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Supreme Court's Reanalysis of School Desegregation Remedial Decrees: Is the Majority Placing Subtle Limits on the Trial Court's Vast Equitable Discretion, The

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The Supreme Court's Reanalysis of School Desegregation Remedial Decrees: Is the Majority Placing Subtle Limits on the Trial Court's Vast Equitable Discretion?

*Missouri v. Jenkins*

I. INTRODUCTION

Since *Brown v. Board of Education* declared in 1954 that "separate but equal" schools violate the Fourteenth Amendment's Equal Protection Clause, federal district courts have implemented remedial decrees to eliminate the vestiges of past de jure segregation. Despite the Supreme Court's numerous attempts at clarification, the remedial task is still marked by much ambiguity and broad judicial discretion. *Missouri v. Jenkins* (Jenkins II) provides the latest example of the Court's reanalysis of the desegregation issue. Despite placing subtle limits on the trial court's equitable discretion, Jenkins II still leaves this broad judicial discretion and the vague legal standards intact.

II. FACTS AND HOLDING

The Kansas City, Missouri School District's (KCMSD) desegregation litigation began in 1977 when the KCMSD, its school board, and two school board members' children charged the State of Missouri, the surrounding suburban school districts (SSD's), and various federal agencies with causing and maintaining racially segregated schools in the Kansas City metropolitan area. The district court dismissed the case against the federal agencies and

3. "De jure" segregation results from intentional state action. "[T]he differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate." *Keyes v. School Dist. Number 1, Denver, Colo.*, 413 U.S. 189, 208 (1973). *See also* *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").
4. *See infra* notes 26-70 and accompanying text.
the SSD's and realigned the KCMSD as a nominal defendant. The district
court determined that the State and the KCMSD had operated a segregated
school system within the KCMSD and were liable for an intradistrict
violation. After numerous remedial orders and an appeal that ultimately
reached the United States Supreme Court, this litigation entered its
eighteenth year with a second trip to the High Court.

The immediate controversy focused on two issues. First, the State
challenged that requiring the State to fund salary increases for the KCMSD
instructional and noninstructional staff was beyond the scope of the district
court’s remedial authority. Second, the State disputed the district court’s
order requiring the State to continue funding the remedial quality education
programs for the 1992-93 school year because the State contended that the
KCMSD had attained partial unitary status with respect to the current
quality education programs.

Rejecting both of the State’s arguments, the district court first declared
that the salary increase was warranted to "improve educational opportunities
and reduce racial isolation" as well as to remedy the vestiges of segregation

7. Id. at 442.
9. See Christina J. Nielsen, Note, Missouri v. Jenkins: The Uncertain Future of
10. Missouri v. Jenkins, 491 U.S. 274 (1989) [hereinafter Jenkins I]. In Jenkins I,
the Court addressed whether the district court could directly levy taxes to fund the
desegregation remedies. See Missouri v. Jenkins, 495 U.S. 33 (1990). In earlier
decrees, the district court had ordered the State of Missouri to pay the greater share
of the desegregation costs. Jenkins, 593 F. Supp. at 1485. These desegregation costs
amounted to over a total of $448 million for the magnet school program and in excess
of $540 million for total court-ordered capital improvements. Missouri v. Jenkins, 115
at *17 (W.D. Mo. Dec. 20, 1994) (relating to the District Court Order of June 15,
1992; District Court Order of June 30, 1993; and District Court Order of July 30,
1993).
13. See infra notes 62-70 and accompanying text for a discussion of the Supreme
Court’s test for determining "unitary status."
14. Petitioner’s Reply Brief, Missouri v. Jenkins, No. 93-1823, 1994 WL 710859,
at *18 (W.D. Mo. Dec. 20, 1994) (relating to the District Court Order of June 17,
15. See infra notes 43-49 and accompanying text for a discussion of what
constitutes a "vestige" of segregation.
by improving the "desegregative attractiveness" of the KCMSD. Second, although the district court did not address whether or not the KCMSD had achieved partial unitary status, it summarily ordered continued funding of the quality education programs for the 1992-93 school year.

The Court of Appeals for the Eighth Circuit affirmed both district court orders. In rejecting the State’s first argument that the salary increases exceeded the scope of the district court’s remedial authority, the Eighth Circuit explained that the remedial purpose was "designed to reverse white flight by offering superior educational opportunities." Second, the Court of Appeals found that the district court had implicitly rejected the State’s request for a determination of partial unitary status as to the quality education programs because mere implementation of the programs alone was not sufficient. Moreover, the Eighth Circuit reasoned that "[t]he school district was far from reaching its maximum potential because KCMSD is still at or below national norms at many grade levels" in academic achievement.

The United States Supreme Court granted the State’s petition for certiorari to consider the following:


Some commentators criticize the use of compensatory programs as a tool to induce integration because measures designed to attract white pupils may take priority over remedial programs designed to cure minority educational harm. See, e.g., Robert L. Crain & Rita E. Mahard, How Desegregation Orders May Improve Minority Academic Achievement, 16 HARV. C.R.-C.L. L. REV. 693, 707 (1982) ("Concentration on methods designed to prevent white flight increases the likelihood that district funds will be diverted into services appealing to middle-class white parents at the expense of sacrificing compensatory and human relations programs meeting minority needs."); and DANIEL V. MONTI, A SEMBLANCE OF JUSTICE: ST. LOUIS DESEGREGATION AND ORDER IN URBAN AMERICA (1985) (commenting that the school board used funds to upgrade system and gave second priority to black grievances).

