Revised 6th ed. 1991). De facto segregation is inadvertent, occurs without legal authority, and results from social, economic and other factors. *See id.* at 288; *see also* Keyes v. School Dist. No. 1, Denver, Colorado, 413 U.S. 189, 192 (1973) (explaining that de facto segregation exists where discrimination results not from adherence to unconstitutional laws but from the implementation of techniques such as the gerrymandering of school attendance zones, the placement of new schools, and the fashioning of school policies that attain or maintain a segregated school system throughout the district). In *Swann*, the Court held that school officials overseeing a district with a history of segregation carried the burden of abolishing all vestiges of discrimination, regardless of its type. *See Swann*, 402 U.S. at 15-16, 18.

certain school districts.[15] The question that lingered was whether a district court's remedial authority was tempered in some way or could the court order remedies which assuredly would provide an integrated district regardless of the expansiveness and cost.[16] Case law demonstrates that a district court's authority to remedy such a constitutional violation has definite limits and that those limits may be an obstacle in attaining effective relief.[17] The judicial question at issue was the scope of authority of a district court to remedy past instances of segregation.[18]

In a recent case, *Missouri v. Jenkins*,[19] the Supreme Court addressed the permissible scope of a district court's authority to order a desegretive remedy.[20] Initially, the Court stated that a review of the proper scope of a district court's remedial authority was integral to deciding whether the ordered desegregation decrees were beyond the district court's broad power.[21] The Court found the desegregation order requiring State funding of salary increases for Kansas City, Missouri, School District (KCMSD) employees unconstitutional because it was designed to achieve an interdistrict goal in the absence of an interdistrict violation.[22] Furthermore, the Court held that the order mandating continued funding of quality education programs by the State could not be sustained because an

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[15] *See* Goedert, *supra* note 11, at 1868; *see also Swann*, 402 U.S. at 28 (stating that it was not enough for school authorities to simply implement race neutral policies but, rather, these authorities had to make serious attempts to achieve unitariness).

[16] *Cf.* Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (commenting that it is the duty of the school board to present a plan that assuredly will work, and will work now).

[17] *See* Michael G. Starr, *Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees*, 32 ALA. L. REV. 399, 439 (1981) (maintaining that there are practical constraints on what a court is able to do and jurisprudential confines on what it should endeavor to complete).

[18] *See Missouri v. Jenkins*, 115 S. Ct. 2038, 2048 (1995). A study focusing on the three levels of the federal judiciary in school desegregation litigation in Ohio and Michigan described the controversy between those who support the proposition that federal court intervention undermines local autonomy and those who believe that the federal judiciary must uphold constitutional rights when state authorities and their local counterparts have failed to do so. *See* Michael W. Combs, *The Federal Judiciary and Northern School Desegregation: Judicial Management in Perspective*, 13 J.L. & EDUC. 345, 345-99 (1984)). Evaluating the outcomes from this study, Mr. Combs found that:

> district courts and the court of appeals have read the remedial powers of the federal courts more and more expansively, perhaps out of frustration and a desire to dispose of these seemingly interminable cases. The Supreme Court, however, seems to have taken an opposing view, resisting broad shift of power from state and local officials to federal courts, and championing the perceived virtue of local control.

Id. at 399.

[19] 115 S. Ct. 2038 (1995).

[20] *See id.* at 2047.

[21] *See id.*

[22] *See id.* at 2053-54.

improper test was used to determine whether partial unitary status had been achieved.[23]

In 1977 the KCMSD, the school board, and four children attending district schools filed a complaint against the State of Missouri and other defendants in the United States District Court for the Western District of Missouri.[24] Plaintiffs claimed that the State and other defendants had maintained a racially segregated school system.[25] The district court repositioned the KCMSD as a defendant and found that the KCMSD and the State were liable for the operation and maintenance of a dual school district in violation of the students' rights pursuant to the Equal Protection Clause of the Fourteenth Amendment.[26] To remedy this violation, the district court designed an expansive desegregation plan to be financed by

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[23] *See id.* at 2055. A school district that has attained partial unitary status enjoys diminished judicial control. *See* Stewart & Torres, *supra* note 5, at 242 n.14; *infra* notes 112-113 (discussing the authority of a district court to allow partial withdrawal of control once the school district has attained partial unitary status); *see also infra* notes 113-118 and accompanying text for a detailed discussion of the factors set forth in *Freeman v. Pitts* which the district court should use on remand to determine if partial unitary status has been achieved; *supra* note 7 for a general discussion of unitary status.

[24] *See Jenkins*, 115 S. Ct. at 2042. The other defendants included the surrounding suburban school districts in Missouri and Kansas and several governmental agencies, specifically the United States Department of Housing and Urban Development (HUD) because of discriminatory residential policies pursued by the state and federal agency. *See* School Dist. of Kansas City, Mo. v. Missouri, 460 F. Supp. 421, 427 (W.D. Mo. 1978). The district court dismissed the claims against the surrounding suburban school districts and the federal defendants. *See* Jenkins v. Missouri, 593 F. Supp. 1485, 1488 (W.D. Mo. 1984)). The district court dismissed the adjoining school districts from the suit because the court found no remnants of the pre-1954 segregatory policies in the surrounding school districts and attributed the movement of African-Americans into the KCMSD to economic causes over which the neighboring school districts had no control. *See* Missouri v. Jenkins, 807 F.2d 657, 663-64 (8th Cir. 1986); *see* Goedert, *supra* note 11, at 1889-92 and accompanying notes (dealing with the specifics of the suit against the federal defendants, especially HUD); *see also* James S. Kunen, *The End of Integration*, TIME, Apr. 29, 1996, at 39, 41 (noting that the district court judge who excused the neighboring school districts admitted that he would have reason to regret his decision).

[25] *See Jenkins*, 115 S. Ct. at 2042. For a detailed history of the State mandated segregated school system in Missouri see Goedert, *supra* note 11, at 1882-83; and Stephanie A. Finley, *Eradicating Dual Educational Systems Through Desegregation:* Missouri v. Jenkins, Note, 17 S.U. L. REV. 119, 121-22 (1990). Although the Missouri Attorney General announced that the desegregation provisions of the Missouri Constitution were no longer enforceable in 1954, it was not until 1957 that the Missouri legislature repealed its segregation laws and not until 1976 that the constitutional provisions requiring segregated schools were rescinded. *See* Goedert, *supra* note 11, at 1883. For a discussion of the history of discrimination in the Eighth Circuit, of which Missouri is a part, see generally Honorable Gerald W. Heaney, *Busing Timetables, Goals and Ratios: Touchstones of Equal Opportunity*, 69 MINN. L. REV. 735 (1985).

[26] *See Jenkins*, 115 S. Ct. at 2042. The Equal Protection Clause sets forth that a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

both the KCMSD and the State.[27] Since implementation of the court decrees, the State has provided the majority of the supporting funds through

[27] *See Jenkins*, 115 S. Ct. at 2042-45. In June 1985, the district court imposed its first remedial order which stated as its goal the removal of all the remains of state imposed segregation. *See id.* at 2042. The court ordered the implementation of improved quality education programs, magnet schools, reduced class sizes, and the restoration of the KCMSD to AAA classification which was the highest classification given by the State's Board of Education. *See id.* The KCMSD achieved the AAA status during the 1987-1988 academic year and since that time has sustained and has surpassed AAA requirements. *See id.* at 2043. The quality education programs cost over $220 million. *See id.* The district court found no interdistrict violation and, therefore, did not order an interdistrict reassignment of pupils between the KCMSD and the surrounding suburban school districts. *See id.* (citing *Jenkins*, 639 F. Supp. at 38); *see also Milliken I*, 418 U.S. 717, 752-53 (1974).

Thereafter, in November 1986, the court approved an extensive capital improvements and magnet school plan and required the KCMSD and the State to share joint and several liability for its funding. *See Jenkins*, 115 S. Ct. at 2043. The plan was adopted to afford an increased educational opportunity to every KCMSD student in addition to hopefully attracting non-minority students from private schools within the KCMSD and those attending schools in surrounding suburbs. *See id.* Up to the date of trial, the magnet school program including transportation costs exceeded $448 million. *See id.* In April 1993, the trial court contemplated, but rejected, a proposal by the plaintiffs and the KCMSD concerning a long-range magnet school renewal program. *See id* at 2043-44. This program included a 10-year budget of more than $500 million to be funded by the KCMSD and the State through its joint and several liability. *See id.* at 2044.

In June 1985, in order to stop the deterioration of the KCMSD's facilities, the district court mandated substantial capital improvements. *See id.* The district court considered "irrelevant" the State's contention that the condition of the facilities was not caused by unlawful segregation. *See id.* (citing *Jenkins*, 639 F. Supp. at 40). The court concentrated on correcting the remnants of segregation and instituting a desegregation strategy that would maintain and entice non-minority students into the KCMSD. *See id.* (quoting *Jenkins*, 639 F. Supp. at 41). The first phase of the capital improvements scheme cost $37 million. *See id.* (citing *Jenkins*, 639 F. Supp. at 41). Additionally, the district court mandated that the KCMSD submit another proposal for further capital improvements that would enable the KCMSD to bring its facilities up to comparable points with those in the surrounding suburban school districts. *See id.* (citing *Jenkins*, 639 F. Supp. at 41). Then, in November 1986, the district court accepted a plan for further capital improvements in order to eliminate the effects of prior racial segregation and to entice non-minority pupils to return to the KCMSD. *See id.*

The district court approved, for the most part, a long-range capital improvements plan submitted by the KCMSD in September 1987 which cost over $187 million. *See id.* This plan included renovating approximately 55 schools, closing 18 others, and building 17 new facilities. *See id.* (citing *Jenkins*, 672 F. Supp. at 405). The court ordered such substantial measures because the other option, the "patch and repair" approach, would not have attained suburban comparability or have been aesthetically pleasing. *See id.* (quoting *Jenkins*, 672 F. Supp. at 404). The court reasoned that more extensive renovations than those proposed by the State were necessary or the KCMSD schools would continue to be inferior, deterring new enrollment. *See id.* (quoting *Jenkins*, 672 F. Supp. at 405). To date, capital improvements costs have soared to over $540 million. *See id.*

In 1987 the district court instituted salary assistance for KCMSD teachers. *See id.* Since the implementation of this decree, the order has been changed to encompass salary

assistance to virtually every employee in the KCMSD. *See id.* The total cost of this part of the desegregation decree since 1987 has exceeded $200 million. *See id.*

This desegregation decree ordered by the district court has been depicted as the most expensive and ambitious remedial plan in the annals of school desegregation. *See id.* The annual expenditure per student at the KCMSD vastly exceeds that of the surrounding suburban school districts or of any other school district in Missouri. *See id.* The KCMSD has continued to maintain a "friendly adversary" relationship with the plaintiffs and has persisted in suggesting even more expensive programs. *See id.* The annual cost for this desegregation decree is approaching $200 million. *See id.* These impressive expenditures have financed:

> high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2000-square-foot planetarium; green houses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities.

Id. at 2044-45 (quoting Missouri v. Jenkins, 495 U.S. 33, 77 (1990) (Kennedy, J., concurring in part and concurring in judgment)). The cost of this remedial decree has exceeded the KCMSD's budget. *See id.* at 2045. The State, through joint and several liability, has borne most of the costs. *See id.* The district court has admitted to permitting the district authorities to "dream" and has afforded the resources for those "dreams" to come true. *See id.*; for a thorough treatment of the district court's orders see Christina J. Nielsen, Note, Missouri v. Jenkins: *The Uncertain Future of School Desegregation*, 64 U. MO. K.C. L.R. 613, 616-19 (1995).

Subsequently, the KCMSD was unable to provide the funds to support its share of the costs of the desegregation decree; therefore, the district court ordered a direct increase in property tax levies within the KCMSD. *See* Jenkins v. Missouri, 672 F. Supp 400, 413 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *aff'd in part and rev'd in part*, 495 U.S. 33 (1990)). The Eighth Circuit affirmed the district court's holding in part and declared that the district court had the power to order state and local authorities to levy taxes. *See* Jenkins v. Missouri, 855 F.2d 1295, 1314 (8th Cir. 1988), *aff'd in part and rev'd in part*, 495 U.S. 33 (1990)). The court of appeals, however, also noted that principles of federal and state comity demand that minimally obtrusive means be used to redress a constitutional violation. *See id.* The appellate court held that from now on, the district court should refrain from imposing property tax increases and, instead, authorized and instructed the local school board to implement its own tax levies so it could adequately provide funds to support its obligation under the desegregation decree. *See id.* The United States Supreme Court granted certiorari to review whether a federal court can permissibly impose a tax. *See* Missouri v. Jenkins, 495 U.S. 33, 45 (1990) (hereinafter *Jenkins II*). The Court declined to address the additional issue presented for review concerning the appropriate scope of the district court's remedial order. *See id.*; Raina E. Brubaker, Comment, Missouri v. Jenkins: *Widening the Mistakes of* Milliken v. Bradley, 46 CASE W. RES. L. REV. 579, 584 (1996) (stating that the question the Court denied certiorari to was almost identical to that presented to the Court for review in Missouri v. Jenkins, 115 S. Ct. 2038 (1996)). The Supreme Court held that the lower courts' intrusion into local authority contravened principles of state and local comity and therefore reversed the decisions below. *See Jenkins II*, 495 U.S. at 50. The Court affirmed the Eight Circuit's decision modifying of the funding order. *See id.* at 58. For a more detailed discussion of the Court's holding see Linda A. Schwartzstein, *Bureaucracy Unbounded: The Lack of Effective Constraints in the Judicial Process*, 35 ST. LOUIS U. L.J. 597 (1991); Robert T. Abramson, Note, 21 SETON

the result of its joint and several liability.[28] Due to this enormous expense financed predominantly by the State, the State challenged the authority of the district court to fashion such a broad desegregation remedy.[29]

The district court found that the order requiring salary increases was justified because highly qualified employees were needed to maintain a strong academic curriculum and to implement desegregation programs aimed at increasing educational opportunities and limiting racial isolation.[30] The court based its ruling on removing the effects of segregation by ameliorating the "desegregative attractiveness" of the KCMSD.[31] The district court failed to address the State's contention that the State had achieved partial unitary status in its present quality education program, and ordered the State to fund the program for the 1992-1993 academic year.[32]

The State appealed to the United States Court of Appeals for the Eighth Circuit, challenging the district court's implementation of four orders.[33] The Eighth Circuit affirmed the lower court's holding.[34] The majority opined that the salary increases did relate to the State's prior constitutional infringement of supporting a system of de jure segrega-

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HALL L. REV. 387 (1991); Finley, *supra* note 25, at 123-32; Deborah E. Beck, Casenote, Jenkins v. Missouri: *School Choice as a Method for Desegregating an Inner-City School District*, 81 CALIF. L. REV. 1029, 1033-38 (1993).

[28] *See Jenkins*, 115 S. Ct. at 2045.

[29] *See id.*

[30] *See id.* The district court also found that salary increases were necessary to maintain the level of quality of the KCMSD's regular academic program. *See id.*

[31] *See id.*

[32] *See id.*; *see also supra* note 23 for a thorough discussion of partial unitary status.

[33] *See* Jenkins v. Missouri, 11 F.3d 755, 757 (8th Cir. 1993), *rev'd*, Missouri v. Jenkins, 115 S. Ct. 2038 (1995). The State appealed two district court orders which included base costs of the original group of magnet schools ("flagship magnets") as desegregation expenses for which the State and KCMSD shared joint and several liability. *See id.* at 758; *see also* Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. June 26, 1990) (order granting funding of magnet schools as a desegregation expense); Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. July 5, 1991) (order granting KCMSD's proposal for magnet schools and including base costs as part of the desegregation expense). The State objected to this categorization of base costs as desegregation expenses, even though the obligation of the KCMSD, because through joint and several liability the State indirectly financed these expenses. *See Jenkins*, 11 F.3d. at 759. The flagship schools were built before the implementation of the district court's desegregation decree and were converted into magnet schools pursuant to the remedial plan. *See id.* at 758. "Base costs" are those necessary expenses associated with running the schools. *See id.* The third order disputed the necessity of certain quality education programs for the 1992-1993 school year. *See id.* at 757-58; *see also* Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. June 17, 1992). The fourth order on appeal mandated that the State subsidize salary increases for KCMSD employees. *See Jenkins*, 11 F.3d. at 758; *see also* Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. June 25, 1992).

[34] *See Jenkins*, 11 F.3d at 769.

tion.[35] Although the district court had failed to address the State's arguments that it had achieved partial unitary status, the court of appeals concluded that the district court had implicitly rejected them.[36] The Eighth Circuit relied on student achievement levels in the KCMSD which were at or below national averages at many grade levels to show that the KCMSD had not reached its maximum potential and, therefore, had not achieved partial unitary status.[37]

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[35] *See id.* at 767. The appellate court commented that the State was viewing the constitutional violation and resulting injury too narrowly. *See id.* The court noted that salary funding was needed to successfully carry out the desegregation decree. *See id.* at 768. The court further explained that highly qualified personnel were needed not only to institute specialized desegregation programs aimed at increasing educational opportunities and limiting racial segregation, but also to assure that the regular academic program did not diminish in quality. *See id.* Additionally, the appellate court found that high quality employees improved the "desegregative attractiveness" of the KCMSD. *See id.* The court considered this broad equitable remedy as appropriate when compared to the nature and extent of the constitutional infringement. *See id.* at 767 (quoting Milliken v. Bradley, 433 U.S. 267, 280 (1977)).

[36] *See id.* at 765. The Eighth Circuit relied on the district court's statements during the June 17, 1992 hearing and its subsequent orders such as the April 16, 1993 order which focused on this issue to find the implicit rejection of partial unitary status in the district court's June 17 order. *See id.* During the June hearing, the district court noted that the goal of the desegregation remedy was not to implement quality education programs as the State contended but to desegregate the school district. *See id.*

> The Court'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 the Kansas City, Missouri School District . . . . That's the goal. And a high standard of quality education. The magnet schools, the summer school program and all these programs are tied to that goal . . . .

Id.; *see* Missouri v. Jenkins, 115 S. Ct. 2038, 2046 (1995) (stating that the court of appeals apparently used these findings to determine that the State had not achieved partial unitary status). The Eighth Circuit agreed with the district court's observation that:

> 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 of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation.

Jenkins, 11 F.3d at 765-66.

[37] *See Jenkins*, 11 F.3d at 765. Over the dissent of five judges, the court of appeals denied rehearing en banc. *See* Jenkins v. Missouri, 19 F.3d 393, 395 (8th Cir. 1994), *rev'd*, 115 S. Ct. 2038 (1995)). First, the dissent examined the ordered salary increases and portrayed the efforts of the KCMSD, the American Federation of Teachers, and the plaintiffs to avoid the collective bargaining process as uncalled for and unlikely reasonably related to the constitutional infractions found by the court. *See id.* at 399 (Beam, J., dissenting from the denial of rehearing en banc). The dissent also agreed with the argument of the State that the wages paid to trash haulers, parking lot attendants, and food handlers did not relate to the desegregation plan or to the constitutional infringements. *See id.* Second, the dissent declared that the district court had used an incorrect test in evaluating whether partial unitary status had been achieved by the KCMSD in its quality

The United States Supreme Court granted certiorari[38] to determine: 1) whether the district court surpassed its authority in ordering salary increases to virtually all personnel of the KCMSD, and 2) whether the lower court correctly used findings that student achievement test scores had not reached some unidentified level to hold that the State had not reached partial unitary status in its quality education program.[39] Before resolving the direct issues on appeal, the majority opined that an examination of the scope of the lower court's remedial authority was necessary to determine if the remedial orders of the district court were within its power.[40] The Supreme Court held that the order implementing across-the-board salary increases for all KCMSD employees, based on the goal of improving the "desegregative attractiveness" of the KCMSD, exceeded the district court's broad remedial authority.[41] This goal, the majority concluded, served an interdistrict purpose when no interdistrict violation had occurred.[42] The Supreme Court also reversed and remanded the district court order requiring the State to fund quality education programs because the lower court applied an inappropriate test to determine whether partial unitary status had been achieved.[43]

The United States Supreme Court first analyzed the appropriate authority of a district court to fashion remedial decrees for segregated school districts in the noteworthy case of *Brown v. Board of Education* (*Brown II*).[44] Although *Brown I* held that racial discrimination in public

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education programs. *See id.* at 400. Continuing, the dissent stated that the district court and the panel had misinterpreted *Freeman v. Pitts* and had imposed an obstacle in the path of withdrawing judicial supervision over public education that was without basis in the law. *See id.*; *see also infra* notes 113-118 and accompanying text discussing the *Freeman* decision. The dissent chided the district court for imbedding a student achievement goal measured by yearly standardized tests into the court's determination of whether the KCMSD had attained partial unitary status when the Constitution mandated no such standard. *See Jenkins*, 19 F.3d at 400. Noting that the KCMSD students had facilities and programs that offered more educational opportunity than any other district in America, the dissent stated that the district court was not convinced that the KCMSD had achieved its potential because the KCMSD had failed to achieve national averages on standardized tests at many grade levels. *See id.* at 403 (Beam, J., dissenting from the denial of rehearing en banc). In conclusion, the dissent insisted that this case "as it now proceeds, involves an exercise in pedagogical sociology, not constitutional adjudication." *Id.* at 404 (Beam, J., dissenting from the denial of rehearing en banc).

[38] *See* Missouri v. Jenkins, 115 S. Ct. 41 (1994).

[39] *See* Missouri v. Jenkins, 115 S. Ct. 2038, 2046 (1995).

[40] *See id.* at 2047; *see also supra* note 27 observing that the Supreme Court previously denied certiorari on this almost identical issue.

[41] *See Jenkins*, 115 S. Ct. at 2052.

[42] *See id.* at 2054.

[43] *See id.* at 2055.

[44] 349 U.S. 294 (1955) (hereinafter *Brown II*).

schools was unconstitutional,[45] the *Brown II* decision was necessary in order to further address the manner in which relief was to be granted.[46] The majority voiced the traditional determination that the primary responsibility for remedying past instances of segregation rested with school authorities.[47] While remaining loyal to this guiding principle, the Court stated that district courts must determine whether school authorities in good faith have complied with constitutional truths in the remedial action.[48] The Supreme Court asserted that equitable principles should guide a district court in fashioning necessary remedial decrees when school officials have failed to adequately deal with the violation.[49] While considering both the private and public interests involved, the majority instructed the district courts[50] to require the defendants to begin a "prompt and reasonable start toward full compliance" with the ruling of *Brown I*.[51] The Court remanded the case to the district courts to implement such orders and decrees that were necessary and proper to allow plaintiffs to

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[45] *See Brown I*, 347 U.S. 483, 495 (1954). *Brown I* interpreted the large constitutional principle and struck down segregation. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); *see supra* note 4 for further treatment of the *Brown I* holding. The Court in *Brown II* began the struggle of implementing those constitutional commands into practice. *See Swann*, 402 U.S. at 15.

[46] *See Brown II*, 349 U.S. at 298.

[47] *See id.* at 299. Specifically, the Court stated that school authorities are primarily charged with determining, evaluating, and solving these problems. *See id; see infra* note 111.

[48] *See Brown II*, 349 U.S. at 299. The majority noted that the local district courts most appropriately are able to judicially appraise the desegregation plans of school authorities because of their prior experience with the case, proximity to local conditions and the possibility of further hearings. *See id.* For these reasons, the Court remanded the case. *See id.* at 301

[49] *See id.* at 300. The Court set forth that the traditional aspects of equity, which include practical flexibility in fashioning remedial decrees and weighing the public and private needs, should continue to guide the federal trial court in these cases. *See id.* The goal, the Court promulgated, was to integrate the public schools for plaintiffs as soon as practicable. *See id.* The Court recognized that accomplishing this goal may require the removal of a number of obstacles so that the school district can adhere to the constitutional principles set forth in *Brown I*. *See id.* The Court continued by acknowledging that although the district court may properly consider the public interest in eliminating any obstacle in an effective and systematic manner, the importance of these constitutional ideals must not surrender to disagreement. *See id.*

[50] *See id.* In *Brown I* the Supreme Court consolidated cases from Kansas, Virgina, Delaware, and South Carolina because all these suits involved a common legal question although premised on different local conditions and facts. *See Brown I*, 347 U.S. 483, 486 & n.1 (1954).

[51] *Brown II*, 349 U.S. at 300. The Court commented that once the school district has made such a start, a court may find that in order to effectively carry out the ruling additional time is needed. *See id.* If additional time is necessary, the majority placed the burden upon the defendant to show that the delay was beneficial to the public interest and was in good faith compliance. *See id.*

be admitted to public schools in a racially nondiscriminatory manner "with all deliberate speed."[52]

Almost a decade later, the Court once again confronted a federal court's power to fashion decrees requiring school districts to comply with defined constitutional principles.[53] The petitioner in *Griffin v. County School Board* originally brought suit challenging the discriminatory practices maintained in the public schools of Prince Edward County.[54] Although previously the *Brown I* Court had held the segregative policies of the Prince Edward County school district unconstitutional, attempts to desegregate the school district were resisted.[55] The United States Su-

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[52] *See id.* at 301. A number of scholars have criticized the tentative approach set forth in *Brown II*. *See* TRIBE, *supra* note 8, § 16-18, at 1489; R. CARTER, THE WARREN COURT: A CRITICAL ANALYSIS 46, 52-57 (R. Sayler, et al. eds., 1969); Beck, *supra* note 27, at 1039-40 & n.66 (1993). The Court's initial hesitancy to require immediate nationwide desegregation was understandable upon consideration of the complexities of such a transition, but its timid approach allowed the initiation of many local schemes to avert the constitutional mandate of integration. *See* Beck *supra* note 27, at 1039-40; *see also* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978 61-77 (1979) (noting that the *Brown II* decision can be justified, "but just barely"). The continued support of this lenient attitude for the 10 years following *Brown II* resulted in 11 southern states still having segregated school districts comprised of 98.8% African-American children. *See* Beck, *supra* note 27, at 1040. Upon realization that school districts were not making appreciable movement towards integration, the Court became impatient. *See id.*; *see e.g.*, cases listed *supra* note 8.

[53] *See* Griffin v. County Sch. Bd., 377 U.S. 218 (1964).

[54] *See id.* at 220-21. Petitioners in *Griffin* were part of the class action brought before the United States Supreme Court in *Brown I*. *See id.* at 221. The Court in *Brown I* held that segregated school districts denied African-American students the equal protection of the law. *See Brown* I, 347 U.S. at 495).

[55] *See Griffin*, 391 U.S. at 221. Through amendments to the Virginia Constitution, in 1956 the State General Assembly and local governments were given the authority to allocate funds to aid students to attend public or nonsectarian private schools as well as the students' local public school. *See id.* In 1959 the General Assembly also held a special session where legislation was enacted to close all public school that had an integrated student population; to end state funding of these desegregated schools; to subsidize children in non-sectarian private schools through tuition grants; and to include teachers in these newly created private schools in the State retirement benefit plan. *See id.* at 221. The General Assembly abandoned its "massive resistance" to desegregation in April 1959 and implemented a "freedom of choice" program. *See id.* at 221-22. The Assembly repealed the remainder of the 1956 legislation and the tuition grant law of 1959 and replaced these enactments with a new tuition grant program. *See id.* at 222. Additionally, the Assembly repealed the State's mandatory attendance laws with an optional attendance policy. *See id.*

The United States Court of Appeals for the Fourth Circuit instructed the district court to enjoin discriminatory practices employed by the school district; to require the school board to take "immediate steps" toward permitting students to enter the white high school for the 1959 school term without regard to race; and to demand that the school officials implement similar policies as to elementary school admissions. *See id.*; *cf.* Green v. County Sch. Bd., 391 U.S. 430, 442 (1968) (implementing more urgent language regarding the integration process by requiring the school board to construct a plan that

preme Court found that the system of tax credits and tuition grants employed in the county had helped to support private white schools, while the public schools, the only educational facilities available to black students, remained closed.[56] The majority held that under these circumstances, the black children of this school district were denied equal protection under the law as guaranteed by the Fourteenth Amendment. [57]

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promised to realistically convert the district to a unitary system in a timely fashion). The supervisors of the school district, having previously noted that they would not operate a public school system "wherein white and colored children [were] taught together," refused to levy taxes for the 1959-1960 academic year. *See Griffin*, 391 U.S. at 222. The public schools of the county thus failed to reopen for the 1959-1960 school year and were replaced by a system of private schools indirectly subsidized by the county provided tuition grants and tax credits. *See id.* at 222-23. A private group immediately assembled to operate private schools for the white children of the county. *See id.* at 223. Offers were made to the African-American community to set up such schools for their children, but were rejected because they preferred to continue the fight for desegregated public schools. *See id.* In 1960 the General Assembly enacted a new grant program allocating $125 or $150 to every child, regardless of race, to attend a public school or a nonsectarian private school not in the child's near vicinity. *See id.* The Assembly also authorized localities to give their own grants. *See id.* Pursuant to this authority the Prince Edward Board of Supervisors passed an ordinance providing an additional tuition grant of $100. *See id.* Additionally, the supervisors passed an ordinance giving up to a 25% property tax credit for donations to any nonsectarian private school. *See id.* at 223-24. The district court, finding that the actions taken by the board of supervisors were designed to maintain a segregated school system, enjoined the county from giving tuition grants and tax credits so long as the public schools stayed closed. *See id.* at 224. The court interpreted state law as forbidding such state tuition grants in localities without public schools. *See id.* at 224 n.8. The court initially abstained from deciding whether the county's public schools could be closed pending determination of state law on this issue by the Virginia courts. *See id.* at 224. Later, however, the district court ruled on this issue without waiting for the State court's decision, and held that one district's public schools could not be closed so as to avoid implementing the constitutionally mandated policies of desegregation while the State allowed other districts' public schools to remain open which were paid for by taxpayers. *See id.* at 224. Thereafter, the supervisors and school board brought a declaratory judgment action in a Virginia circuit court. *See id.* at 225. These parties requested that the district court abstain from further action until final rulings were handed down from the state courts concerning these issues. *See id.* The district court declined this request and reiterated that the county could not close its public schools to avoid desegregation when all other public schools in the State remained open. *See id.* Reversing, the Fourth Circuit held that the trial court should have declined from adjudicating these issues until the state court had ruled on the validity of the tax credits and tuition grants, as well as the permissibility of closing the public schools. *See id.*

[56] *See Griffin*, 391 U.S. at 230.

[57] *See id.* at 232. Before delving into the substantive question presented for review, the Supreme Court separately explained why respondents' motion to dismiss was denied. *See id* at 226-29. The Court held that the issues required a prompt decision. *See id.* at 229. The plaintiffs in the original case, the Court noted, had passed high school age. *See id.* Continuing, the Court pronounced, "[t]here has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in [*Brown I*] . . . had been denied Prince Edward County Negro children." *Id.* Accordingly, the Supreme Court reversed the Fourth Circuit's judgment remanding the case for abstention and proceeded to discuss the meritorious issues of the case. *See id.*

The Court then addressed the authority of the district court to grant relief necessary to end racial discrimination in the public schools.[58] Without questioning the authority of the district court to grant such relief, the Supreme Court approved the injunction issued against county officials by the district court which prohibited county tuition grants or tax credits while public schools remain closed.[59] The Supreme Court also stressed that the district court had the authority to issue further orders to assure that these petitioners were no longer denied their constitutional rights.[60]

The Court more precisely defined the scope of authority and the duty of a district court and local school authorities in implementing desegregation plans in public schools in *Swann v. Charlotte-Mecklenburg Board of Education*.[61] In 1969 the District Court for the Western District of North Carolina ordered the local school board to present an agenda for both student and faculty desegregation.[62] Both the school district and a

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[58] *See id.* at 232. The Court stressed that relief must be quick and effective. *See id.*

[59] *See id.* The Supreme Court saw this remedy as "appropriate and necessary" because the grants and tax credits had enabled the county to deprive petitioners of a public school education which every other student in Virginia enjoyed. *See id.* at 233. The Court also commented that the district court could mandate that county supervisors levy taxes in order to raise sufficient funds to reopen, operate, or maintain a public school system in the district without racial discrimination like those operated throughout the State. *See id.*

[60] *See id.* at 233-34.

[61] 402 U.S. 1 (1971).