17. See supra note 12.
20. Id. at 767; see also Missouri v. Jenkins 13 F.3d 1170, 1172 (8th Cir. 1993) (affirming the district court’s June 30, 1993 and July 30, 1993 orders).
21. Jenkins, 11 F.3d at 762.
1. Whether the District Court exceeded its constitutional authority when it granted salary increases to virtually all instructional and noninstructional employees of the KCMSD, and

2. Whether the District Court properly relied upon the fact that student achievement test scores had failed to rise to some unspecified level when it declined to find that the State had achieved partial unitary status as to the quality education programs.\(^2\)

Reversing the court of appeals, Chief Justice Rehnquist, writing for the majority, held that the salary increases designed to improve "desegregative attractiveness" (an interdistrict goal) exceeded the scope of the intradistrict\(^2\) violation.\(^2\) Furthermore, the majority held that whether or not the KCMSD student achievement levels reach national norms does not constitute the appropriate test for deciding whether a school district has achieved partial unitary status. Consequently, the Supreme Court held that the district court "should sharply limit, if not dispense with, its reliance on this factor."\(^2\)

III. LEGAL BACKGROUND

A. A District Court's Remedial Decree Powers in School Desegregation

In 1954, the Supreme Court ruled, in *Brown v. Board of Education (Brown I)*,\(^2\) that state-imposed racial segregation in public schools violated the Fourteenth Amendment's Equal Protection Clause. The next year, in *Brown II*,\(^2\) the Court held that the school authorities bear the primary responsibility for remedying its constitutional violations.\(^2\) This responsibility includes the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."\(^2\)

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23. See infra notes 51-60 and accompanying text for a discussion of interdistrict versus intradistrict violations and remedies.
25. Id. at 2055.
28. *Brown II*, 349 U.S. at 299. See also Note, Allocating the Burden of Proof after a Finding of Unitariness in School Desegregation Litigation, 100 HARV. L. REV. 653, 653 (1987) (A finding of intentional segregation "places the school board under an affirmative duty to change the system from a dual to a 'unitary' one.").
29. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 437-38 (1968). For other Supreme Court decisions imposing an affirmative duty on the school authorities to eliminate the dual school system, see Dayton Bd. of Educ. v. Brinkman,
In fashioning these remedial decrees, the lower courts could exercise their equitable powers. The Court noted that "[t]raditionally, equity has been characterized by a practical flexibility in shaping its remedies . . . ." Therefore, the district courts possessed a "broad power to fashion a remedy that [would] assure a unitary school system." However, limits on the district court's broad remedial powers did exist. For instance, "[t]he nature of the violation determines the scope of the remedy." Consequently, the Court emphasized that these remedial decrees should target:

Elimination of the discrimination inherent in the dual school systems, not with the myriad factors of human existence which can cause discrimination in a multitude of ways. . . . The elimination of racial discrimination in public schools . . . should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities . . . . Our objective . . . does not and cannot embrace all the problems of racial


30. Brown II, 349 U.S. at 300. See 3 RONALD D. ROTUNDA & JOHN E. NOVAK, TREATISE ON CONSTITUTIONAL LAW § 18.9(a)(1) (2d ed. 1992) (district courts have broad equitable powers to remedy past wrongs as breadth and flexibility are inherent in equitable remedies).

31. Brown II, 349 U.S. at 299. Following Brown I, the desegregation decisions have been described by commentators as a "patchwork of unintelligibility," "chaos out of confusion," and "surrealistic." James S. Liebman, Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform, 76 VA. L. REV. 349, 352 (1990) (citing Mark G. Yudof, School Desegregation: Legal Realism, Reasoned Elaboration and Social Science Research in the Supreme Court, 42 LAW & CONTEMP. PROBS. 57, 87, 99, 102, 105 (1978)). See also Chip Jones, Comment, Freeman v. Pitts: Congress Can (And Should?) Limit Federal Court Jurisdiction in School Desegregation Cases, 47 SMU L. REV. 1889, 1901-02 (1994) (discussing that such a vague instruction to the district courts has resulted in "decades of confusion about the role of the courts in supervising school desegregation plans.").

32. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); see also Milliken v. Bradley, 418 U.S. 717, 746 (1974) [hereinafter Milliken I]; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 16-18, at 1488-89 (2d ed. 1988) (quoting Brown II, 349 U.S. at 299): ""Because of their proximity to local conditions and the possible need for further hearings', the federal district courts were delegated the primary responsibility to supervise the 'transition to a system of public education freed of racial discrimination.'"

33. Swann, 402 U.S. at 16. See also Freeman v. Pitts, 503 U.S. 467, 489 (1992) ("A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation.").
prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.  

Therefore, the district court would exceed its equitable authority if its orders included remedies aimed at conditions that did not violate the Constitution, did not result from such violation, or sought to encompass governmental units that the constitutional violation neither involved nor affected.  

Nonetheless, the Court subsequently determined that desegregation decrees could address more than simply racial imbalances caused by unlawful segregation.  

Because Brown I held that "[s]eparate educational facilities are inherently unequal," federal courts also could require remedial educational programs designed to overcome the inherent inequalities flowing from the unconstitutional dual school system.  

To assist district courts in exercising their equitable powers, the Court, in Milliken II, formulated the following three-part framework:

34.  Id. at 22-23.
36.  Milliken II, 433 U.S. at 282-83.  See Tracy Ellen Sivitz, Note, Eliminating the Continuing Effects of the Violation: Compensatory Education as a Remedy for Unlawful School Segregation, 97 YALE L.J. 1173, 1175 (1988) ("The Milliken II decision significantly advanced prior desegregation jurisprudence by holding that complete remediation of unconstitutional racial segregation and its effects may require eliminating not only widespread systemic or institutional effects of the violation but also the individualized educational harms produced by segregation.").
38.  Examples of remedial education programs include early childhood intervention, curriculum development, reduction in pupil-teacher ratios, counseling and career guidance, remedial reading, and staff development.
39.  Milliken II, 433 U.S. at 282-83 ("[D]iscriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual school system founded on racial discrimination.  Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system.").  See United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1963) (to eliminate the effects of prior segregation, federal courts can address matters other than pupil assignment).
1. The remedy must relate to the condition that violates the Constitution.  

2. [T]he decree must indeed be remedial in nature, that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.  

3. [T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.  

Therefore, to determine the scope of the violation and satisfy the first step in the *Milliken II* framework, the district courts must identify the vestiges

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In the *Jenkins* litigation, the district court found the constitutional violation to be the state segregation existing prior to 1954. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1490 (W.D. Mo. 1984). The effects of this unconstitutionality took the form of low academic achievement and racial imbalances throughout the schools in the KCMSD. *Id.* at 1492.