[62] *See id.* at 7. The Court accepted these proposals by the school board on an interim basis. *See id.* These plans were only temporary and the Court required the board to submit a third proposal by November 1969. *See id.* at 8. Desegregation plans were necessary because the Charlotte-Mecklenburg school board's attempt to desegregate the district through a system of "geographic zoning with a free-transfer provision" had failed. *Id.* at 7. In June 1969, of the 24,000 African-American students in the district, 21,000 attended public schools within the metropolitan area of Charlotte. *See id.* Two-thirds of those 21,000 students were educated at schools that were 100% or at least 99% black. *See id.*

In November 1969, the board submitted a partially completed plan which the district court deemed unacceptable. *See id.* at 8. Consequently, the Court appointed an expert to prepare a desegregation plan for the district. *See id.* Eventually, the board submitted a final plan. *See id.*

Two plans were reviewed by the district court: the "board plan" and the "Finger plan." *See id.* The board plan when presented in final form closed seven schools and redistributed the students attending these schools. *See id.* To achieve a more equal racial mix, the board formed new school attendance boundaries but maintained grade structures and specifically did not use the pairing or clustering methods to desegregate. *See id.* In detail, the board plan proposed reassignment of African-American pupils to nine of the district's ten high schools resulting in 17%-36% black population at each school. *See id.* The 10th school's population make-up was left untouched with a minority student composition of 2%. *See id.* The board plan also rezoned areas for junior high schools. *See id.* African-American students now composed 0-38% of the student body at 20 of the 21 junior high schools. *See id.* One junior high school remained 90% black. *See id.* Gerrymandering of geographic zones was used to desegregate elementary schools. *See id.* at

court-appointed expert submitted desegregation plans to the court for review.[63] The final plan accepted by the district court included a racial balance requirement.[64] Although the use of a ratio to achieve a desegregated school system was challenged, the Supreme Court upheld the plan determining that the use of this mathematical ratio was merely a starting point in the process of formulating an appropriate remedy, not an inflexible requirement.[65] The majority promulgated that the broad and flexible equitable remedial discretion of the district court allowed the court to make limited use of ratios in forming a desegregation remedy.[66] The majority opined that judicial authority to construct a remedial decree arose when local authorities were unable to acceptably correct their constitutional violation of maintaining a segregated school system.[67] As is true with any equity case, the Court reiterated that the type and extent of the constitutional violation dictated the appropriate scope of the remedy.[68] The

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9. Over half of the African-American students remained in nine schools which were 86% to 100% black. *See id.* Also, school zones were drawn so that half of the white students attended schools which were 86-100% white. *See id.*

The Finger plan was prepared by Dr. John Finger, the court-appointed expert,. *See id.* This plan closely resembled the board plan with respect to the senior high schools with the exception that 300 African-American students be transported to a virtually all-white high school. *See id.* The Finger plan also modeled the board plan for junior high schools with the addition of "satellite" zones. *See id.* These satellite plans created attendance zones that were not continuous with normal surrounding attendance zones and substantially desegregated all district junior high schools. *See id.* A major distinction between the board plan and Finger plan was evident in the zoning patterns for elementary schools. *See id.* The Finger plan not only employed geographic zoning but, also, proposed the use of other zoning, pairing, and grouping methods to achieve a 9-38% African-American population at all elementary schools. *See id.*

The district court approved the board plan as altered by the Finger plan for the senior and junior high schools. *See id.* at 10. The court accepted the Finger plan for desegregating the elementary schools. *See id.*

[63] *See id.* at 7-8.

[64] *See id.* at 23.

[65] *See id.* at 25. The Court stated that awareness of the racial mixture of a school district is likely to be a helpful starting point in fashioning a remedy to rectify past constitutional violations. *See id.* The majority also noted that remedying such a constitutional violation did not mean that all schools within communities must always mirror the racial composition of the entire school district. *See id.* The Court stressed that if the district court's holding required, as a substantive constitutional right, any set percentage of racial balance, that process would be forbidden and the court would be required to reverse. *See Swann*, 402 U.S. at 24. *But see* Spencer v. Kugler, 404 U.S. 1027, 1031-32 (1972) (mem.) (Douglas, J., dissenting) (contending that racial imbalances in a school district function as a serious detriment to effective educational opportunities for children of minority groups, especially in the northern and central regions of the United States where there is an absence of the entrenched social order of segregation).

[66] *See Swan*, 402 U.S. at 25; *see also infra* note 68 for a brief discussion of equity.

[67] *See Swann*, 402 U.S. at 16.

[68] *See id.* A court's equity power arises from its inherent ability to adjust remedies in a practicable manner, to eradicate the conditions, or to redress the damages caused by

Supreme Court concluded that the desegregation plan ordered by the district court was related to the severity of the constitutional violation and was within the equitable powers of the district court.[69]

In *Milliken v. Bradley* (*Milliken I*),[70] judicial consideration of school desegregation decrees continued, and the Court restricted the expansive judicial control over defendant school systems previously enjoyed by the *Brown II* and *Swann* district courts.[71] The Supreme Court analyzed the circumstances under which a district court may order interdistrict relief to end segregation.[72] Emphasizing the controlling principle enunciated in *Swann*, the Court clarified that the scope of the remedy was dictated by the extent and nature of the constitutional violation.[73] The Court articu-

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unlawful action. *See* Freeman v. Pitts, 503 U.S. 467, 487 (1992). In order to enforce these underlying principles fairly and adequately, "equitable remedies must be flexible." *See id.* A school desegregation case comports with other cases in which a court fashions equitable remedies to correct the denial of a constitutional right. *See id.* The Court is responsible for remedying the constitutional infringement by weighing the individual and collective interests against one another and finding an equilibrium between the two. *See id.*

[69] *See Swann*, 402 U.S. at 30. For a more detailed discussion of *Swann* see generally BERNARD SCHWARTZ, *SWANN*'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986).

[70] 418 U.S. 717 (1974) (5-4 decision) (hereinafter *Milliken I*).

[71] *See* Parkman, *supra* note 2, at 729.

[72] *See Milliken I*, 418 U.S. at 741. In *Milliken I* the Supreme Court asserted that the district court had fashioned a remedial decree encompassing the metropolitan area to remedy a system of de jure segregation in the Detroit public schools. *See id.* at 732. Acknowledging that no proofs had been offered as to violations by the suburban school districts or as to the drawing of improper boundaries, the Court stated that the district court had included 53 of the 85 surrounding school districts and the Detroit district as the "desegregation area." *See id.* at 733. The majority set forth that the district court had noted that plans that excluded the surrounding areas of Detroit would only make the Detroit school district "more identifiably [b]lack." *See id.* at 732. The Court furthered that accordingly the lower court recognized the need to look beyond the Detroit school district's boundaries to remedy this problem. *See id.* at 732-33. The majority agreed with the trial court's observation that school zone lines are drawn as a matter of political convenience and should not to be used to withhold constitutional rights. *See id.* at 733. The court of appeals, the majority professed, affirmed the district court's desegregation plan, reasoning that such a plan was appropriate because of the violations committed by the State. *See id.* at 735. The Supreme Court noted that the appellate court had held that the State had engaged in de jure segregation and also had controlled the instrumentalities that would help to correct the vestiges of the discriminatory State acts. *See id.* at 736. Further, the Supreme Court pointed out that the appellate court had concluded that an interdistrict remedy was within the district court's equity power. *See id.*

[73] *See id.* at 741 (citing *Swann*, 402 U.S. at 16). *Milliken I* is said to illustrate the problems the Court has experienced in civil rights actions in employing traditional remedial doctrines. *See* TRIBE, *supra* note 8, § 16-19, at 1494. In a typical lawsuit, the remedy logically flows from the nature of the underlying violation: "Once the nature of the defendant's wrong is determined—defeat of plaintiff's expectations, retention of a benefit, or frustration of a reliance interest-the relief follows as a matter of course." *Id.*, § 16-19, at 1494-95 (quoting Abram Chayes, *Foreword: Public Law Litigation and the Burger*

lated that although district boundary lines can be bridged when the constitutional violation calls for interdistrict relief, these boundaries may not be casually ignored or considered a mere administrative convenience.[74] This, the Court determined, was consistent with the tradition of local control over public education.[75] Prior to setting aside the boundaries of autonomous school districts, the Court professed that there must be a constitutional violation within one district which caused significant segregative effects in an adjoining district, or a drawing of district boundaries deliberately shaped because of race.[76] The Supreme Court held that because there was no showing of a violation by any of the surrounding school districts[77] and no evidence of any policy which had interdistrict

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Court, 96 HARV. L. REV. 4, 45 (1982)). Remedial decrees in school desegregation cases differ because these remedies take the form of court orders restructuring institutions and, often, requiring continued court oversight. *See id.*, § 16-19, at 1495. Factual circumstances are considered by a district court when fashioning the affirmative injunction, thereby radically broadening the discretionary element of the relief. *See id.* The *Milliken I* Court, by requiring a close nexus between the ordered remedy and the specifically defined right when confronting extensive de jure segregation, for the first time justified a segregated outcome in a case where the Court found that a constitutional infringement existed. *See id.* Additionally, in *Milliken I*, a case decided only a few years after the *Swann* Court first reviewed and upheld such an order, the Supreme Court overruled a desegregation decree for the first time. *See id.*

[74] *See Milliken I*, 418 U.S. at 741.

[75] *See id.* at 741-42. The Court noted that local control over public schools has been thought to be essential to the continuity of community support and concern for schools and to the maintenance of the quality of educational systems. *See id.* at 741-42 (citing Wright v. Council of the City of Emporia, 407 U.S. 451, 469 (1972)). The *Milliken I* Court claimed that Michigan's education system providing for considerable local control was similar to that of most states, and the Court carefully detailed the disruption that would be caused by the interdistrict remedial decree approved by the two lower courts. *See Milliken I*, 418 U.S. at 742-43; *see also* Brubaker, *supra* note 27, at 591 (explaining that the interdistrict remedy exceeded the district court's authority because it would bind an innocent independent political entity); Hills v. Gautreaux, 425 U.S. 284, 293 (1976) (advocating that in the *Milliken I* opinion the Court's reason for refusing to order a metropolitan area desegregation order, although addressing the many practical problems associated with the consolidation of many school systems by judicial decree, was grounded upon the fundamental limitations imposed upon the remedial authority of a federal court to rearrange the operation of state and local governing bodies).

Tribe questioned the Court's finding that the district boundary lines were sacrosanct, especially because the Court had previously ruled that local student assignments did not enjoy a sacred position as a symbol of local autonomy and control over public schools. *See* TRIBE, *supra* note 8, § 16-19, at 1495; *Milliken I*, 418 U.S. at 733.

[76] *See Milliken I*, 418 U.S. at 745. The Court simply intimated that if there was not an interdistrict violation or an interdistrict effect, there was no constitutional wrong which could be corrected by an interdistrict remedy. *See id.*

[77] *See id.* Evidence introduced at trial showed that during the latter part of the 1950s, the Carver District, a predominantly African-American suburban district, arranged to have its minority students transferred to a predominantly African-American school in Detroit. *See id.* at 749. Carver was an autonomous school district that did not have a high school because of the lack of an adequate location for high school facilities. *See id.* In

effects, the district court had exceeded its remedial authority by ordering the metropolitan area to be included in the desegregation area.[78]

1960 a predominantly white suburban school district, the Oak Park School District, annexed the Carver School District at the suggestion of local officials. *See id.* No claim was made that the 1960 annexation was initiated to further a segregative purpose or to achieve a segregative result or that the Oak Park School District maintained a dual system. *See id.* at 750. According to the appellate court, this arrangement was necessitated by the refusal of the surrounding white districts to accept Carver students. *See id.* The Supreme Court, while noting that this situation might have had a segregative impact on the student populations of both the districts involved, stated that nothing in the record supported the appellate court's supposition that the suburban schools had refused to admit the Carver students. *See id.* Quoting the familiar phrase of *Swann* that "the nature of the violation determines the scope of the remedy," the Supreme Court declared that this isolated instance involving two school districts did not justify the expansive metropolitan remedy ordered by the district and appellate courts. *See id.*

[78] *See id.* at 752-53. The Court addressed the dissent's position that once State participation was found, the lower court should have had authority to reconstruct the school districts surrounding Detroit. *See id.* at 745-46. The majority opinion assumed arguendo that State agencies had participated in maintaining a segregated system in Detroit but disagreed with the dissent as to the appropriate federal power to remedy this constitutional wrong. *See id.* at 746. The majority proferred that when disparate treatment of black and white students occurred within the Detroit system and not in the surrounding suburbs, the remedy must be contained within that district. *See id.* at 746 (citing *Swann*, 402 U.S. 1, 16 (1971)). The Court explicitly rejected the dissent's contention that the cross-district transportation of students was a way to devise a "suitably flexible remedy" for a violation of the rights of African-American students in Detroit. *See id.* at 747. The majority emphasized that this type of interdistrict remedy could be validated only by an insupportably expansive interpretation of the constitutional right to attend a unitary school system. *See id.*

The 5-4 split in the Court demonstrated the fundamental disagreement among the Supreme Court Justices regarding the purpose of school desegregation. *See* TRIBE, *supra* note 8, §16-19, at 1494 n.9. Previously, the *Swann* Court unanimously stated that once the existence of a de jure system was established the district court or school authorities must seriously attempt to attain the greatest possible proportion of actual desegregation. *See id.* (quoting *Swann*, 402 U.S. at 26). The *Milliken I* dissent understood *Swann* to mean that school officials must do all that they practicably can to ensure a unitary school population. *See id.* (quoting *Milliken I*, 418 U.S. at 802) (Marshall, J., dissenting)). The majority opinion, however, interpreted the *Swann* declaration differently and saw it as requiring a remedy that restored individuals subject to discriminatory actions to the place they would have been in without such conduct. *See id.* (quoting *Milliken I*, 418 U.S. at 746). Therefore, the Court reasoned that because there was no evidence submitted of interdistrict segregative action, it followed that the sole constitutional right of minority students living in Detroit was to go to a desegregated school in that district. *See id.* (quoting *Milliken I*, 418 U.S. at 746). The Court's dispute as to the ultimate goal of school desegregation evidenced itself in the Court's handling of the State's accountability for local school segregation. *See id.* The *Milliken I* majority characterized right and remedy depending on the violation's jurisdictional impact. *See id.* The majority opined that State action that indirectly or directly contributed to the de jure segregation in the Detroit school system obliged the State only to attain a desegregated Detroit district. *See id.* The dissenting Justices, however, construing right and remedy on the basis of the outcome and the presence of discriminatory state practices, direct or vicarious, required the State to exercise its affirmative duty to use all of its power, including its authority to refashion school district boundaries if needed, in a way that aided desegregation in fact.

In 1977 the Court once again addressed the scope of and the possible limits on the school desegregation decree set forth in *Milliken I* in *Milliken v. Bradley* (*Milliken II*).[79] Specifically, the Court held that ordering remedial education programs as a component of a school desegregation decree did not exceed the authority of the district court.[80] Al-

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See id. The dissent concluded, based on a different desegregative objective, that the majority allowed Michigan to successfully shield itself from its obligation under the Fourteenth Amendment to furnish effective desegregation remedies by conferring power over its public school systems in the local districts. *See id.* (quoting *Milliken I*, 418 U.S. at 763) (White, J., dissenting)). For a critical discussion of the *Milliken I* Court's holding see Goedert, *supra* note 11, at 1872-76; *see also* Beck, *supra* note 27, at 1043-44 (enunciating that *Milliken I* greatly reduced the ability of a federal court to require interdistrict relief); Brubaker, *supra* note 27, at 591 (noting that the *Milliken I* decision is often criticized because it endorsed, and even invited, "white flight" from the inner-cities to the surrounding suburbs where white children were sheltered from forced integration).

Milliken I held that the underlying constitutional violation, whether it be interdistrict or intradistrict, was mutually exclusive. *See* Parkman, *supra* note 2, at 729. Therefore, a remedy affecting another district needed to be supported by a violation occurring in a surrounding district or a constitutional violation producing significant segregative effects in adjoining districts. *See id.* at 729-30 (citing *Milliken I*, 418 U.S. at 744-45). Subsequently, in *Hills v. Gautreaux*, the Court distinguished *Milliken I* and held that at times a district court has the power to order remedies that affect surrounding areas which have not participated in the segregative practices. *See Gautreaux*, 425 U.S. 284, 296 (1973). The *Gautreaux* Court opined that a district court should be able to exercise remedial powers in this way so long as resulting orders have no segregative effects and do not bind innocent districts. *See id.* For a more detailed discussion of *Gautreaux* see *infra* note 152. These seemingly contradictory decisions failed to provide instruction as to when a court may include innocent school districts in a remedial decree aimed at a segregated school district. *See* Parkman, *supra* note 2, at 730. *But see* Missouri v. Jenkins, 115 S. Ct. 2038, 2057 (1995) (O'Connor J, concurring) (finding that *Gautreaux* did not overrule the predicates of *Milliken I* necessitating a finding of significant segregative effects on surrounding school districts before an interdistrict remedy could be imposed). Consequently, the Supreme Court in *Milliken II* undertook the task of providing additional insight into and specifically defining the scope of a federal court's remedial power. *See* Parkman *supra* note 2, at 730. *See generally* Elwood Hain, *Sealing Off the City: School Desegregation in Detroit, in* LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 223-308 (Howard I. Kalodner & James J. Fishmam eds., 1978) (discussing in-depth the circumstances leading up to the *Milliken I* decision).

[79] 433 U.S. 267 (1977) (hereinafter *Milliken II*).

[80] *See id.* at 287. The four educational components at issue included reading, in-service training, testing, and counseling and career guidelines. *See id.* at 275-76. As part of the desegregation order, the district court approved the school board's plan which contained these educational components. *See id.* at 277. The State and the Detroit School Board were to share the costs of these four programs. *See id.* The Sixth Circuit affirmed the order of the district court and explicitly approved findings as to the need for these compensatory programs. *See id.* at 277-78.

The Supreme Court opined that often an effective remedy involved innovative solutions. *See id.* at 283. The Court held that the trial court had not exceeded its equitable authority by ordering education programs as part of the desegregation decree for Detroit and set forth three equitable principles which govern a district court when implementing a desegregation plan. *See id.* at 280-81. First, the Court professed that a district court needs to consider the impact of the violation to ensure that the remedy is closely related to

though never having directly addressed the permissibility of remedial education programs as part of a court decree,[81] the Supreme Court once again stressed that the lower courts should follow equitable principles in fashioning desegregation decrees.[82] The Court discussed the additional steps besides pupil reassignment that district courts had previously taken to remedy desegregation depending on the scope and extent of the underlying constitutional violation.[83] The Court concluded that the district court's remedial decree was adequately tailored to remedy the constitutional violation and, thus, did not surpass the district court's desegregative authority.[84]

Against this foundation of precedent, the United States Supreme Court, in *Missouri v. Jenkins*,[85] determined that the district court had exceeded its remedial desegregative authority by ordering programs, including salary increases for virtually all school district employees, which attempted to achieve an interdistrict goal when there had been no corre-

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the constitutional violation. *See id.* at 280. Second, the Court determined that the remedy should strive to restore individuals to the position that they would have been in without the constitutional infringement. *See id.* at 280 (quoting *Milliken I*, 418 U.S. at 746). Third, the Court stressed that a district court should respect the right of state and local officials to manage their local affairs. *See id.* at 280-81.

[81] *Id.* at 279 & n.13. The *Milliken I* Court asserted that the district court's order in *Swann v. Charlotte-Mecklenburg Board of Education* included in-service training programs, but in affirming the decree, the Supreme Court did not specifically address the permissibility of this type of program. *See id.* at 279 n.13. Also, the Court commented that in *Keyes v. School Dist. No. 1, Denver, Colorado*, the Supreme Court explicitly avoided passing on the lower court's holding which required "compensatory education in an integrated environment." *See id.* (quoting *Keyes*, 413 U.S. 189, 214 n.18 (1973)).

[82] *See id.* at 279-80 (quoting *Brown II*, 349 U.S. 294, 300 (1955)).

[83] *See id.*, 433 U.S. at 282-83. Noting a number of cases that approved remedial plans encompassing more than pupil reassignment, the Supreme Court specifically relied on *United States v. Montgomery County Bd. of Educ.* and *Swann* to show that such plans do not necessarily exceed the scope of a district court's authority. *See id.* at 287. In *Montgomery County*, the Court did not focus on pupil reassignment but instead implemented policies to desegregate faculty and staff as necessary to dismantle the dual system. *See United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 231-32 (1969). Thus, the *Montgomery County* Court promulgated the proposition that a federal court must occasionally address issues other than student assignment to rectify the effects of prior segregation. *See id.* The *Swann* Court reaffirmed the principle that discriminatory student assignment plans can negatively affect other aspects of the school system and incorporate further inequalities. *See Swann*, 402 U.S. at 20-21. Accordingly, the *Milliken II* Court averred that federal courts "cannot close their eyes to inequalities" which result from a segregated system. *See Milliken II*, 433 U.S. at 283.

[84] *See Milliken II*, 433 U.S. at 287. The Court also found that the Eleventh Amendment was not violated by requiring the State to finance these programs because the decree only required the State to conform its conduct to constitutional principles and to provide prospective equitable relief, even though this included expenditures by the State. *See id.* at 289; Parkman, *supra* note 2, at 731-32 (claiming that the *Milliken II* decision once again broadened the scope of a federal trial court's power).

[85] 115 S. Ct. 2038 (1995) (5-4 decision).

sponding interdistrict violation.[86] The Court also held that the district court used an inappropriate test to determine if partial unitary status had been achieved within the district.[87] Writing for the majority, Chief Justice Rehnquist began by providing a general overview of the procedural history of this much litigated case.[88] After developing the background for this controversy, the majority discussed the propriety of the district court's order of salary increases to virtually all KCMSD employees.[89] Ancillary to this determination, but necessary to resolve the ultimate question, the Court found that an attack upon the scope of the district court's remedial order was correctly within the question presented.[90]

The majority addressed Justice Souter's argument that the Court's decision to review the breadth of the district court's remedial power was

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[86] *See id.* at 2053-54. For an additional discussion of the *Missouri v. Jenkins* decision see Gary D. Allison & Louis W. Bullock, *Backlash: The Court Protects the Entrenched Advantages of the Majority*, 31 TULSA L. J. 425, 426-29 (1996).

[87] *See id.* at 2055. The Eighth Circuit suggested that the State could establish an interdistrict program if it desired which included requiring suburban districts to allow minority students to transfer from the KCMSD. *See* Beck, *supra* note 27, at 1036 n.46. This is possible because the State is not limited by constraints that bind a federal court. *See id.*

[88] *See Jenkins*, 115 S. Ct. at 2042-45. The Court noted that this case had been before the same district judge for 18 years. *See id.* at 2042; *see also supra* notes 24-43 and accompanying text discussing the path of this much litigated case. Justices O'Connor, Scalia, Kennedy and Thomas joined the Court's opinion. *See Jenkins*, 115 S. Ct. at 2042. For an additional discussion of the Court's opinion see Parkman, *supra* note 2, at 739-53; Brubaker, *supra* note 27; Simon, *supra* note 11, at 678-681.

[89] *See Jenkins*, 115 S. Ct. at 2047. Chief Justice Rehnquist noted that the Court's grant of certiorari in *Jenkins II* to review only the method by which the lower court had funded the desegregation decree solely indicated that the Court resisted the State's attempt to challenge the scope of the remedial decree at that time. *See id.* (citing *Jenkins II*, 495 U.S. 33, 53 (1990)); *see* Brubaker, *supra* note 27, at 584 (noting that the question the Court denied certiorari to in *Jenkins II* was almost identical to that accepted for review in the present case because it was fairly included in the questions presented). The Chief Justice stressed that the *Jenkins II* Court "neither 'approv[ed]' nor 'disapprov[ed]'" the Eighth Circuit's conclusion that the lower court's remedy was permissible. *See Jenkins*, 115 S. Ct. at 2047 (quoting *Jenkins II*, 495 U.S. at 53); *supra* note 27 discussing the scope of the Supreme Court's review in *Jenkins II*.

[90] *See Jenkins*, 115 S. Ct. at 2047. Supreme Court Rule 14.1 governs the procedures litigants are to follow when submitting a writ of certiorari to the Court. *See* SUP. CT. R. 14.1. ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). The ancillary question is required to be more closely associated to the question submitted than merely relating to or complementing that question. *See* Brubaker, *supra* note 27, at 587. The Court previously noted that Rule 14.1(a) makes the petitioner concentrate on the issues the Court has considered to be especially important, thus allowing the Court to efficiently allocate limited resources. *See id.* at 587-88 (quoting Yee v. City of Escondido, 503 U.S. 519, 536 (1992)). *But see infra* note 219 discussing the dissent's interpretation of Rule 14.1.

"both unfair and imprudent".[91] The Chief Justice cited the dissent's claim that the Court's previous denial of certiorari on the State's attack of the district court's remedial power in *Jenkins II*[92] was a factor that influenced respondents to present their case without adequate attention to the basic issue.[93] The majority noted the dissent's position that the failure to address this basic issue now affected the Court's decision.[94] Chief Justice Rehnquist disagreed with Justice Souter's arguments and reiterated that a failure to grant a writ of certiorari does not indicate the Court's opinion regarding the merits of a case.[95] The Chief Justice stressed that respondents were not lulled into a "false sense of security" because the Court's decision in *Jenkins II* made respondents aware that the district court's remedial authority had not been affirmed.[96] The Court also emphasized that in the *Jenkins II* decision, at least four Justices had questioned the court's remedy.[97]

The majority noted that the State yet again had challenged the district court's remedial authority to demand the specific orders at issue.[98] Both the district court and the court of appeals, the Chief Justice pointed out, were aware of this challenge.[99] Moreover, the majority contended, the State included this challenge in its certiorari petition in addition to arguing that the salary increases ordered by the lower court had exceeded the scope of the district court's remedial authority.[100] The Chief Justice expounded that all involved parties, including the reviewing courts, had recognized the expansiveness of the district court's remedial authority to be at issue.[101] Dismissing Justice Souter's arguments, the majority opined that there was "no unfairness or imprudence" in including issues

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[91] *See Jenkins*, 115 S. Ct. at 2047; *infra* notes 217-220 and accompanying text (setting forth Justice Souter's disagreement with the Court's willingness to review the proper scope of the district court's remedial authority when it had not been accepted for review).

[92] 495 U.S. 33 (1990); *see supra* note 27 for a brief discussion of the Court's holding in *Jenkins II*.

[93] *See Jenkins*, 115 S. Ct. at 2047.

[94] *See id.*

[95] *See id.* (quoting United States v. Carver, 260 U.S. 482, 490 (1923)).

[96] *See id.* at 2047 (citing *Jenkins II*, 495 U.S. 33, 53 (1990)).

[97] *See id.* (citing *Jenkins II*, 495 U.S. at 75-80) (Kennedy, J., concurring in part and concurring in judgment).

[98] *See Jenkins*, 115 S. Ct. at 2047.

[99] *See id.* at 2047-48.

[100] *See id.* at 2048 The majority restated that the respondents' brief contended that the State's attack on the breadth of the remedial authority of the district court was not fairly presented and was meritless. *See id.*

[101] *See id.*

to be decided by the Court which had been passed upon below, had been properly brought before the Court, and had been briefed by all parties.[102]

The majority then proceeded to discuss relevant precedent concerning the authority of a district court to fashion orders remedying the effects of segregated school districts.[103] The Chief Justice first interpreted the *Swann* Court's holding as identifying the discretion that must attach to a district court when fashioning a remedy, while also acknowledging limits on such remedial authority.[104] The majority then furthered the Court's historical perspective through an analysis of *Milliken I*, where the Court held that a district court had surpassed the permissible level of remedial authority by creating interdistrict relief when the neighboring school districts had not committed any constitutional violation.[105] The Chief Justice quoted the *Milliken I* decision which stressed that in the absence of an interdistrict violation, or an interdistrict effect, interdistrict relief was not available.[106]

Chief Justice Rehnquist continued by outlining the three-part framework set forth in *Milliken II* to aid district courts in exercising their remedial authority.[107] First, the Court reiterated the principle behind equitable remedies- that the nature of the remedy is dictated by the nature and breadth of the constitutional abridgment.[108] Second, the majority stated

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[102] *See id.*

[103] *See Jenkins*, 115 S. Ct. at 2048-49.

[104] *See id.* at 2048. The majority, quoting the *Swann* Court, stated:

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

Id. (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-23 (1971)); *see supra* notes 61-69 and accompanying text for an in-depth discussion of *Swann*.

[105] *See Jenkins*, 115 S. Ct. at 2048 (citing *Milliken I*, 418 U.S. 717, 746-47 (1974)). For a more thorough treatment of *Milliken I* see *supra* notes 70-78 and accompanying text.

[106] *See Jenkins*, 115 S. Ct. at 2048 (quoting *Milliken I*, 418 U.S. at 745). The Court observed that the *Milliken I* Court also rejected the contention that schools comprised of a majority of African-American students were not desegregated whatever the racial population of the district's boundaries and however neutrally the school district's zoning lines had been fashioned and administered. *See id.* (citing *Milliken I*, 418 U.S. at 747 n.22).

[107] *See id.* at 2049 (citing *Milliken II*, 433 U.S. 267, 280-81 (1977)).

[108] *See id.* (quoting *Milliken II*, 433 U.S. at 280) (promulgating that the character of the desegregation decree is to be guided by the nature and reach of the constitutional violation). Chief Justice Rehnquist stated that the *Milliken II* Court added further to this factor by clarifying that it simply meant that there must be a nexus between the federal court decree and the constitutional violation. *See id.* at 2049 (quoting *Milliken II*, 433 U.S. at 280).

that the desegregation decree must be specifically drafted so as to enable a victim of discriminatory actions to be restored to the position the individual would have attained without such violative conduct.[109] Third, when fashioning a remedy, the Chief Justice noted, the federal courts must consider state and local interests in controlling their own affairs as allowed pursuant to the Constitution.[110]

Because Chief Justice Rehnquist recognized that federal oversight of local school districts was only meant as a temporary means to remedy past discrimination,[111] the majority then considered the necessary showing a school district operating pursuant to a desegregation order must make for partial or complete relief from such an order.[112] Looking to *Freeman*

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[109] *See id.* (quoting *Milliken II*, 433 U.S. at 280).

[110] *See id.* (quoting *Milliken II*, 433 U.S. at 280-81). In applying this framework the majority pointed out six areas set forth in Green v. County Sch. Board. which the Court had previously reviewed to aid in the determination of whether a school district is racially identifiable. *See id.* The Court articulated that "student assignments, . . . 'faculty, staff, transportation, extracurricular activities and facilities,'" were indicia of segregated school districts. *Id.* at 2049 (quoting Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991).

[111] *See Jenkins*, 115 S. Ct. at 2049 (citing *Dowell*, 498 U.S. at 247); United States v. Lopez, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring) (commenting that education has traditionally been the responsibility of the states because of history and their expertise in this area); Freeman v. Pitts, 503 U.S. 467, 489 (1992) (finding that the district court's end purpose was not only to remedy the constitutional violation but also to restore control of the school system to state and local authorities); *Milliken II*, 433 U.S. 267, 280-81 (1977) (asserting that when fashioning a remedy, a federal court must consider the interests of local and state governments in controlling their own affairs); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977) (*Dayton I*) (observing that local autonomy of school systems is an important national tradition); *Milliken I*, 418 U.S. 717, 741-42 (1974) (recognizing that the deeply rooted tradition of local control over public education has long been considered essential both to preserving community interest and support for public education and to maintaining the quality of school systems); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973) (noting that local control over education provides citizens the opportunity to become involved in decision-making, allows communities the ability to structure educational programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence"); Wright v. Council of the City of Emporia, 407 U.S. 451, 469 (1972) (asserting that citizens strongly desire to have direct control over the education of their children); *see also* Simon, *supra* note 12 (discussing the conflict in school desegregation cases between maintaining local control and remedying constitutional violations).

[112] *See Jenkins*, 115 S. Ct. at 2049. The Court has insisted that relief from a desegregation decree is available once the constitutional violator has attained unitary status. *See supra* note 23 (differentiating between dual and unitary districts). The concept of unitariness, the Court has explained, has been useful in delineating the scope of the a trial court's power, for it conveys the principle that a district once operating as a dual system must be analyzed both at the time the remedial decree is ordered and when one of the parties requests a modification or withdrawal of the district court's remedial control. *See Freeman*, 503 U.S. at 486. The Court has stressed that the requirement of a unitary system needs to be implemented pursuant to the guiding principles governing equitable remedies. *See id.* at 487; *supra* note 68 and accompanying text for a brief treatment of equitable remedies. Pursuant to a federal court's flexible equitable power, the Court has

v. Pitts,[113] the Chief Justice specifically set forth three factors which must be entertained by a court when contemplating a request for partial with-

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stated that once a school district has attained partial unitary status, the tribunal has the discretion to require a partial withdrawal of control over the district. *See Freeman*, 503 U.S. at 489. This discretion, the Court has promulgated, also arises from the constitutional authority that substantiated the lower court's initial intervention and the court's ultimate objectives of remedying the violation and returning control of the school district to state and local authorities. *See id.* The Court has noted that permitting a district court to relinquish control of some, but not all, areas concerning the desegregation decree illustrates the use of equitable discretion. *See id.* at 493. The Court has professed that by withdrawing supervision over areas that no longer require judicial intervention, a district court can focus the court's and the school district's resources on areas still affected by de jure segregation. *See id. But see* Bradley W. Joondeph, Note, *Killing* Brown *Softly: The Subtle Undermining of Effective Desegregation in* Freeman v. Pitts, 46 STAN. L. REV. 147 (1993) (suggesting that the partial withdrawal of supervision permits school districts to take actions that may have a resegregatory impact on areas where compliance has been achieved).