41. *Milliken II*, 433 U.S. at 280 (quoting *Milliken I*, 418 U.S. at 746) (emphasis added). For the *Jenkins* remedial orders, the district court implemented broad-based remedial orders that included the creation of magnet schools—all in the pursuit of "desegregative attractiveness" as well as the correction of the "system-wide reduction in student achievement." *Jenkins v. Missouri*, 639 F. Supp. 19, 23-24 (W.D. Mo. 1985), aff'd, 807 F.2d 657 (8th Cir. 1986), and *cert. denied sub nom.*, Kansas City, Mo. Sch. Dist. v. Missouri, 484 U.S. 816 (1987). See also *Nielsen*, *supra* note 9, at 616-19, citing the various remedial orders.

42. *Milliken II*, 433 U.S. at 280-81 (emphasis added). See also *infra* notes 65-67 and accompanying text for a discussion of the importance of considering local interests.

However, the *Milliken II* Court also noted that eliminating individualized harms would require significant time and effort because compensatory programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke. . . . Rather, by the nature of the antecedent violation, . . . the victims . . . will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. . . .

*Id.* at 290.

Alternatively, see *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) ("Returning schools to the control of local authorities at the earliest practicable date is essential. . . .") and *Board of Educ. v. Dowell*, 498 U.S. 237, 247 (1991), *remanded to Dowell v. Board of Educ.*, 778 F. Supp. 1144 (W.D. Okla 1991), and *aff'd*, 8 F.3d 1501 (10th Cir. 1993) ("From the very first, federal supervision of local school systems was intended as a temporary measure. . . .").
of segregation.\textsuperscript{43} The Court, in \textit{Green v. County School Board},\textsuperscript{44} found that the most important vestiges of a segregated system include the school district’s policy and practice regarding faculty, staff, transportation, extracurricular activities and facilities. However, these factors are neither exclusive nor rigid.\textsuperscript{45}

A present condition that is too attenuated from the former school segregation will not qualify as a vestige. For example, in \textit{Pasadena City Board of Education v. Spangler},\textsuperscript{46} the Court found that the district court exceeded its remedial authority by ordering annual readjustment of attendance zones after the school district had already established a racially neutral student assignment system. The Court concluded that "subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible."\textsuperscript{47} Following this principle, the Court in \textit{Freeman v. Pitts}\textsuperscript{48} held that "[t]he vestiges of segregation that are the concern of the law . . . may be subtle and intangible but nonetheless they must be so real that they have a causal link to the de jure violation being remedied."\textsuperscript{49}

43. "Vestiges" consist of those effects of intentional discrimination which, if unremedied, maintain the regime of school segregation. These vestiges represent the central focus of school desegregation remedies. \textit{Swann}, 402 U.S. at 15-16.


47. \textit{Id.} at 434 (the court rejected that "white flight" caused the racial movement as the trends occurring in Pasadena closely patterned the state-wide trends in both segregated and desegregated California schools). See \textit{Freeman}, 503 U.S. at 495 ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications."). For a discussion of "white flight" and its effects on desegregation, see Steven I. Locke, Comment, Board of Education v. Dowell: \textit{A Look at the New Phase in Desegregation Law}, 21 HOFSTRA L. REV. 537, 546 n.81 (1992).

48. 503 U.S. 467 (1992). The \textit{Freeman} Court reversed the Eleventh Circuit's holding that a school district must provide "'heroic,' 'even bizarre' measures to attain racial balance when the imbalance is attributable neither to the prior de jure system nor to a later violation by the school district but rather to independent demographic forces." 61 U.S.L.W. (BNA) 3054 (Aug. 4, 1992) (quoting Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989)).

49. \textit{Id.} at 496. See Jones, \textit{supra} note 31, at 1910-11 ("With \textit{Freeman}, the Court adds a new qualifier in measuring whether a school district has met its burden to desegregate—pragmatism.").
In addition, the Court noted in Spangler that the district court should give the school board a precise statement of its obligations under a desegregative decree.\textsuperscript{50} Another important factor in determining a remedial decree’s scope requires distinguishing between intradistrict and interdistrict violations and remedies.\textsuperscript{51} In Milliken I, the Court found that the district court exceeded its equitable authority by ordering an interdistrict remedy when the surrounding suburban school districts had not violated the Constitution, and the Detroit school district violations had not produced significant segregative effects in these surrounding districts.\textsuperscript{52} The Court noted that school district lines cannot be "casually ignored or treated as a mere administrative convenience."\textsuperscript{53}

In Hills v. Gautreaux,\textsuperscript{54} the Court explained its ruling in Milliken I regarding metropolitan area school desegregation orders. The Court noted that "[n]othing in the Milliken decision suggests a per se rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred."\textsuperscript{55} Rather, the Milliken I proposed remedy failed because the federal judiciary could not order a mandatory interdistrict remedy on state and local political entities that did not violate the Constitution and where a violation did not produce significant segregative effects in these

\begin{itemize}
\item \textsuperscript{50} Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976). \textit{See also} Board of Educ. v. Dowell, 498 U.S. 237, 246-50 (1991) (the constitutional violators are "entitled to a rather precise statement of [their] obligations under a desegregation decree.")
\item \textsuperscript{51} Milliken I, 418 U.S. at 745 ("[A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation.").
\item In the Jenkins litigation, the district court found the violation to have occurred only within the KCMSD and thus to establish only an intradistrict violation as opposed to an interdistrict violation. Jenkins v. Missouri, 931 F.2d 470, 475 (8th Cir. 1991), \textit{cert. denied}, 502 U.S. 967 (1991); Jenkins v. Missouri, 931 F.2d 1273-74 (8th Cir. 1991), \textit{cert. denied}, 502 U.S. 925 (1991); Jenkins v. Missouri, 838 F.2d 260, 264 (8th Cir.), \textit{cert. granted in part}, 488 U.S. 888 (1988), \textit{cert. denied in part}, 488 U.S. 889 (1988), and \textit{aff’d}, 491 U.S. 274 (1989).
\item Milliken I, 418 U.S. at 745.
\item Id. at 741.
\item 425 U.S. 284 (1976).
\item Id. at 298.
\end{itemize}
non-violating districts. On the other hand, a court could order a constitutional violator to implement a remedy that expanded beyond the violation's boundaries.