[113] 503 U.S. 467 (1992). In *Freeman*, petitioners filed a motion in the United States District Court for the Northern District of Georgia asking for dismissal of the litigation because petitioners had eliminated the dual school system previously in place and had achieved unitary status. *See id.* at 473. The district court examined the *Green* factors in addition to considering the quality of education afforded to white and to black students and found that the district was a unitary system with respect to student assignments, transportation, facilities, and after school activities and, therefore, ordered no additional relief in those areas. *See id.* at 474. The lower court, however, did not dismiss the case because the district had not achieved unitary status in every respect. *See id.* The district court found that remnants of the segregated system lingered in the areas of instructional employee and principal assignments, resource disbursements, and quality of education. *See id.* The district court ordered that adequate measures be taken to remedy these problems. *See id.*

Both parties appealed and the Eleventh Circuit affirmed the lower court's ultimate conclusion that the district had yet to reach unitary status. *See id.* at 484. The appellate court, however, reversed the lower court's ruling that the district had no continuing responsibilities as to student assignments. *See id.* The circuit court rejected the lower court's approach of individually reviewing each of the *Green* factors to determine whether unitary status had been attained, and held that unitary status was achieved only if a school system satisfied all six *Green* categories at the same time over a period of years. *See id.* Because the district had not reached unitary status in all categories at one time, the Eleventh Circuit propounded that the district could not be relieved of its constitutional duties by blaming demographic shifts for student assignment patterns which happened before unitary status was declared. *See id.* at 484-85. The appellate court held that petitioners were responsible for the racial imbalance in the student the population and would be required to take actions that "may be administratively awkward, inconvenient, and even bizarre in some situations" to remedy the imbalance. *Id.* at 485 (quoting *Swann*, 402 U.S. at 28).

The Supreme Court granted certiorari and held that in the course of overseeing a desegregation decree, a federal court has the power to give up partial control and supervision of school districts before the district has completely complied with unitary requirements in all areas of school operation. *See id.* at 485, 490. The majority professed that the district court, in exercising the prerogative to order the partial withdrawal of judicial control, must consider the purposes and goals of equitable power in a desegregation case. *See id.* at 491. Continuing, the *Freeman* Court promulgated that the district court had not erred in this instance by ordering a partial withdrawal over some areas of the desegrega-

drawal.[114] First, the majority stated that the Court must determine whether the school district has completely and acceptably complied with the desegregation decree in the parts of the school system where federal oversight would be withdrawn.[115] Second, the Chief Justice enunciated that a court must decide whether continued judicial control would be needed or practicable to attain compliance with the court decree in other areas of the school system.[116] Third, the majority asserted that a court needs to consider whether the district has demonstrated its good faith commitment, to the public, parents, and pupils of the previously disfavored race, to comply with the court's entire decree, all laws, and the Constitution.[117] Chief Justice Rehnquist emphasized that the ultimate inquiry focused on whether the constitutional infringer had adhered to the desegregation decree in good faith throughout its implementation, and whether the remains of past discrimination had been eradicated to the extent practicable.[118] Before addressing the specific orders at issue, the majority professed that a proper analysis of such remedial decrees rested upon the orders serving as an appropriate method to place those discriminated against in the position that they would have attained in the absence of such conduct.[119] The Court also asserted that this analysis focused on restoring control to State and local officials of a school district that is operating pursuant to the Constitution.[120]

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tion decree. *See id.* at 492. The Court additionally recognized that the district court appropriately exercised equitable discretion by considering the quality of education, an area not previously included as one of the six factors evaluated, when determining whether unitary status had been reached under *Green*. *See id.* at 492-93. The Court concluded by rejecting the Eleventh Circuit's holding that retention of judicial supervision over student assignments was needed to achieve compliance in the other areas of the school system. *See id.* at 496-97. The Court focused on the respondents' failure to show that racial balancing was a proper means to remedy other deficiencies. *See id.* at 498. The Court remanded the case so that the district court could make specific findings concerning this issue. *See id.*; for an additional discussion of *Freeman* see Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791, 799-803 (1993).

[114] *See Jenkins*, 115 S. Ct. at 2049.

[115] *See id.* (quoting *Freeman*, 503 U.S. at 491).

[116] *See id.* (quoting *Freeman*, 503 U.S. at 491).

[117] *See id.* (quoting *Freeman*, 503 U.S. at 491); Board of Educ. v. Dowell, 498 U.S. 237, 249-50 (1991) (commenting that a federal trial court should consider whether the violator had followed the desegregation decree in good faith and whether the remains of the discriminatory conduct had been removed to the extent practicable); *see also* Morgan v. Nucci, 831 F.2d 313, 321 (1st Cir. 1987) (stressing that a finding of good faith reduces the probability that a school district's acquiescence with court decrees is but a short-lived constitutional ritual).

[118] *See Jenkins*, 115 S. Ct. at 2049 (quoting *Freeman*, 503 U.S. at 492).

[119] *See id.*

[120] *See id.* (quoting *Freeman*, 503 U.S. at 489).

Turning to the specific orders challenged, the Chief Justice first addressed the State's argument that the order implementing salary increases exceeded the district court's authority because it was designed to achieve an "interdistrict goal," when the constitutional violation was only "intradistrict" in nature.[121] The majority once again set forth the principle that the type of desegregation remedy is dictated by the nature and scope of the underlying constitutional violation.[122] The majority further stated that the most appropriate course of action for an intradistrict infraction is an intradistrict solution[123] that attempts to terminate the racial identity of a school's population that is in the effected district by eradicating, to the extent practicable, the remains of de jure segregation affecting all aspects of the school system's operations.[124] The Chief Justice noted that both the district court and the Eighth Circuit agreed that there was no interdistrict constitutional violation involved in this case which would necessitate interdistrict relief.[125] Thus, the Court posited, the proper remedy to be fashioned by the trial court should have focused on eliminating the remains of previous de jure segregation found within the KCMSD.[126]

The majority recognized that both lower courts believed that a solely intradistrict remedy would be inadequate due to the 68.3% African-American enrollment level in the KCMSD.[127] The Chief Justice, however, professed that the Court in *Milliken I* had rejected the notion that schools comprised of a majority of African-American students were not desegregated regardless of the racial composition of the school district's

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[121] *See id.*

[122] *See id.* at 2049-50 (quoting *Milliken II*, 433 U.S. 267, 280 (1977)); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976) (articulating that there are certain boundaries that a court may not cross when dismantling a dual school system).

[123] *See Jenkins*, 115 S. Ct. at 2050; *Milliken I*, 418 U.S. at 746-747.

[124] *See Jenkins*, 115 S. Ct. at 2050; Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971) (recognizing that the first remedial duty of officials in previously maintained dual districts is to eradicate invidious racial distinctions); Green v. County School Bd., 391 U.S. 430, 437-38 (1968) (requiring the school districts operating state mandated dual systems to engage in affirmative conduct to convert the districts to unitary systems and to eliminate the practice of racial discrimination both "root and branch").

[125] *See Jenkins*, 115 S. Ct. at 2050 (citing *Jenkins II*, 495 U.S. at 37 n.3) (adding that the district court had also ruled that the discriminatory conduct had not affected the surrounding school districts and therefore dismissed the suit against the suburban districts and denied an interdistrict remedy)

[126] *See Jenkins*, 115 S. Ct. at 2050. Chief Justice Rehnquist enunciated that the vestiges of discrimination in the KCMSD specifically consisted of a district-wide decline in student achievement levels and the presence of 25 schools that were racially identifiable with a student population that was over 90% African-American. *See id.*

[127] *See id.*

population and the neutrality of the school zoning lines.[128] The Court contended that the district court had not attempted to eliminate the racial identity of the schools comprising the KCMSD,[129] but instead had initiated a program to develop a district equal to or better than the neighboring suburban school districts.[130] The majority noted that the district court had focused on "desegregative attractiveness" and "suburban comparability" in fashioning a remedy.[131] The objective of "desegregative attractiveness", the Chief Justice pointed out, was to remedy the district-wide decrease in student achievement and to attract non-minority pupils not currently attending schools in the KCMSD.[132] Chief Justice Rehnquist noted the breadth of this remedy consisted of an elaborate plan for capital improvements, course enhancement, and extracurricular enrichment in not only the previously identifiable African-American schools but in many schools within the district.[133] The majority observed that the district court's remedial orders had converted almost all of the schools within the KCMSD into magnet schools.[134]

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[128] *See id.* (quoting *Milliken I*, 418 U.S. 745, 747 n.22 (1974)); Freeman v. Pitts, 503 U.S. 467, 494 (1992) (promulgating that a racial imbalance in pupil attendance zones was not equivalent to evidence that the district was not following the desegregation decree); *Milliken II*, 433 U.S. 267, 280 n.14 (1977) (articulating that the Court had continually held that racial imbalances alone in a school system did not violate the Constitution); *Dayton I*, 433 U.S. 406, 417 (1977) (averring that the existence of racially identifiable schools in a racially mixed community without more does not violate the Constitution); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (refusing to require the school district to annually rearrange its attendance zones so as to permanently maintain the recommended racial mix ordered by the district court); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971) (professing that the presence of a small number of single-race schools within one district, in and of itself, does not indicate a segregated district); *see, e.g.*, United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 n.5 (1972) (impliedly approving a desegregation plan with a student racial composition of 86% black and 14% white); Wright v. Council of City of Emporia, 407 U.S. 451, 457 (1972) (approving a desegregation plan resulting in a 66% black and 34% white district); Green v. School Bd., 391 U.S. 430, 432 (1968) (upholding a desegregation plan with a final racial make-up of 57% black and 43% white).

[129] *See Jenkins*, 115 S. Ct. at 2050. *But see* Goedert, *supra* note 11, 1867-82 (supporting an interdistrict remedy when dealing with a racially identifiable district).

[130] *See Jenkins*, 115 S. Ct. at 2050.

[131] *See id.*

[132] *See id.* at 2051.

[133] *See id.*

[134] *See id.* The district court had converted all high schools, all middle schools, and 50% of the elementary schools within the KCMSD into magnet schools. *See id.* Generally understood, magnet schools are part of the public school system and have distinctive curricula and scholastic programs of a high quality aimed at promoting integration by attracting students from their local and private schools. *See* Brubaker, *supra* note 27, at 583; Kimberly C. West, Note, *A Desegregation Tool that Backfired: Magnet Schools and Classroom Segregation*, 103 YALE L.J. 2567, 2568-71 (1994) (explaining the purposes of magnet schools and their specific role in desegregation). *See generally* Christine H.

The Chief Justice recognized that the Court had previously approved intradistrict desegregation remedies including magnet schools,[135] which have the benefit of supporting the voluntary relocation of students within a district to help remedy desegregation without resorting to extensive busing and the refashioning of school zones.[136] Chief Justice Rehnquist, however, impugned the district court's remedial plan which the Court stated was not designed to redistribute students within the KCMSD so as to eradicate racially identifiable schools but, rather, to attract non-minority pupils from outside districts.[137] The majority expounded that this goal exceeded the scope of the intradistrict violation found by the district court.[138] The Chief Justice declared that, in effect, the district court had developed a remedy to achieve indirectly what concededly the lower court lacked the remedial power to order directly.[139]

Next, the majority further clarified the meaning of an interdistrict violation as set forth in Milliken I as a violation that precipitated segregation in adjoining districts.[140] The majority maintained that in Milliken I there was no reason to believe that the district court could have bypassed limitations on its remedial power by mandating that the constitutional violator institute a magnet school plan fashioned to attain the same interdistrict movement of students that was held to exceed the court's remedial authority if ordered directly.[141] The Chief Justice asserted that the district court had done just that by making the KCMSD a magnet district

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Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WM. & MARY L. REV. 613, 619 (1995) (stating that the magnet school concept was popularized in 1975 and 1976 when district courts in Houston, Milwaukee, and Buffalo approved such voluntary transfer programs).

[135] *See, e.g., Milliken II*, 433 U.S. 267, 272 (1977).

[136] *See Jenkins*, 115 S. Ct. at 2051. The majority stated that magnet schools are an attractive component in an intradistrict remedy because they encourage desegregation while preventing to some extent the withdrawal of white students from the district that might occur from mandatory student reassignment. *See Jenkins*, 115 S. Ct. at 2051; Jenkins v. Missouri, 639 F. Supp 19, 37 (W.D. Mo. 1985); *cf.* U.S. v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972) (noting that avoidance of "white flight" cannot substantiate achieving anything less than full compliance with unitary status).

[137] *See Jenkins*, 115 S. Ct. at 2051.

[138] *See id.*

[139] *See id.* (citing Jenkins v. Missouri, 639 F. Supp. 19, 38 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986)) (stating that due to the limitation on the court's remedial power in restructuring the functions of state and local governments, any required program extending beyond the zoning lines of the KCMSD exceeded both the nature and scope of the underlying constitutional violation).

[140] *See id.* at 2052; *supra* notes 70-78 and accompanying text for a more detailed discussion of *Milliken I*.

[141] *See Jenkins*, 115 S. Ct. at 2052. *But see supra* note 87 (suggesting that the State on its own initiative could implement such a remedy because it was not constrained by the same limits as was the district court).

so as to allow the court to achieve the interdistrict goal of attracting nonminority pupils from the encircling suburban school districts and relocating them within the KCMSD.[142] The Chief Justice then found that the goal of "desegregative attractiveness" exceeded the reach of the trial court's broad remedial power.[143] The majority considered respondents' argument that the district court's dependence upon "desegregative attractiveness" was justified based upon the court's observation that segregation had caused "white flight"[144] to surrounding suburban school districts.[145] The Chief Justice, however, averred that both of the "findings" of the lower courts as to "white flight" were internally inconsistent[146] as

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[142] *See Jenkins*, 115 S. Ct. at 2052.

[143] *See id.*; *see also Milliken II*, 433 U.S. 267, 280-81 (1977).

[144] *See Jenkins*, 115 S. Ct. at 2052. James Coleman first proffered the concept of "white flight" in the mid-1970s. *See* Goedert, *supra* note 11, at 1878. Coleman's theory rested on the principle that whites facing the possibility of school desegregation would tend to leave the inner-city for the suburbs in large numbers. *See id.* This exodus would hinder any meaningful possibility of effective desegregation because it would leave inner city schools more racially identifiable and reduce the tax base, thereby decreasing the financial resources available to the school districts. *See id.* Coleman acknowledged that there were other factors besides desegregation that influenced the mass departure to the suburbs, but noted that the present means by which school districts were being desegregated was augmenting the problem rather than decreasing it. *See id.* n.63. Critics of the "white flight" theory point out that the process of suburbanization has been happening since the early 1900s. *See* id. at 1878. These critics contend that the residential relocation of urban whites occurs not because of desegregation efforts but, rather, because of the desires of individuals to be closer to their jobs, to have additional property, and to live in a cleaner environment. *See id.*; Orfield, *supra* note 10, at 831 (stating that during the past two generations, whites have increasingly supported school integration, and residential choices may be a result of white resistance to predominantly minority schools with high poverty rates and social problems instead of racial isolationism).

Some scholars have commented that implementing interdistrict relief to mitigate "white flight" is a "logically attractive position." *See* Goedert, *supra* note 11, at 1879. If desegregation efforts within an urban area are likely to cause "white flight", an obvious way to prevent the exodus is to increase the number of whites included within the reach of the remedy by embracing the surrounding areas within the desegregation plan. *See id.*

[145] *See Jenkins*, 115 S. Ct. at 2052. The Court traced the history of segregation within Missouri which mandated segregated schools prior to 1954. *See id.* at 2052 n.6. In 1954 the State's Attorney General declared this official policy unenforceable after the decision in *Brown I*. *See id.* The following school year, 18.9% of the district's students were African-American. *See id.* The black population of the KCMSD steadily rose to 30% in the 1961-1962 academic year; 40% during the 1965-1966 school year; and 60% in the 1975-1976 academic year. *See id.* The KCMSD instituted the 6C desegregation plan to achieve a minimum minority student population of 30%. *See id.* Since the 6C desegregation plan was implemented until 1986, enrollment in the KCMSD has decreased 30% and, specifically, white enrollment was down 44%. *See id.*

[146] *See id.* at 2052. The majority pinpointed the discussion of this issue by the lower courts. *See id.* n.7. The Court examined the lower courts' refusals to consider this constitutional violation interdistrict in nature with future findings of the appellate court that stated that "white flight" was caused by the African-American student majority in the

well as in conflict with the typical presumption that "white fight" may be a consequence of desegregation, not from de jure segregation.[147] Concluding, the majority observed that the record failed to sustain the district court's reliance on "white flight" as a reason for a legitimate expansion of the court's intradistrict remedial power through the goal of "desegregative attractiveness".[148]

Chief Justice Rehnquist dismissed the respondents' argument that the district court had only examined the culpability of the adjoining school districts.[149] The majority noted that the reach of the remedial order was much broader encompassing whether the neighboring school districts infringed the Constitution and whether interdistrict segregative effects were present.[150] Thus, the majority observed that the district court made specific findings that refuted the existence of current significant effects which led to the lower court's conclusion that the test of *Milliken I* had not been met.[151]

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district schools which was blamed on the KCMSD's and the State's constitutional violations. *See id.*

[147] *See id.* Substantial evidence was presented at the hearing as to the liability issue that many residents within the KCMSD relocated to the suburbs due to the district's attempt to integrate its schools. *See id.* n.8; *see also* U.S. v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972) (acknowledging that "white flight" may occur because of the implementation of a desegregation remedy). *Contra* Orfield, *supra* note 10, at 827 (criticizing courts for blaming "white flight" on desegregation and using this as a means for ending desegregation orders when courts have failed to consider that possibly the limits on remedial authority may have made continuous desegregation impossible).