Moreover, the Court distinguished the Gautreaux situation from Milliken I and concluded that in this case a metropolitan area remedy was proper despite the absence of an interdistrict violation or significant segregative effects outside the Chicago city limits. The rationale for this holding focused on the constitutional violators' (Chicago Housing Authority and the federal Department of Housing and Urban Development) statutory authority to operate outside the Chicago city limits as well as on the absence of displacing any of the suburban governmental entities' rights and powers. Consequently, the Court found this order would be "wholly commensurate with the 'nature and extent of the constitutional violation.'"

B. Relinquishing Jurisdiction Over a Desegregation Order—The Test for Determining a School District's Unitary Status

After ordering, implementing, and monitoring the remedial decree, the final step and goal is for the district court to relinquish jurisdiction over the order and leave local authorities with the charge to continue to operate a unitary school system. Before relinquishing jurisdiction, the district court must determine if the school district has achieved a unitary status. The term "unitary" connotes a school system that complies with the Constitution's Equal Protection Clause. In other words, the school district must eliminate

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56. Id. In Milliken I, the remedy involved a mandatory interdistrict reassignment of students through busing. 418 U.S. at 745. Cf. Jenkins I, 495 U.S. at 59-60 (Kennedy, J., concurring in part and concurring in judgment) (citing Milliken v. Bradley, 433 U.S. 267, 272 (1977), for the proposition that magnet schools encourage voluntary desegregation of students as opposed to mandatory busing or redrawing of district boundary lines).

57. Gautreaux, 425 U.S. at 298.

58. Id. at 305.

59. Id. at 298.

60. Id. at 300 (quoting Milliken I, 418 U.S. at 744).


63. Board of Educ. of Oklahoma City Pub. Schs. v. Dowell, 498 U.S. 237, 246 (1991). The Dowell Court explained that "[c]ourts have used the terms "dual" to denote a school system which has engaged in intentional segregation of students by race, and "unitary" to describe a school system which has been brought into compliance with the command of the Constitution." Id.
the vestiges of de jure segregation to the extent practicable.\textsuperscript{64}

The Court regarded federal supervision over school systems as "a temporary measure to remedy past discrimination."\textsuperscript{65} The Court based this decision on the concern for local control over public school systems.\textsuperscript{66} The Court recently reaffirmed this precept in \textit{Freeman}: "Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."\textsuperscript{67}

Nonetheless, the Court noted that a district court "need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future."\textsuperscript{68} The \textit{Freeman} Court articulated a three-factor guide to assist the lower courts in determining whether to declare that a school district has achieved unitary status and whether to fully or partially withdraw judicial supervision:

1. \textit{W}hether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn;
2. \textit{W}hether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system;

Several legal commentators have noted that courts encounter difficulty in determining when a school district has attained "unitary status." \textit{See}, \textit{e.g.}, \textit{Freeman} v. Pitts, 112 S. Ct. 1430, 1443-44 (1992) ("the term ‘unitary’ is not a precise concept [and] does not have fixed meaning or content"); Kevin Brown, \textit{Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation}, 58 GEO. WASH. L. REV. 1105, 1107 n.7 (1990) ("There is a considerable amount of confusion about the terminology in this area."); and Bradley W. Joondeph, \textit{Note, Killing Brown Softly: The Subtle Undermining of Effective Desegregation in Freeman v. Pitts}, 46 STAN. L. REV. 147, 148 n.4 (1993).

\textsuperscript{64} \textit{Dowell}, 498 U.S. at 250. \textit{See supra} notes 43-49 and accompanying text for a discussion of the factors \textit{Green} identified as among the vestiges of segregation.

\textsuperscript{65} \textit{Dowell}, 498 U.S. at 247. \textit{See also} Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) (stating that "local autonomy of school districts is a vital national tradition"); and \textit{Milliken I}, 418 U.S. at 742 (explaining the importance of local control over education in relation to the intent that remedial decrees not extend in perpetuity).


\textsuperscript{68} \textit{Dowell}, 498 U.S. at 249.
3. and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and constitution that were the predicate for judicial intervention in the first instance.69

In analyzing whether a school district has eliminated the vestiges of segregation to the extent practicable, the Court further concluded in Freeman that the vestiges would less likely be the result of a prior segregated system as time passes from the initial violation. In addition, the Court noted that a school district's demonstrated good faith can further attenuate the causal link between current conditions and the prior violation.70

IV. INSTANT DECISION

A. Majority Opinion

The United States Supreme Court granted the State's petition for certiorari to consider the following:

1. Whether the District Court exceeded its constitutional authority when it granted salary increases to virtually all instructional and noninstructional employees of the KCMSD, and
2. Whether the District Court properly relied upon the fact that student achievement test scores had failed to rise to some unspecified level when it declined to find that the State had achieved partial unitary status as to the quality education programs.71

In Jenkins II, Chief Justice Rehnquist, writing for the five-justice majority,72 decided that a proper determination of the ultimate issues in the case73 required analyzing the district court's scope of remedial authority.74

69. Freeman, 503 U.S. at 491.
70. Id. at 496. See also Brown II, 349 U.S. at 299 (instructing courts "to consider whether the action of the school authorities constitutes good faith implementation of the governing constitutional principles.").
72. Justices Kennedy, O'Connor, Scalia, and Thomas joined the majority opinion.
73. See supra notes 21, 71 and accompanying text for the questions on which the Court granted certiorari.
74. Jenkins II, 115 S. Ct. 2038, 2047 (1995). The majority concluded that the State's challenge to the remedy's scope was "fairly included in the question presented." Id. However, Justice Souter argued in dissent that the majority's consideration of this foundational issue exceeds the issues on which certiorari was granted. Id. at 2073-74.
Because the district court based its salary order on increasing the desegregative attractiveness of the KCMSD, the Court considered whether relying on desegregative attractiveness was proper in order to adequately resolve the State's challenge to the court's order. 75

The Court recognized that limits exist on a district court's admittedly broad remedial powers. Citing Swann, the Court acknowledged that the courts should not direct their orders at broader purposes beyond the jurisdiction of the school authorities. 76 For instance, the Court referred to Milliken I as a case where a district court exceeded its authority by imposing an interdistrict remedy when the surrounding school districts had not violated the Constitution. "Without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." 77

The Court noted that the district court found, and the court of appeals affirmed, that Jenkins II did not involve an interdistrict constitutional violation nor an interdistrict effect and, therefore, interdistrict relief was not warranted. 78 Although the Court recognized its previous approval of a desegregation remedy involving magnet schools, 79 the Court justified this approval of intradistrict magnets based upon the remedy's limited purpose of voluntarily redistributing students within the school district. However, the Court distinguished Jenkins because the KCMSD magnet schools proposed to attract nonminority students from outside the KCMSD. The Court stated:

[T]his interdistrict goal is beyond the scope of the intradistrict violation identified by the District Court. In effect, the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students. 80

As a result, the Court held that the "District Court's pursuit of 'desegregative attractiveness' [was] beyond the scope of its remedial authority. 81

Furthermore, the Court rejected the school district's argument to expand the intradistrict remedy into the SSD's through the pursuit of desegregative attractiveness because past segregation led to "white flight" from the KCMSD.