[148] *See Jenkins,* 115 S. Ct. at 2053; *Milliken I,* 418 U.S. at 746; *see also Dayton I,* 433 U.S. 406, 417 (1977) (showing failed to sustain remedy as necessary to "eliminate all vestiges of segregation"). Citing *Freeman v. Pitts,* the Court professed that in a school case the remains of segregation with which the law is concerned possibly may be intangible and subtle; however, these vestiges of segregation still must be actual and be causally linked to the de jure infraction being redressed. *See Jenkins,* 115 S. Ct. at 2053 (quoting Freeman v. Pitts, 503 U.S. 467, 496 (1992)).

[149] *See Jenkins,* 115 S. Ct. at 2052 (quoting Jenkins v. Missouri, 807 F.2d 657, 672 (8th Cir 1986)).

[150] *See id.* at 2052-53 (quoting Jenkins v. Missouri, 807 F.2d 657, 672 (8th Cir 1986)). The majority pointed out that the district court's order stated that only one district was affected, the KCMSD, and this dictated that the remedy be limited solely to that system. *See id.* (quoting Jenkins v. Missouri, 807 F.2d 657, 672 (8th Cir 1986)).

[151] *See id.* at 2053 (quoting Jenkins v. Missouri, 807 F.2d 657, 672 (8th Cir. 1986) (affirming by a divided court the findings of the district court and conclusion that no interdistrict violation or effect was found)). Chief Justice Rehnquist commented that Justice Souter in dissent construed the Eighth Circuit's findings to show that the constitutional violations of the KCMSD and the State had not resulted in segregated neighboring school districts. *See id.* n.9. The Chief Justice clarified that the Eighth Circuit would not have reached this question because the present class of plaintiffs before the court, present and future KCMSD pupils, would not have standing to challenge segregatory practices within the adjoining school districts. *See id.*; *cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (setting forth the three elements comprising the constitutional minimum standing requirements). Thus, the majority stated that the Eighth Circuit meant exactly

The Chief Justice proceeded to address Justice Souter's claims that the Court's holding effectively overruled *Hills v. Gautreaux*.[152] Chief Justice Rehnquist found the decisions to be consistent and restated the *Milliken I* principle that a district court exceeds the scope of its remedial power by attempting to remedy an intradistrict violation that has not resulted in significant interdistrict effects with a remedy having an interdistrict purpose.[153] The majority asserted that this conclusion followed immediately from *Milliken II* where the Court reaffirmed the basic principle that a federal court order surpasses appropriate limits if its goal is to abolish a condition that is not in contravention with the Constitution or fails to flow from such violation.[154]

The Chief Justice concluded that the district court's goal of "desegregative attractiveness" could not be reconciled with precedent that limits a district court's remedial power.[155] The Court reasoned that the lower court's rationale that the greater the amount spent per student in the KCMSD, the more likely that an unknown amount of non-minority pupils not currently attending KCMSD's schools would enroll, was not

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what was said: the *Milliken I* requirements were not fulfilled because the district court's findings annul current significant interdistrict effects. *See Jenkins*, 115 S. Ct. at 2053 n.9 (quoting Jenkins v. Missouri, 807 F.2d 657, 672 (8th Cir. 1986)).

[152] *See Jenkins*, 115 S. Ct. at 2053. In *Gautreaux*, the Court found that HUD along with a local housing agency had participated in implementing and preserving a racially segregated public housing program. *See* Hills v. Gautreaux, 425 U.S. 284, 287-91 (1976). The Supreme Court stated that the court of appeals had ordered the establishment of a comprehensive area plan to remedy the violation. *See id.* at 291. The Court granted certiorari to consider, in light of *Milliken I*, if interdistrict relief was permissible without a finding of an interdistrict violation. *See id.* at 292. The majority found that the relevant geographic area containing the plaintiffs' housing alternatives was the Chicago housing market, not simply the Chicago city limits. *See id.* at 299. Therefore, the Court concluded that a metropolitan-wide remedy was not prohibited as a matter of law. *See id.* at 306. The Court did not require the district court to expose HUD to a remedy exceeding the geographical or political limits of its violation. *See id.* Rather, the Court stressed that the holding should not be read as mandating a metropolitan-area order. *See id.* The Court reversed the court of appeals' fact-finding that would have required a metropolitan-area remedy and remanded the case to the district court to obtain further evidence and engage in additional consideration of the appropriateness of metropolitan-area relief. *See id.*

[153] *See Jenkins*, 115 S. Ct. at 2053-54 (citing *Milliken I*, 418 U.S. 717, 744-45 (1974)).

[154] *See id.* at 2054 (quoting *Milliken II*, 433 U.S. 267, 282 (1977)). The Court also briefly addressed the point emphasized in *Milliken II* that federal courts, in adherence to constitutional principles, must consider the interests of local and state authorities in overseeing their own affairs when devising a remedy. *See id.* at 2052 (quoting *Milliken II*, 433 U.S. at 280-81); *supra* note 111 (providing further support for local control of school districts). The Court differentiated *Gautreaux*, which included the imposition of a order upon a federal agency, from *Milliken II*, which raised federalism concerns implicated when a federal court imposes a remedial order on a state. *See Jenkins*, 115 S. Ct. at 2054; *Milliken II*, 433 U.S. at 280-81.

[155] *See Jenkins*, 115 S. Ct. at 2054.

subject to any objective limitation.[156] The majority further noted that the goal of "desegregative attractiveness" had been used as a "hook on which to hang" new policies regarding improving the overall quality of education within the KCMSD.[157]

Also acknowledging that there was no timetable as to the length of the district court's involvement, the majority enunciated that each additional program mandated by the district court ensured the lower court's continued involvement.[158] Each new program offered to enhance the "desegregative attractiveness" of the KCMSD, the majority observed, has been financed by the State, making the KCMSD increasingly more dependent on additional State funding as well as on continued supervision by the court to ensure that such funding is provided.[159] The Court stressed that this conflicted with the principle that local control over education is an important national tradition[160] and, therefore, a district court must endeavor to restore control of a school system to state and local authorities.[161] Concluding, the Court stated that because the goal of "desegregative attractiveness" had caused numerous imponderables and was so far removed from eradicating the racial identifiableness of the KCMSD's schools, the pursuit of this goal exceeded the district court's broad discretion.[162] The majority held that the district court's order requiring salary increases, based on remedying the remains of segregation by increasing the "desegregative attractiveness" of the KCMSD, was too distant from the permissible implementation of an acceptable means to correct previous legally mandated segregation.[163]

The majority, relying on similar considerations, rejected the district court's order mandating continued State funding of quality education programs because of inadequate student achievement levels.[164] The ma-

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[156] *See id.*; *cf. Milliken II*, 433 U.S. at 280 (requiring the remedial order to be fashioned to the extent practicable to return the individuals who have been subject to discriminatory actions to the place they would have occupied without such conduct). The Court interpreted this reasoning to mean that every increased expenditure for teachers, staff, books, or buildings would help to make the KCMSD more attractive to non-minority students which would hopefully encourage those non-minority students to enroll. *See Jenkins*, 115 S. Ct. at 2054.

[157] *See Jenkins*, 115 S. Ct. at 2052 (citing *Jenkins II*, 495 U.S. 33, 76 (1990) (Kennedy, J., concurring in part and concurring in judgment)).

[158] *See id.* at 2054.

[159] *See id.*

[160] *See id.* (citing *Dayton I*, 433 U.S. 406, 410 (1977)).

[161] *See id.*; Freeman v. Pitts, 503 U.S. 467, 489 (1992); Board of Educ. v. Dowell, 498 U.S. 237, 247 (1971).

[162] *See Jenkins*, 115 S. Ct. at 2055.

[163] *See id.*; *Milliken II*, 433 U.S. at 280.

[164] *See Jenkins*, 115 S. Ct. at 2055.

jority clarified that the State had not asked the Court to declare that the quality education programs had achieved partial unitary status.[165] Rather, the Court noted that the State challenged the requirement that it continue to indefinitely fund the quality education programs until national averages were achieved.[166] The Court enunciated that review of this issue was needlessly complicated by the lack of findings by the district court in the order requiring the continued funding of the quality education programs.[167] The Chief Justice commented that the court of appeals, while recognizing that in the determination of partial unitary status careful fact-finding and thorough recordation of findings must be made, did not remand the case to the district court.[168] Instead, the Eighth Circuit attempted, the majority noted, to build a sufficient record from the district court's comments from the bench and from the lower court's orders.[169] Chief Justice Rehnquist professed that the court of appeals incorrectly relied on one order of the district court which stated that the KCMSD had failed to attain its maximum potential because the KCMSD was still equal to or below national averages at many grade levels.[170] The majority declared that this was not the correct test to use to decide whether a previously segregated school district had attained partial unitary status.[171] The Court set forth that the basic responsibility of a district court is to determine whether the decrease in achievement by minority pupils caused by prior de jure segregation has been eliminated to the extent practicable.[172] Based upon precedent, the majority maintained, the KCMSD and the State were entitled to explicit statements of their respective responsibilities under a desegregation decree.[173] The Chief Justice asserted that although the district court found that segregation caused a system-wide decrease in achievement within the KCMSD,[174] it had failed to identify the incremental effect segregation actually had on African-American student

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[165] *See id.*

[166] *See id.* The State assumed that the requirement of significant education improvement in both teaching and facilities may originally have been justified, but its unlimited extension was not. *See id.*

[167] *See id.*; *see also* Jenkins v. Missouri, No. 77-0420-CV-W-4 (June 17, 1992)

[168] *See Jenkins*, 115 S. Ct. at 2055.

[169] *See id.*; *supra* note 36 and accompanying text (providing the Eighth Circuit's findings regarding partial unitary status).

[170] *See Jenkins*, 115 S. Ct. at 2055.

[171] *See id.*; Freeman v. Pitts, 503 U.S. 467, 491 (1992); Board of Educ. v. Dowell, 498 U.S. 237, 249-50 (1991).

[172] *See Jenkins*, 115 S. Ct. at 2055.

[173] *See id.* at 2055 (quoting *Dowell*, 498 U.S. at 246).

[174] *See id.* (quoting Jenkins v. Missouri, 639 F. Supp. 19, 24 (1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986)).

achievement levels or the definite goals of the quality education programs.[175]

The Chief Justice articulated that the district court must apply the three-part test set forth in Freeman v. Pitts when reconsidering this order.[176] The majority noted that the district court upon remand should take into account that the State's involvement in the quality education program has been limited to the financing, not the execution, of those programs.[177] The district court, the Court professed, should sharply limit, if not do away with, reliance on improved achievement on test scores because all parties concur that this was irrelevant in attaining partial unitary status as to the quality education programs.[178] Noting that numerous external factors beyond the control of the KCMSD and the State may affect minority student achievement, the Court insisted that as long as the external factors were not caused by segregation, they should not play a part in the remedial calculus.[179] The majority commented that requiring the attainment of academic goals with no connection to the effects of segregation would unnecessarily delay the restoration of local control over the KCMSD.[180]

The Court pointed out that the district court should have taken into account that many of the objectives of the quality education plan had been achieved, noting that the KCMSD contained buildings and opportunities presently unavailable at any other school in the country.[181] The majority observed that KCMSD schools had obtained a AAA rating eight years ago, and that during seven of those years the current remedial programs had been in effect.[182] The Court thus maintained that minority students in

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[175] *See id.*; *cf. Dayton I*, 433 U.S. at 420 (stating that a district court is to determine the additional segregative consequence the constitutional infringement had on the present racial make-up of the school district's enrollment as compared to the distribution if no constitutional violation had occurred). The Court also pointed out that the goal of obtaining "desegregative attractiveness" no longer provided support for the quality education programs. *See Jenkins*, 115 S. Ct. at 2055 n.10; *supra* text accompanying note 143.

[176] *See Jenkins*, 115 S. Ct. at 2055. For a more detailed discussion of *Freeman*, see *supra* notes 113-117 and accompanying text.

[177] *See Jenkins*, 115 S. Ct. at 2055.

[178] *See id.*

[179] *See id.* at 2055-56; Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22 (1971).

[180] *Jenkins*, 115 S. Ct. at 2056.

[181] *See id.* The Court analogized that in education, as in economics, a "rising tide lifts all boats" but furthered that the quality education programs should be fashioned to correct the injuries sustained by the victims of previous de jure segregation. *See id.*

[182] *See id.* The AAA rating is awarded by the State Department of Elementary and Secondary Education upon consideration of a set list of criteria which reflects the ability of a school system to furnish the resources needed to provide an educational program

levels up through grade seven in the KCMSD have continuously attended AAA-rated schools.[183] The Chief Justice emphasized that minority students who at one time attended schools rated below the AAA level have subsequently attended remedial education programs for up to seven years.[184]

In conclusion, the majority reminded the district court that on remand the end purpose should not be solely to correct the violation to the extent possible but, also, to restore control of a school system functioning in adherence to constitutional principles to state and local authorities.[185] Accordingly, the Court reversed the judgment of the court of appeals and remanded the case to the district court for reconsideration of partial unitary status of the KCMSD consistent with the majority's opinion.[186]

In a concurring opinion, Justice O'Connor, began by rejecting the State's argument that the appropriateness of the district court's remedial plan was correctly included in the question of whether achievement by students was a proper indicator of partial unitary status.[187] Justice O'Connor, however, recognized that the State also challenged the district court's order requiring salary increases for virtually all KCMSD employees based on improving the "desegregative attractiveness" of the district.[188] The Justice asserted that included within this challenge, the State asked the Court to determine if the district court's order followed precedent that dictates that the scope and nature of the remedy address the underlying constitutional violation.[189] Thus, the Justice promulgated that the State not only inquired as to whether salary increases were a proper way to attain the district court's objective of "desegregative attractiveness" but, also, whether that objective related to the underlying constitutional violation.[190] The Justice reasoned that the appropriateness of

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meeting the basic needs of its students. *See* Jenkins v. Missouri, 639 F. Supp. 19, 26 (W.D. Mo. 1985).

[183] *See Jenkins*, 115 S. Ct. at 2056.

[184] *See id.*

[185] *See id.* (quoting Freeman v. Pitts, 503 U.S. 467, 489 (1992)). *But see* Simon, *supra* note 12, at 697-702 (stating that local autonomy should be considered in the formulation of the remedy, but continued emphasis on local autonomy in the implementation and dissolution phase of the remedial plan is misplaced).

[186] *See Jenkins*, 115 S. Ct. at 2056.

[187] *See id.* at 2056 (O'Connor, J., concurring). Justice O'Connor declared that simply because it was necessary to answer one inquiry before another did not protect the first question from Rule 14.1(a). *See id.* (quoting Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 977 (1995) (O'Connor, J., dissenting)); *supra* note 90 (discussing Supreme Court Rule 14.1(a)).

[188] *See Jenkins*, 115 S. Ct. at 2056 (O'Connor, J., concurring).

[189] *See id.*

[190] *See id.*

"desegregative attractiveness" as a remedial goal was not just an issue to be decided before the clearly presented question[191] but, rather, was an issue included in the question itself.[192] Justice O'Connor continued that the plain language of the question presented coupled with the State's brief provided notice of the issue to the respondents.[193]

The Justice next insisted that the majority's analysis comports with the Court's decision in *Hills v. Gautreaux*.[194] Justice O'Connor also addressed the dissent's interpretation of an "intradistrict violation", dismissing it as a "semantic distinction."[195] The correct interpretation of an intradistrict violation, Justice O'Connor stated, did not focus on whether the violation produced any effects on surrounding districts but whether the violation caused "significant segregative effects" beyond the district.[196] The Justice emphasized that upon affirming the district court's initial remedial order, the Eighth Circuit specifically noted that the lower court had examined and rejected whether the adjoining school districts were constitutional violators and whether significant segregative effects were present.[197] The Justice concluded that the lower courts' holdings clearly indicated that there was no interdistrict violation justifying the

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[191] *See id.* (citing *Lebron*, 115 S. Ct. at 966).

[192] *See id.*

[193] *See Jenkins*, 115 S. Ct. at 2056 (O'Connor, J., concurring).

[194] *See id.* at 2057 (O'Connor, J., concurring). Justice O'Connor emphasized that footnote eleven, which reversed the finding by the court of appeals that possibly an interdistrict violation or the existence of interdistrict segregative effects may have been present, must be read in context. *See id.* at 2058 (O'Connor, J., concurring) (citing *Gautreaux*, 425 U.S. 284, 294 n.11 (1976)). The Justice noted that the dissent argued that this holding implied a suggestion that district boundaries may be crossed even without a showing of interdistrict segregative effects. *See id.* Justice O'Connor, however, maintained that the Court only rejected the petitioners' contention that the mandated metropolitan-wide remedy was impermissible. *See id.* The Justice continued that the court of appeals went too far in the opposite direction by suggesting that the lower court *must* consider metropolitan-wide relief based on the fulfillment of the *Milliken I* test. *See id.* The Justice observed that the Court reversed the appellate court's findings so as to preserve the fact finding function of the district court and to allow the lower court to exercise discretion accordingly. *See id.* Justice O'Connor pointed out that the Court repeated the *Milliken I* requirement of interdistrict segregative effects within a different district to support an interdistrict remedy and held that the appellate court's unsupported speculation failed to reach the level of demonstration required. *See id.* (quoting *Gautreaux*, 425 U.S. at 295 n. 11).

[195] *See id.* at 2059 (O'Connor, J., concurring). Justice O'Connor commented that the district court had classified the constitutional violation as intradistrict because it had not caused segregation outside of the KCMSD and the surrounding school districts had not participated in the violation. *See id.* The Justice explained that the district court had not conveyed the impression that the violation had produced no effects of any type beyond the district. *See id.*

[196] *See id.* (citing *Milliken I*, 418 U.S. 717, 745 (1974)).

[197] *See id.*

implementation of a regional remedial plan.[198] The Justice also briefly discussed Justice Souter's argument that the district court narrowly interpreted which effects were segregative.[199] Justice O'Connor emphasized that although the violation had segregative effects on the KCMSD, the effects it had on the surrounding school districts did not justify interdistrict relief because they were not segregative.[200]

Justice O'Connor averred that the district court's orders should have been fashioned to place African-American students on par with white KCMSD students.[201] If reestablishing the KCMSD to unitary status would draw white students into the district, the Justice professed that this reversal of "white flight" would not be of legal consequence.[202] The Justice, however, stressed that the district court's goal of "desegregative attractiveness" to reverse the effects of "white flight," no matter how troubling, was impermissible because the exodus was not the direct result of the constitutional violation.[203]

Concluding, Justice O'Connor recognized that unfortunately numerous factors may cause various types of discrimination but stated that Article III of the Constitution limits judicial intervention to cases involving constitutional violations.[204] The Justice then affirmed the principle that the type of desegregation relief is dictated by the nature and breadth of the constitutional violation.[205]

Justice Thomas concurred with the majority's treatment of the two remedial issues submitted for review but wrote separately to comment on

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[198] *See id.*

[199] *See Jenkins*, 115 S. Ct. at 2059 (O'Connor, J., concurring).

[200] *See id.*

[201] *See id.* at 2060 (O'Connor, J., concurring).

[202] *See id.*

[203] *See id.* The Justice professed that whether "white flight" was a result of segregation or desegregation, the finding that the KCMSD was racially segregated and that there was neither an interdistrict violation nor a significant interdistrict effect foreclosed the possibility of a remedy crossing district lines. *See id.*

[204] *See Jenkins*, 115 S. Ct. at 2061 (O'Connor, J., concurring). The Justice recognized that Congress is empowered with the ability to determine whether legislation is necessary to ensure that the guarantees of the Fourteenth Amendment are enjoyed by all, while federal courts hold no such license and must always function within their limited judicial role. *See id.* Article III of the Constitution specifically sets forth that federal court jurisdiction extends "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority". U.S. CONST. art. III, § 2.

[205] *See Jenkins*, 115 S. Ct. at 2061 (O'Connor, J., concurring). The Justice also noted that the majority was correct in only reviewing the propriety of the order mandating salary increases and refraining from addressing the permissibility of all the other remedies ordered by the district court. *See id.*

the course of this litigation.[206] The Justice stated that the mere existence of one-race schools was insufficient to charge the State with a segregative policy.[207] Justice Thomas continued that without a finding of intentional State action, the district court improperly relied upon the proposition that racial imbalances were unconstitutional to anchor the liability of the State.[208] The Justice also stressed that a school that is comprised of a majority of African-American students is not necessarily inferior.[209] Justice Thomas observed that the goal of the Equal Protection Clause is to guarantee that all individuals are treated equally by the State regardless of their race, not to require strict race-mixing.[210]

Justice Thomas next commented that the Court has given federal courts much freedom in remedying problems that have not been adequately addressed by government policies.[211] The Justice insisted that it is time for the Court to stop ignoring constitutional principles like federalism[212] or the separation of powers when attempting to reform the

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[206] *See id.* at 2062 (Thomas, J., concurring).

[207] *See id*; cases cited *supra* note 128. The Justice noted that the continuing racial isolation in school populations following the end of de jure segregation may well be the result of voluntary housing preferences or other private decisions. *See Jenkins*, 115 S. Ct. at 2062 (Thomas, J., concurring). The district court, Justice Thomas pointed out, still rested the State's liability on its previously imposed segregative policies before 1954, and its failure to fulfill its affirmative duty of dissembling the dual school system after 1954. *See id.*

[208] *See Jenkins*, 115 S. Ct. at 2062 (Thomas, J., concurring).

[209] *See id.* at 2064 (Thomas, J., concurring). The Justice stated that the district court's willingness to accept stereotypes regarding the inferiority of a black institution and the inability of blacks to succeed without the benefit of white company resulted from a misreading of *Brown I*. *See id.* In *Brown I*, the Court acknowledged many psychological and sociological studies claiming to demonstrate that de jure segregation injured black students by creating "a feeling of inferiority" in them. *See id.* The Justice commented that the district court cited this passage in *Brown I* to strengthen the assertion that mandatory segregation is inherently unequal and is harmful to self esteem. *See id.* Justice Thomas asserted that the district court misunderstood *Brown I*. *See id.* Justice Thomas averred that *Brown I* did not state that racially isolated educational institutions were intrinsically inferior. *See id.* The harm that the Court noted, the Justice observed, was connected to de jure and not de facto segregation. *See id.* at 2064-65. (Thomas, J., concurring). The Justice articulated that "black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." *Id.* at 2065 (Thomas, J., concurring); *see also* Finley, *supra* note 25, at 130 (highlighting the usefulness of African-American colleges in the education of victims of discrimination).

[210] *See Jenkins*, 115 S. Ct. at 2066 (Thomas, J., concurring); *supra* note 26 (setting forth the Equal Protection Clause of the Fourteenth Amendment).

[211] *See Jenkins*, 115 S. Ct. at 2066 (Thomas, J., concurring).

[212] *See id.* The Justice professed that the Court previously held that education is primarily the responsibility of the States. *See id.* at 2070 (Thomas, J., concurring) (citing Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977); *supra* note 111 lending further support to this proposition. The principle of federalism is derived from the Tenth

schools.[213] Additionally, Justice Thomas stated that there was no history of federal courts possessing broad remedial power, and that the courts should sparingly impose equitable remedies pursuant to clear rules to restore predictability to the law and to ensure that constitutional remedies are aimed at those who have been injured.[214] The Justice concluded by articulating that the federal courts should not use racial balance as a pretext for resolving social problems that fail to transgress constitutional principles.[215]

In the principal dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, began by challenging the Court's decision to include the propriety of the district court's magnet school order along with the two court orders specifically granted review.[216] Justice Souter argued that this issue had not been accepted for review, had not been necessary to resolve in deciding the specific questions accepted for consideration, and had been rejected for review when presented in an earlier petition for

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Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. When the States granted the delegated powers to the federal government, those powers were limited both in scope and in the way in which they could be used. *See* Leading Cases, 109 HARV. L. REV. 239, 247 (1995); *see also* Honorable Sven Erik Holmes, *Introduction: The October 1994 Supreme Court Term*, 31 TULSA L.J. 421, 422-23 (1996) (asserting that the Court's decisions concerning race appear to be moving toward the limited ability of government to deal with these problems which is directly related to the Court's federalism decisions during this same term).

[213] *See Jenkins*, 115 S. Ct. at 2066 (Thomas, J., concurring). Justice Thomas conceded that although this case did not entail judicial encroachment upon another branch of government's power, nonetheless, separation of powers principles should apply. *See id.* at 2070-71 (Thomas, J., concurring). One author has stated that although Justice Thomas's assertion is logically and historically proper, it does not comport with the Court's own declarations. *See* Leading Cases, *supra* note 212, at 244 n.49, 247 n.71 (1995) (noting that in Elrod v. Burns, 427 U.S. 347 (1976) a plurality agreed with the Court's prior holding in Baker v. Carr, 369 U.S. 186 (1962) that the political question doctrine fails to protect the states and added that the separation of powers principle similarly does not apply to the federal courts' relationship to the States); *cf. id.* at 246 (stating that when federal courts surpass solely remedying constitutional violations, they remove decision-making authority from the democratic branches in the absence of a constitutional mandate to do so which violates the separation of powers). Although precedent shows that principles of the separation of powers doctrine do not apply to the relationship between the federal courts and the states, "the Constitution's structural and textual limits on judicial authority support Justice Thomas's assertion in *Missouri v. Jenkins* that 'what the federal courts cannot do at the federal level they cannot do against the States.'" *Id.* at 247 (quoting Jenkins, 115 S. Ct. at 2070-71 (Thomas, J., concurring)).

[214] *See Jenkins*, 115 S. Ct. at 2067-71 (Thomas, J., concurring). Justice Thomas expressed that the dissent's acceptance of the district court order implementing salary increases typifies the Court's failure to put limits on the federal courts' equitable remedial power. *See id.* at 2071 (Thomas, J., concurring).

[215] *See id.* at 2073 (Thomas, J., concurring).

[216] *See id.* (Souter, J., dissenting).

certiorari.[217] The Justice criticized the majority's willingness to reach this broader issue because the respondents were unaware that a fundamental premise of a part of the district court's remedial decree was to be the focus of the case.[218] Thus, Justice Souter contended that the respondents were not sufficiently prepared to address the foundational issue.[219] The dissent asserted that the Court effectively overruled twenty years of

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[217] *See id.* The State previously had challenged the district court's remedial order implementing magnet schools and the order requiring capital improvements, claiming that the district court was using an interdistrict remedy to correct an intradistrict violation. *See id.* at 2075-76 (Souter, J., dissenting). The court of appeals rejected the State's charges and the Supreme Court granted certiorari in 1989. *See id.* at 2076 (Souter, J., dissenting). The State's petition asked the Court to review the propriety of the district court's ordering property tax increases to cover the costs of the remedial program, and the permissibility of the magnet school program which was the foundation of the district court's desegregation plan. *See id.* The Supreme Court accepted the taxation question and held that although the district court could not directly impose the tax increase, it could mandate that the KCMSD tax property at an appropriate rate which would enable the district to cover the costs of its share of the desegregation decree. *See id.* The Court denied certiorari on the claim questioning the magnet school program. *See id.* Justice Souter commented that if the Court had accepted this issue for review, the Court could have also decided whether the magnet school program exceeded the boundaries of the district court's equitable discretion to remedy the underlying constitutional violation. *See id.* Justice Souter emphasized that the State did not brief this issue when it submitted its 1994 petition for certiorari to the Court in this case. *See id.*

[218] *See id.* at 2073-74 (Souter, J., dissenting).

[219] *See id.* at 2074 (Souter, J., dissenting). Justice Souter propounded that Supreme Court Rule 14.1 precluded review of the broader issue of the permissibility of the magnet school program that was not included in the petition for certiorari. *See id.* at 2076 (Souter, J., dissenting). Rule 14.1, the Justice continued, sets forth that only questions specifically stated or fairly included in the petition will be addressed by the Court. *See id.* Although the majority found this broader issue to be "fairly included" in the State's salary question, Justice Souter disagreed and averred that the Court could decide the test-score and salary issues without considering the propriety of the magnet school element of the underlying remedial scheme. *See id* at 2077 (Souter, J., dissenting). The State also conceded that the Court could answer the questions submitted to and accepted by the Court without deciding the permissibility of the magnet school plan. *See id.* Therefore, the dissent reasoned that this should terminate the discussion of this issue. *See id.* The Justice also noted that even if it was proper for the Court to entertain the foundational issue under Rule 14.1, the critical question is whether the Court may decide that issue without clear warning, especially when the Court had declined to address this issue previously. *See id.*; Brubaker, *supra* note 27, at 589 (criticizing the broad reading of Rule 14.1 and the majority's willingness to disprove the magnet school plan that previously in 1990 had sustained the Court's order to impose a tax, as demonstrating a strong judicial activism from the conservative Justices).

Justice Souter clarified that the position that the Justice previously had taken in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), was not inconsistent with the position that the dissent now espoused. *See Jenkins*, 115 S. Ct. at 2077 n.2 (Souter, J., dissenting). Justice Souter stated that in *Bray* the question was fairly included within the question presented and, therefore, properly addressed by the Court. *See id.* Justice Souter emphasized that the *Bray* Court had not previously denied certiorari of the issue in question as had occurred in the present case. *See id.*

constitutional precedent by considering an issue that was not addressed in argument and by not giving adequate notice to the parties of the issue to be decided.[220]

The dissent next addressed the test score issue and found that neither the district court nor the Eighth Circuit had relied on the attainment of national averages in denying the State's request for a declaration of partial unitary status.[221] Rather, Justice Souter observed, the Eighth Circuit had not found that the KCMSD had reached partial unitary status simply because the State had failed to make the showing necessary for that relief.[222]

As to the second issue before the Court, Justice Souter expounded that the majority overlooked that the district court had based the orders of salary increases on two complementary but distinct rationales.[223] The dissent observed that the district court had considered salary increases for KCMSD employees to be an important element in helping to reverse the system-wide decrease in student achievement caused by the segregated system within the KCMSD.[224] Justice Souter criticized the majority for

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[220] *See Jenkins*, 115 S. Ct. at 2074 (Souter, J., dissenting).

[221] *See id.* at 2078 (Souter, J., dissenting). The dissent pointed out that the June 17, 1992 order relevant to the test score question had not mentioned achieving national averages in test scores and had not addressed the issue of partial unitary status. *See id.* The test score reference was found in a subsequent district court order dated April 16, 1993 which was not under review Justice Souter added. *See id.* The dissent noted that the discussion of student achievement levels was quoted in the Eighth Circuit's opinion affirming the June 17, 1992 order which had canvassed subsequent orders of the district court, and included the lower court's finding of fact that the KCMSD had not reached national averages at many grade levels. *See id.* Justice Souter stressed that neither the district court nor the court of appeals had required attainment of certain student achievement levels before unitary status was declared. *See id.*

[222] *See id.* at 2078-79 (Souter, J., dissenting). The dissent stated the three-part test set forth in *Freeman v. Pitts*, which governmental entities asking for partial relief from a desegregation order are to follow, governed this determination. *See id.* at 2079 (Souter, J., dissenting). The dissent explained that it is the burden of the constitutional violator to show that these *Freeman* conditions exist, and observed that the State failed to allege its conformity with two of the three conditions. *See id.*

Justice Souter recognized that test scores will be relevant in determining if the remedial programs have eliminated to the extent practicable vestiges of prior segregation on student achievement levels. *See id.* at 2080-81 (Souter, J., dissenting); *Freeman*, 503 U.S. at 483 (considering student achievement levels of African-American students as one factor in determining if previously segregated system has reached unitary status). The Justice insisted that a more detailed record is needed in order for the district court upon remand to make an informed decision on this issue. *See Jenkins*, 115 S. Ct. at 2081 (Souter, J., dissenting).

[223] *Jenkins*, 115 S. Ct. at 2083 (Souter, J., dissenting).