75. Id. at 2047.
76. Id. at 2048 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-23 (1971)).
77. Id. (quoting Milliken I, 418 U.S. 717, 745 (1974)).
78. Id. at 2050, 2053. See Missouri v. Jenkins, 807 F.2d 657, 672 (8th Cir. 1986).
80. Jenkins II, 115 S. Ct. at 2051 (emphasis in original).
81. Id. at 2052.
to the SSD's. The Court found that the lower courts' findings on whether segregation or desegregation caused white flight were "inconsistent internally." Nonetheless, the lower courts both concluded that no interdistrict violation nor interdistrict effect existed.

Similarly, the Court rejected Justice Souter's claim that this holding overruled Gautreaux and the permissibility of a metropolitan area remedy in the absence of a finding of an interdistrict violation. The Court distinguished Gautreaux from the present case because Gautreaux imposed a remedy on a federal agency. Consequently, Gautreaux "did not raise the same federalism concerns that are implicated when a federal court issues a remedial order against a State."

Based on this analysis, the Court found the district's pursuit of desegregative attractiveness "is not susceptible to any objective limitation . . . [and] cannot be reconciled with our cases placing limitations on a district court's remedial authority." As a result, the Court concluded that the district court's order of salary increases, which was based on "remediying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD" was "simply too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation."

Turning to the second issue, the Court reversed the district court's order that required the State to continue funding the quality education programs because the KCMSD had not attained "its maximum potential because the District is still at or below national norms at many grade levels." To clarify, the Court reasoned that "improved achievement on test scores is not necessarily required for the State to achieve partial unitary status . . . , the District Court should sharply limit, if not dispense with, its reliance on this factor."

Furthermore, the Court instructed the District Court, in reconsidering its order, to apply the Freeman three-part test.

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82. Id. at 2052-53.
83. Id.
84. Id. at 2053.
85. Id. at 2090 (Souter, J. dissenting). See supra notes 54-60 and accompanying text for a discussion of Gautreaux's holding regarding the permissibility of a metropolitan area remedy.
86. Jenkins II, 115 S. Ct. at 2053.
87. Id. at 2054.
88. Id.
89. Id. at 2055.
90. Id. (quoting Appendix to Petition for Certiorari A-131).
91. Id.
92. Id. See supra notes 69-70 and accompanying text for a discussion of the
In addition, the Court prescribed that the district court revise its determination that "[s]egregation has caused a system wide reduction in achievement" in the KCMSD and precisely identify segregation's incremental effects on minority student achievement as well as the quality education program's specific goals to correct these deficits.

Based on this analysis, the Court noted that "numerous external factors beyond the control of the KCMSD and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus."

B. Justice O'Connor's Concurring Opinion

Justice O'Connor, writing in concurrence, emphasized that the Court's decision followed Gautreaux as federal courts may order constitutional violators "to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred." However, Justice O'Connor highlighted that transgressing territorial boundaries is only permissible when "the intradistrict constitutional violation produced significant interdistrict segregative effects."

Next, Justice O'Connor rejected Justice Souter's view regarding "white flight's" role in causing segregative effects. She reasoned that "white flight" resulted in an increased number of white students absorbed into a unitary system and, thus, was not "segregative beyond the KCMSD."

Consequently, Justice O'Connor concluded that since the lower courts found neither an interdistrict violation nor a significant interdistrict segregative effect, the district court "cannot order remedies seeking to rectify regional demographic trends that go beyond the nature and scope of the violation."
C. Justice Thomas’s Concurring Opinion

Justice Thomas, writing in concurrence, addressed the following themes. First, he reasoned that "mere de facto segregation (unaccompanied by discriminatory inequalities in educational resources) does not constitute a continuing harm after the end of de jure segregation. ‘Racial isolation’ itself is not a harm; only state-enforced segregation is." Second, Justice Thomas expressed the need to circumscribe the federal equitable power by imposing more precise standards and guidelines. Decreasing judicial discretion would ensure that judicial remedies target those actually injured as well as restore predictability in the law.

Finally, Justice Thomas concluded that de jure segregation remedies should not include educational programs for students who were not in school when segregation existed.

D. Justice Souter’s Dissenting Opinion

Justice Souter, writing for the dissent, stated that the majority’s going beyond the two questions presented in the petition for certiorari and reaching the broader foundational question regarding the scope and validity of the district court’s magnet school remedy "does not survive scrutiny." Instead, Justice Souter found that these questions were "answerable on their own terms."

In determining the propriety of the district court’s salary orders, Justice Souter found that to the extent that these orders "are justified by reference to the quality of education alone, nothing in the Court’s opinion precludes those orders from remaining in effect." The dissent noted that the district court had "consistently treated salary increases as an important element in remedying the system-wide reduction in student achievement" and did not solely...
justify its orders on the basis of desegregative attractiveness.\textsuperscript{110}

In determining the role of student test scores when seeking termination of a desegregation decree, Justice Souter contended that none of the lower courts' orders required "a certain level of test scores before unitary status can be found, or indicates that test scores are the only thing standing between the State and a finding of unitary status."\textsuperscript{111} Instead, the dissent noted that the State did not attempt to make the showing required by \textit{Freeman}\textsuperscript{112} for partial relief from the desegregation decree.\textsuperscript{113} Rather, Justice Souter stated that the State only claimed that the quality education programs had been implemented but failed to show that the programs "had remedied the reduction in student achievement... to the extent practicable."\textsuperscript{114}

Consequently, the dissent stated that if the State made a proper motion for unitary status regarding the educational programs, test scores would, nonetheless, "undoubtedly play a role"\textsuperscript{115} in determining whether the improvement programs have cured a deficiency in student achievement to the extent practicable. However, requiring the students of the school district to achieve the national average would not be a prerequisite to unitary status because other causes separate from prior school segregation vestiges could impede achieving this goal.\textsuperscript{116}

After addressing these two specific questions, the dissent proceeded to address the validity of the KCMSD's magnet remedy. The dissent attacked the Court's "assumption" that "the effects of segregation were wholly contained within the KCMSD" and that, therefore, any interdistrict remedy was improper.\textsuperscript{117} In support, Justice Souter acknowledged that simply because the lower court found no significant segregative effects in the SSD's\textsuperscript{118} and classified the problem as an "intradistrict violation,"\textsuperscript{119} the possibility existed that the State and the KCMSD's action "produced significant non-segregative effects outside the KCMSD that led to greater

\textsuperscript{\textit{W.D. Mo. 1987}.}

\textit{110. Jenkins II}, 115 S. Ct. at 2081 (Souter, J., dissenting).

\textit{111. Id.} at 2078.

\textit{112. See supra} notes 69-70 and accompanying text for a discussion of the \textit{Freeman} test for partial unitary status.

\textit{113. Jenkins II}, 115 S. Ct. at 2079-80 (Souter, J., dissenting).

\textit{114. Id.} at 2079.

\textit{115. Id.} at 2080.

\textit{116. Id.} at 2081.

\textit{117. Id.} at 2083.

\textit{118. Jenkins v. Missouri}, 807 F.2d 657, 664, 668-70, 672, 678 (8th Cir. 1986); and District Court Order of June 5, 1984.

\textit{119. Jenkins}, 807 F.2d at 672, 678.
segregation within it." For example, the dissent referred to the lower courts' finding that "segregated schools . . . ha[ve] led to white flight from the KCMSD to suburban districts . . . ." The dissent chastised the Majority for its "arbitrary supposition" that "white flight' may result from desegregation, not de jure segregation."52

As a contrary explanation to this cause-and-effect dilemma, the dissent explained that: "There would be no desegregation orders . . . without prior unconstitutional segregation . . . , and an adverse reaction to a desegregation order is traceable in fact to the segregation that is subject to the remedy."53

Next, Justice Souter asserted that the Court's decision redefined Milliken I's concept of an interdistrict remedy and, thus, substantially limited the permissible remedies for prior segregation by "categorically forbidding imposition of a remedy on a guilty district with intended consequences in a neighboring innocent district" in the absence of segregative effects in the innocent district. The dissent contended that Milliken I classified an interdistrict remedy as the "imposition of remedial measures on more than one wrongdoing school district." Justice Souter further explained that Milliken I did not hold that:

any remedy that takes into account conditions outside of the district. . . [was] an 'interdistrict remedy,' and as such improper in the absence of an 'interdistrict violation.' To the contrary. . . . we left open the possibility that a district court might subject a proven constitutional wrongdoer to a remedy with intended effects going beyond the district of the wrongdoer's violation, when such a remedy is necessary to redress the harms flowing from the constitutional violation.

In addition, Justice Souter concluded that the Majority's opinion effectively overruled Gautreaux's holding allowing a remedy that

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120. Jenkins II, 115 S.Ct at 2084 (Souter, J., dissenting).
121. Id. (quoting District Court Order of August 25, 1986).
122. Id. (quoting Jenkins II, 115 S. Ct. at 2052). See Jenkins II, 115 S. Ct. at 2084-85 for Justice Souter's analysis of the lower courts' findings regarding interdistrict effects.
123. Jenkins II, 115 S. Ct. at 2085. See also id. at 2085-86 for Justice Souter's analysis of segregation and desegregation's effects on "white flight."
124. See supra notes 51-60 and accompanying text for a discussion of interdistrict remedies.
125. Jenkins II, 115 S. Ct. at 2088 (Souter, J., dissenting).
126. Id. at 2087.
127. Id. at 2087-88.
extended beyond the constitutional violator’s own jurisdiction (even in the absence of segregative effects beyond that jurisdiction) provided that the remedy did not bind the authorities of the non-violating districts.129 Under Gautreaux, the Dissent found that the KCMSD’s magnet school remedy and its measures to increase the district’s desegregative attractiveness would fall "entirely within the scope of equitable authority . . . [and appear] ‘wholly commensurate with the nature and extent of the constitutional violation.'"130

E. Justice Ginsburg’s Dissenting Opinion

Justice Ginsburg also wrote a dissenting opinion.131 Noting her agreement with Justice Souter’s dissent, Justice Ginsburg added that the history of segregation in Missouri dated back to 1724, with the first desegregation remedial order issued only ten years ago. Therefore, "[g]iven the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon."132

V. COMMENT

School desegregation remedial decrees have the inherent virtues and problems that stem from their grounding in the court’s equitable powers.133 Broad standards—for example, that "the nature of the violation determines the scope of the remedy"134 and that the court should design the decree as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct"135—allow the district courts the flexibility and sensitivity to craft particular remedies designed to correct the unique problems stemming from each violation.136
The early resistance to implementing Brown's mandate may explain and, in part, justify the Court's willingness to grant such broad equitable discretion to the lower courts. However, Justice Thomas notes that "such powers should have been temporary and used only to overcome the widespread resistance to the dictates of the Constitution. The judicial overreaching we see before us today perhaps is the price we now pay for our approval of such extraordinary remedies in the past."\(^\text{137}\)

However, such broad standards also pose problems in identifying the vestiges of unlawful segregation.\(^\text{138}\) For example, the passage of time and the interplay of numerous socioeconomic factors may defy any rational limits on judicial authority in devising a remedy as well as in determining whether to relinquish court supervision over a remedial decree. Therefore, Justice Thomas, in his concurrence, may be signaling that the Court should address the problem by imposing more precise guidelines on the federal equitable power.\(^\text{139}\)

Unfortunately, Jenkins II does not resolve equity's inherent vices; and perhaps a solution does not exist.\(^\text{140}\) However, the majority in Jenkins II does appear to place some limits on the court's remedial decree powers,\(^\text{141}\)

\(^{137}\) Jenkins II, 115 S. Ct. at 2067 (Thomas, J., concurring).