[224] *See id.* at 2081 (Souter, J., dissenting). Justice Souter professed that although some may question extending salary increases to noninstructional employees, it is no less appropriate to implement salary increases for maintenance and administrative personnel, as the district court found that such employees are vital to a successful desegregation ef-

failing to consider this reason and instead solely basing the Court's rejection of salary increases on the goal of attracting non-minority students into KCMSD schools.[225] Justice Souter commented that to the extent the district court, on remand, finds the salary orders to be supported by reference solely to the quality of education, the court should not be precluded from permitting the salary orders to remain in effect.[226]

Next, Justice Souter impugned the majority's interpretation of an "intradistrict violation" as differing from the district court's meaning of the term.[227] The Court, the dissent declared, assumed that the segregatory effects were only within the KCMSD and, therefore, argued that an interdistrict remedy was forbidden.[228] Justice Souter then noted that the majority found that the lower courts were in error when they had considered the reversal of those effects as an appropriate outlay of equitable power to eliminate, to the extent practicable, any lingering remains of the previously segregated system.[229] Justice Souter stressed that the Court did not dispute the lower courts' interpretation of the facts; and on the limited record before the Court, the dissent propounded that the majority's factual assumption was at least a questionable basis for eliminating one principal foundation of the desegregation order.[230]

The dissent recognized that the lower courts had agreed that the neighboring school districts had not participated in activity contributing to segregation within the KCMSD[231] and that the constitutional violations perpetrated by the State and the KCMSD had not caused significant segregative effects in adjoining districts.[232] Based on these findings, Justice Souter reasoned that the district court had concluded that the violation was intradistrict, therefore denying the consolidation of the surrounding school districts with the KCMSD.[233] Justice Souter insisted that there was no discrepancy between the lower courts' findings and the plausibil-

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fort because they maintain deteriorating facilities. *See id.* at 2082 (Souter, J., dissenting). Both lower courts, the dissent added, found and affirmed that the salary increase for teachers was allowed because in order to correct the educational deficits resulting from the previously segregated system in the KCMSD, the individuals responsible for implementing the remedial program must be the highest quality personnel reasonably attainable. *See id.*

[225] *See id.* at 2082-83 (Souter, J., dissenting).

[226] *See id.* at 2083 (Souter, J., dissenting).

[227] *See id.*; Brubaker, *supra* note 27, at 590 (claiming that the Court interpreted the term "interdistrict" to denote something unrecognizable).

[228] *See Jenkins*, 115 S. Ct. at 2083 (Souter, J., dissenting).

[229] *See id.* at 2083-84 (Souter, J., dissenting).

[230] *See id.* at 2084 (Souter, J., dissenting).

[231] *See id.*

[232] *See id.* The surrounding suburban districts have all operated as unitary districts since *Brown*. *See id.*

[233] *See Jenkins*, 115 S. Ct. at 2084 (Souter, J., dissenting).

ity that the violations of the State and the KCMSD had resulted in significant non-segregative effects in the surrounding school districts that produced greater segregation within the KCMSD.[234]

The dissent declared that the lower courts had concurred in finding that the previously imposed system of segregation had led to "white flight."[235] Although the results of "white flight" would not have caused segregation within the neighboring school districts that were maintained in a unitary manner, Justice Souter stated that it represented an effect crossing district borders.[236] The dissent attacked the majority's rejection of the findings of the district court that segregation had led to "white flight" because this rejection of a trial court's fact finding contradicted an accepted norm of appellate procedure.[237] The dissent explained that the Supreme Court is a court of law and cannot review findings of fact by the lower courts without a very clear and exceptional showing of error.[238] Justice Souter contended that the Court failed to demonstrate any exceptional circumstance and instead relied on an obscure contradiction[239] and an arbitrary supposition[240] that "white flight" may follow desegregation, not segregation.[241] The Justice reiterated that all members of the Court were at a disadvantage because factual issues had been resolved inde-

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[234] *See id.*

[235] *See id.*

[236] *See id.*

[237] *See id.*

[238] *See Jenkins*, 115 S. Ct. at 2084 (Souter, J., dissenting) (quoting Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949)).

[239] *See id.* The dissent noted that the doubtful contradiction was claimed to exist between the lower court's findings that segregation caused "white flight", and the appellate court's conclusion that the district court "made specific findings that negate current significant interdistrict effects." *Id.* at 2085 (Souter, J., dissenting). Upon reading the Eighth Circuit's statement in context, Justice Souter stated that the contradiction disappeared and no tension existed between the findings of the two courts; while "white flight" produced significant effects in neighboring school districts, those effects cannot be classified as segregative beyond the KCMSD, because the pupils now attended unitary school districts. *See id.*

[240] *See id.* at 2084 (Souter, J., dissenting). Justice Souter claimed that without the contradiction to rely on, the majority must depend upon the supposition that "white flight" results from integration, not de jure segregation. *See id.* at 2085 (Souter, J., dissenting). The dissent attacked the supposition and the distinction resting on the fact that there was an absence of a break in the line of causation linking the consequences of desegregation with the effects of segregation. *See id.* Noting the majority's reliance on the lower court's reference to evidence that integration resulted in "white flight", Justice Souter posited that the Court relied on nothing inconsistent with the other findings of the district court that segregation had initiated the flight. *See id.* Justice Souter declared that the sole difference between the statements focused on the point at which the trial court happened to examine the causal sequence. *See id.* at 2085-86 (Souter, J., dissenting).

[241] *See id.* at 2084 (Souter, J., dissenting).

pendent of the district court and without proper warning to the respondents.[242]

Justice Souter also contended that the majority opinion involved errors of law in interpreting both *Milliken I* and *Hills v. Gautreaux*.[243] The dissent first addressed the Court's incorrect reading of an interdistrict remedy as set forth in *Milliken I*.[244] Justice Souter professed that the *Milliken I* Court had not held that a remedy that considered conditions outside of the district where a constitutional violation had taken place was an "interdistrict remedy" and, therefore, inappropriate without an "interdistrict violation."[245] Justice Souter opined that the *Milliken I* Court had emphasized the applicable equitable principles that govern remedial action in school desegregation cases[246] and had not precluded a lower court from instituting a remedy with effects reaching beyond the district of the constitutional harm when such remedial action was needed to redress the harms resulting from the constitutional violation.[247] The dissent repudiated the majority's understanding of *Milliken I* under which a remedy with intended consequences on innocent adjoining districts cannot be forced upon a constitutional violator unless the underlying violation had caused segregative effects in the innocent district.[248] The dissent found that this interpretation equaled a redefinition of *Milliken I* and a significant expansion of its stated limitation on permissible remedies for prior segregation.[249]

Additionally, the dissent claimed that the Court effectively overruled *Hills v. Gautreaux*.[250] The *Gautreaux* Court, Justice Souter averred, held that a district court may permissibly impose upon a governmental unit guilty of enforcing segregative practices, even without effects on surrounding subdivisions, a remedy with intended consequences that extend beyond the violator's own subdivision, so long as the order does not burden innocent governmental units that are free of segregative effects.[251] The dissent clarified that although it was permissible to cross district

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[242] *See id.* at 2086 (Souter, J., dissenting).

[243] *See Jenkins*, 115 S. Ct. at 2087, 2088 (Souter, J., dissenting).

[244] *See id.* at 2087 (Souter, J., dissenting) (citing *Milliken I*, 418 U.S. 717, 745 (1974)). For a detailed discussion of *Milliken I* see footnotes 70-78 and accompanying text.

[245] *See Jenkins*, 115 S. Ct. at 2087 (Souter, J., dissenting).

[246] *See id.* (citing *Milliken I*, 418 U.S. at 737-38).

[247] *See id.* at 2088 (Souter, J., dissenting).

[248] *See id.*

[249] *See id.*

[250] *See Jenkins*, 115 S. Ct. at 2088 (Souter, J., dissenting); *supra* note 152 (providing a brief discussion of *Gautreaux*).

[251] *See Jenkins*, 115 S. Ct. at 2088 (Souter, J. dissenting).

lines, even without an interdistrict violation or effect, separate and independent school districts innocent of any violation could not be restrained in the operation of their local school districts.[252] Continuing the analysis, the dissent professed that the magnet school program was included within the reach of the district court's equitable power recognized in *Gautreaux*.[253] The dissent contended as in *Gautreaux* that the adjoining school districts were not subject to any remedial duty because the burden of implementing the program rested entirely on the constitutional infringers, the State, and the KCMSD.[254] Justice Souter also reasoned that even if the magnet program was based on "desegregative attractiveness", this would not constitute an abuse of discretion because the order would still be commensurate with the "nature and extent of constitutional violation."[255] The Justice again stressed that the majority's failure to grant *Gautreaux* its due demonstrated the risks of addressing important and complex questions without proper notice to the parties.[256]

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[252] *See id.* (quoting *Gautreaux*, 425 U.S. at 296). The dissent distinguished *Milliken* I from *Gautreaux* by focusing on the imposition of a remedy in *Milliken I* which divested the innocent surrounding school districts of their autonomy. *See id.* at 2087-89 (Souter, J., dissenting). Justice Souter stated that the *Gautreaux* Court's remedy was permitted because a solution involving a wider metropolitan area was needed in order to properly address the violation, and by imposing this remedy innocent governmental units were not bound in any way. *See id.* at 2089 (Souter, J., dissenting). The dissent stressed that after having found HUD in contravention of the Constitution, the lower court was responsible for making every attempt to implement the methods needed to attain the most effective relief, considering the situation and the suitable methods involved could encompass measures crossing the boundaries of the particular area containing the violation. *See id.* (quoting *Gautreaux*, 425 U.S. at 297).

[253] *See id.*

[254] *See id.*

[255] *See id.* (citing *Gautreaux*, 425 U.S. at 300).

[256] *See Jenkins*, 115 S. Ct. at 2089-90 (Souter, J., dissenting). Justice Souter addressed Justice O'Connor's statement that the dissent put undue emphasis on *Gautreaux*'s footnote 11. *See id.* at 2090 n.8 (Souter, J., dissenting); *supra* note 194. The dissent interpreted Justice O'Connor's reading of *Gautreaux* to allow territorial transgression only after showing that an intradistrict violation caused significant segregative effects. *See Jenkins*, 115 S. Ct. at 2090 n.8 (Souter, J., dissenting). The dissent found that Justice O'Connor's understanding of the *Gautreaux* Court's opinion only to reverse the findings of the court of appeals as to the presence of significant interdistrict effects and to remand the case solely to determine if such effects existed was an implausible reading. *See id.* Justice Souter agreed that *Gautreaux* reiterated the significance of *Milliken I*'s interdistrict segregative effects, but only when related to the kind of relief involved in *Milliken I* which concerned the imposition of remedial obligations upon innocent entities. *See id.* (citing *Gautreaux*, 425 U.S. at 294). The dissent stated that while Justice O'Connor focused on the *Gautreaux* Court's failure to order interdistrict relief directly, the question of relief was more appropriately left to the district court. *See id.* Justice Souter concluded by asserting that nowhere in *Gautreaux* did the Court hold that to validate an interdistrict remedy, a district court would first have to find significant segregative effects crossing the borders of the area found to have violated the Constitution. *See id.*

In a brief dissent, Justice Ginsburg stressed that Missouri has had a long history of segregation in the public schools.[257] Given Missouri's pervasive and shameful history of segregation, Justice Ginsburg believed that restraining the desegregation process now and in this way was an action which was both too soon and too swift.[258]

The role of law in society and whether it should be proactive or reactive is a topic of much debate.[259] In desegregation cases, however, it seems as if the law has positive responsibilities to remedy social ills[260] especially when the judges implementing the desegregation orders acknowledge the limited ability of a federal court to effectuate change when the community involved in the order is resisting change.[261] The social ill to be remedied is not a general malady in racial relations but, rather, a failed desegregation effort which at one time blatantly violated the Constitution, was never adequately remedied, and still continues to exist today. Little progressive movement on racial issues has been made by the American population in the absence of concentrated political pressure.[262] The general population usually has been satisfied by the status quo which seems to have once again pacified the Supreme Court in *Missouri v. Jenkins*.[263]

The Court previously has acknowledged that innovative methods may be the most effective remedies in desegregation cases.[264] Additionally, the Court has stressed that methods of experimentation must remain

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[257] *See id.* at 2091 (Ginsburg, J., dissenting).

[258] *See id.* Justice Ginsburg noted that the seven years court ordered remedial programs have been in effect is de minimis compared to the more than two hundred years of official discrimination. *See id.*; *see also* Drinan, *supra* note 5, at 884 (asserting that "from 1619 to 1954, for 335 years, we branded an entire race with the stamp of social and genetic inferiority. It is not enough, after just thirty years of attempts at reparation, to simply announce that society has been transformed.").

[259] *Compare, e.g.*, Robert L. Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented, in* DE FACTO SEGREGATION AND CIVIL RIGHTS STRUGGLE FOR LEGAL AND SOCIAL EQUALITY 28-57 (1965) (declaring that the law has affirmative duties in society), *with* Charles J. Bloch, *Does the Fourteenth Amendment Forbid De Facto Segregation?, in* DE FACTO SEGREGATION AND CIVIL RIGHTS STRUGGLE FOR LEGAL AND SOCIAL EQUALITY 58-70 (1965) (proposing that the law should react to the desires of society).

[260] *See* Carter, *supra* note 259, at 28-57. Some disagree with this view and claim that the law should accept new elements of life only after communities have reasoned, through experience, that the law must change. *See* Bloch, *supra* note 259 at 58-70.

[261] *See* Flicker, *supra* note 9, at 373; *see also* Robert Anthony Watts, *Shattered Dreams and Nagging Doubts: The Declining Support Among Black Parents for School Desegregation*, 42 EMORY L.J. 891, 891-96 (describing the loss of support among African-Americans for desegregation efforts).

[262] *See* Jack E. White, *Why We Need to Raise Hell*, TIME, Apr. 29, 1996, at 46.

[263] *See id.*

[264] *See Milliken II*, 433 U.S. 267, 283 (1977).

available which permit creative remedial options in school desegregation remedies.[265] The dissent correctly comprehended that the school board was acting in concert with the district court and both were doing no more than complying with prior desegregation case law.[266] The desegregation plan was unique, implementing a system of strong academic curricula through a magnet school program.[267] The dissent astutely noted two purposes supporting this magnet plan.[268] The plan hoped to attract students attending private schools within the KCMSD as well as white students in the surrounding suburbs into the KCMSD schools.[269] Additionally, the desegregation plan was instituted to improve the quality of education for children within the KCMSD.[270] This magnet plan served as an innovative way to integrate a predominantly minority district without requiring the much resisted actions of busing students long distances or redrawing school district zones. Participation in the program was completely voluntary and the authority of the surrounding suburban school districts was not compromised. Academic excellence was the impetus used to stimulate increased educational opportunities for all, but especially for the African-American students of the KCMSD who have attended predominantly one-race schools which were inferior to those of the surrounding suburbs. This desegregation program complied with the mandate set forth in *Green v. County Sch. Bd.* that a plan be instituted that promises realistically and promptly to work.[271] The authorities involved attempted to fashion an integration program which was convenient, workable, practicable, and possibly the only realistic chance of integrating the KCMSD schools.[272] Although admittedly this area of law is muddled and confus-

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[265] *See* United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 235 (1969). The Court in *Green v. County School Board* stated:

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness.

Green, 391 U.S. 430, 439 (1968).

[266] *See, e.g., id.*; *Green*, 391 U.S at 436-37.

[267] *See supra* note 134 detailing the magnet school program of the KCMSD

[268] *See supra* notes 223-225 and accompanying text

[269] *See supra* note 225 and accompanying text.

[270] *See supra* note 224 and accompanying text.

[271] *See Green*, 391 U.S. at 439.

[272] Many authorities argue that magnet school programs may be the only effective desegregation option available now. *See* David J. Armor, *The Desegregation Dilemma*, 109

ing, this confusion has allowed the majority to rationalize its decision. Communities must to the extent practicable make every effort to assure that racially segregated schools become no more than matter of past history.[273]

Children of all races are the losers here. Integrated education is impossible due to demographic patterns leaving the inner-cities predominantly black. Although the immediate focus might more appropriately be on increasing the quality of education provided in both the majority African-American schools and white schools[274] this does not mean that attempts to effectively educate white and black students together should be forgotten. For truly if this alone remains the goal of public education, our children will once again be indoctrinated with the understanding that separate but equal is equal.[275]

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HARV. L. REV. 1144, 1147 (1996) (book review); Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 778 (1986).

[273] *See Montgomery County Bd. of Educ.*, 395 U.S. at 231. Admittedly, the State can voluntarily implement plans involving the mandatory interdistrict movement of students which the court is without authority to order. *See* Beck, *supra* note 27, at 1036 n.46; *supra* note 87. Although possibly the only effective remedy remaining in the desegregation arsenal, it likely will not be used by school districts that were never adequately desegregated and returned to racially identifiable schools soon after involvement ceased.

[274] *See* Alfred A. Lindseth, *A Different Perspective: A School Board Attorney's Viewpoint*, 42 EMORY L.J. 879, 887 (1993).

[275] *See* Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J. 863, 867 (1993).