\(^{138}\) See, e.g., Fiss, supra note 136, at 11 ("The absence of a textually-specific prohibition does not deny the importance of these values . . . . [T]he further one moves from text, the greater the risk of abuse; it is easier for judges, even unwittingly, to enact into law their own preferences in the name of having discovered the true meaning . . . of equality or liberty.").

\(^{139}\) Jenkins II, 115 S. Ct. at 2071 ("But I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.").

\(^{140}\) See Fiss, supra note 136, at 49 ("[S]ince the threat and constitutional value that occasions the intervention can never be defined with great precision, the particular choice of remedy can never be defended with any certitude.").

\(^{141}\) See, e.g., Nielsen, supra note 9, at 624-25 (noting that the Supreme Court only requires that the remedial decree restore the victims to the position they would have occupied in the absence of such conduct "to the extent practicable" as opposed to "the maximum degree possible") (emphasis added).
but the effects of these limits on future cases pose ambiguities that await further clarification.

Nonetheless, *Jenkins II* establishes the following two principles. First, when a district court finds only an intradistrict violation, a district court cannot order even an indirect interdistrict remedy because it is beyond the district court's remedial authority. Second, when a district court determines whether or not a school district has achieved partially unitary status, student academic achievement tests should not play a dominant role in the calculus.

In finding that an indirect interdistrict remedy exceeds the scope of a district court's remedial authority for combatting an intradistrict violation, the majority rejected "desegregative attractiveness" as a justification for remedial measures. As a basis for this rejection, the majority apparently rendered its conclusion in the chicken and the egg dilemma: that desegregation, and not segregation, caused "white flight" into the SSD's. Therefore, this "white flight" did not create a significant segregative effect in the SSD's. Since the goal of "desegregative attractiveness" has an interdistrict purpose, the majority found that this purpose exceeded the violation's scope by targeting a "condition that does not violate the Constitution or does not flow from such violation."

As a result, the majority appears to place primary importance on the existence of significant segregative effects on the surrounding districts before even an indirect interdistrict remedy is permissible. Consequently, as Justice

142. *Jenkins II*, 115 S. Ct. at 2051.
143. *Id.* at 2055.
144. *Id.* at 2052. Consequently, because the district court had based its order to increase KCMSD salaries on "desegregative attractiveness," the Court found that this order (designed to serve an interdistrict goal) fell outside the scope of the district court's remedial authority. *Id.* at 2055.
145. *Id.* at 2053.
146. *Id.* at 2054 (quoting *Milliken II*, 433 U.S. 267, 282 (1977)). See *Jenkins II*, 115 S. Ct. at 2073 (Thomas, J., concurring) ("[T]he District Court exceeded its authority by benefiting those who were not victims of discriminatory conduct."); *cf. Jenkins II*, 115 S. Ct. at 2091 (Souter, J., dissenting) ("Today, the Court declares illegitimate the goal of attracting nonminority students. . . ."); see also Nielsen, *supra* note 9, at 622 (arguing that "[t]he Supreme Court has now rejected not only mandatory desegregation plans, but voluntary integration remedies as well. . . ., [and] [t]he labeling of the goal as desegregative attractiveness is actually what the Court disapproves of, not necessarily the steps taken by the district court, not the actual programs implemented.").
147. *Jenkins II*, 115 S. Ct. at 2053.
Souter indicates in his dissent, the majority opinion limits remedial measures with intended effects beyond territorial bounds when no segregative effects exist in the non-violating districts.\textsuperscript{148}

To the extent that \textit{Gautreaux} suggests that no per se rule exists to bar a remedy with intended effects on districts not found to have violated the Constitution,\textsuperscript{149} \textit{Jenkins II} clarifies that the Court found the metropolitan area remedy permissible in \textit{Gautreaux} because the remedy involved a federal agency (as opposed to a state and local political entities) and did not raise federalism concerns.\textsuperscript{150}

In addition, \textit{Jenkins II} limited the role of student test scores when determining if a school district has attained unitary status.\textsuperscript{151} Sharply limiting reliance on test scores in determining whether the school district has remedied the system-wide reduction in student achievement to the extent practicable does not, however, signify that student test scores should play no role. Rather, the Court indicated that test scores should not be the sole factor that prohibits a school district from achieving partial unitary status regarding student achievement.\textsuperscript{152}

However, underlying the Court's critique of using student test scores as a measure of remedial effectiveness, the Court perhaps is narrowing the factors that would qualify as vestiges of unlawful segregation. For instance, the Court discusses the influence of demographic changes that are independent of de jure segregation yet affect racial composition and student achievement.\textsuperscript{153}

In addition, the Court stresses the importance of providing the school districts with a "precise statement of [their] obligations under a desegregation decree"\textsuperscript{154} when identifying segregation's incremental effect on minority

\textsuperscript{148} \textit{Id.} at 2088 (Souter, J., dissenting). \textit{See id.} at 2060 (O'Connor, J., concurring) ("What the District Court did . . . and how it transgressed the constitutional bounds of its remedial powers, is to make desegregative attractiveness the underlying goal of its remedy for the specific purpose of reversing the trend of white flight.").

\textsuperscript{149} Hills v. Gautreaux, 425 U.S. 284, 298 (1976). \textit{See supra} notes 51-60 and accompanying text for a discussion of Milliken I and \textit{Gautreaux}.

\textsuperscript{150} \textit{Jenkins II}, 115 S. Ct. at 2054.

\textsuperscript{151} \textit{Id.} at 2055.

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.} (quoting Board of Educ. of Oklahoma City Pub. Schs. v. Dowell, 498 U.S. 237, 246 (1991)). However, \textit{see} Nagel, \textit{supra} note 139, at 709-10 (proposing that "a judicial decree specifying in detail how policy should be implemented intrudes deeply into the executive function" and that "some degree of deference to the state executive function with regard to specificity might interfere with the judicial function less than executive compliance with the detailed judicial decree might interfere with
student achievement and the quality education programs’ goals.155 Therefore, external factors construed as too attenuated156 and lacking a causal link157 to the unlawful segregation may not be classified as vestiges and, thus, not bar a determination of unitary status. Perhaps, a better test is the one Justice Thomas proposed in his concurrence. For instance, the district courts could bear the burden of explaining "how more recent social or demographic phenomena did not cause the 'vestiges.'"158

In sum, without analyzing the entirety of the numerous scholarly commentary in the field, the Jenkins litigation serves as an extreme example of two dangers endemic to institutional litigation and particularly desegregation orders—(1) vast equitable discretion for the trial judge and (2) vague legal standards.159 Relying on such discretion and vague standards, the district court ordered elaborate and costly remedies160 designed to attract whites to the KCMSD and to increase student test scores.161

In the process, the district court assumed both the legislative function of crafting detailed rules of prospective conduct as well as the executive role of enforcing these declared rules.162 Independent from partisan politics and not

the executive function").

158. Jenkins II, 115 S. Ct. at 2063-64 (Thomas, J., concurring).
159. See William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L. J. 635, 644 (1982) ("The specificity of the decree and the indeterminacy of the norms that guide its drafting make the trial judge's remedial discretion more difficult to control, and hence more threatening, than the discretion inherent in judicial rulemaking.").

160. See Nielsen, supra note 9, at 616-19 for a discussion of the trial court's remedial orders. See also Jenkins II, 115 S. Ct. at 2066 (Thomas, J., concurring) ("[T]he District Court here ordered massive expenditures by local and state authorities, without congressional or executive authorization and without any indication that such measures would attract whites back to the KCMSD or raise KCMSD test scores.").

161. See supra notes 16-20 and accompanying text.

162. See supra notes 5 and 8 for reference to the court-ordered remedial programs. See also Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1297 (1976):

In public law litigation, . . . factfinding is principally concerned with 'legislative' rather than 'adjudicative' fact . . . . The whole process begins to look like the traditional description of legislation: Attention is drawn to a 'mischief' existing or threatened, and the activity of the parties and court is directed to the development of on-going measures designed to cure the mischief.

See also Nagel, supra note 139, at 711 ("When the welfare and behavior of virtually
accountable to an electorate, the district court arguably violated the Constitution’s two primary structural principles—(1) separation of powers (by wielding legislative and executive power) and (2) federalism (by usurping the state and local control over education).  

While all agree that the problems associated with formally segregated school systems and the inner cities deserve governmental attention, our political tradition and form of government do not condone giving the judiciary the task of devising and implementing the solution. Such a complex problem requires a coordinated response from the proper political spheres in the legislative and executive branches at the state and local levels.

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163. See Fletcher, supra note 159, at 641, 649 noting that in institutional litigation:

a judge moves far beyond the normal competence and authority of a judicial officer, into an arena where legal aspirations, bureaucratic possibilities, and political constraints converge, and where ordinary legal rules are frequently inapplicable" and that "[t]he formulation of the remedial decree... depends... on the moral and political intuitions of one person acting not only without effective external control over his or her actions, but also without even the internal control of legal norms.

164. Jenkins II, 115 S. Ct. at 2070 (Thomas, J., concurring):

Two clear restraints on the use of the equity power—federalism and the separation of powers—derive from the very form of our Government. Federal Courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States. We have long recognized that education is primarily a concern of local authorities.

But see Chayes, supra note 162, at 1307:

Separation of powers comes in for a good deal of veneration in our political and judicial rhetoric, but it has always been hard to classify all government activity into three, and only three, neat and mutually exclusive categories. In practice, all governmental officials, including judges, have exercised a large and messy admixture of powers, and that is as it must be.

165. See Fletcher, supra note 159, at 645 (describing such complex problems as "polycentric." "Polycentricity is the property of a complex problem with a number of subsidiary problem 'centers,' each of which is related to the others, such that the solution to each depends on the solution to all others... [T]hey are ill-suited to resolution by governmental decisionmaking authorities."
Although these branches' initial failure to follow the Constitution is responsible for a portion of the current predicament, the federal judiciary cannot legitimately maintain that this justifies its own disregard of the Constitutional requirements of separation of powers and federalism. Both cases constitute a disrespect for our Constitution and form of government. "There simply are certain things that courts, in order to remain courts, cannot and should not do. There is no difference between courts running school systems or prisons and courts running executive branch agencies."  

IV. CONCLUSION

In Jenkins II, the Supreme Court issued two rulings. First, it ruled that increasing teacher and staff salaries to attain desegregative attractiveness constitutes an impermissible interdistrict remedy to cure only an intradistrict violation. Such remedies exceed the scope of the district court's remedial authority. Second the Court ruled that courts should not rely on student achievement tests that measure whether students in the district have achieved "national norms" as the dominant factor in determining unitary status. However, Jenkins II does not provide clear guidance for lower courts. Identifying the effects of a constitutional violation remains imprecise. Similarly, no clear formula exists to determine when the school districts have eliminated such elusive effects to the extent practicable in order to achieve unitary status.

166. See, e.g., Nagel, supra note 139, at 680: If neither Congress nor the executive nor the state institutions have the will to cooperate with the judiciary to achieve the degree or form of redress desired by the court, then it is entirely possible that the court's objective is unwise. The great structural divisions of power in the Constitution were, after all, designed on the assumption that no single decisionmaker should be trusted. (emphasis in original). But see Fletcher, supra note 159, at 637 (arguing that the trial court's remedial discretion in institutional litigation is presumptively illegitimate; however, this presumption of illegitimacy "may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default. In that event, and for so long as those political bodies remain in default, judicial discretion may be a necessary and therefore legitimate substitute for political discretion.").

168. Id. at 2055.
169. Id.
170. See supra notes 43-49 and accompanying text for a discussion of identifying the vestiges of segregation.
171. See supra notes 62-70 and accompanying text for a discussion of the unitary
Nonetheless, the majority seems to strengthen the causal link required for an effect to result from prior de jure segregation. A school district's good faith effort and the identification of other socio-economic causes may provide sufficient attenuation to disassociate the factor from the effects of past segregation.

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172. See supra notes 76-89 and accompanying text.
173. See supra note 70 and accompanying text.