Missouri v. Jenkins and the de Facto Abandonment of Court-Enforced Desegregation

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MISSOURI V. JENKINS AND THE DE FACTO ABANDONMENT OF COURT-ENFORCED DESEGREGATION

Bradley W. Joondeph*

Abstract: It has been forty-three years since the Supreme Court decided Brown v. Board of Education. In this Article, the author argues that the Court’s recent decision, Missouri v. Jenkins, presages the end of court-enforced school desegregation. In addition, Jenkins shows that the Court is unwilling to confront its doctrinal principles in the area, preferring instead to base its decisions on relatively narrow, case-specific grounds. Jenkins therefore reveals that the Court will end this important era in our constitutional history quietly, gradually and without articulating its justifications. The author also contends that the reasons for curtailing desegregation remedies proffered by Justices Scalia and Thomas in recent concurring opinions, although perhaps more coherent and principled, do not justify the Court’s abandonment of court-enforced desegregation.

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I. INTRODUCTION

On first impression, Missouri v. Jenkins\(^1\) does not look like a landmark in the Supreme Court’s school desegregation jurisprudence. The decision was quite important in Kansas City, of course, as it effectively ended state funding for desegregation remedies in the city’s schools,\(^2\) but neither of its two basic holdings substantially altered constitutional doctrine. Nonetheless, Jenkins may be quite significant, not for what the Court said, but for how it got there. Much of the Court’s reasoning in Jenkins was ill-conceived, if not disingenuous. The Court misconstrued or ignored several well established doctrinal principles, thereby allowing it to craft an opinion that undermined the district court’s justification for a majority of the desegregation remedies in place in Kansas City. The manner in which the Court reached its holdings shows that the Court’s central concern was to end the extensive court-ordered remedies.

The reasoning of Jenkins therefore signals an important shift in the Court’s approach to school desegregation cases. The Court used to presume that, when a formerly segregated school district had failed to eliminate all of the effects of past discrimination, the school district needed to “take whatever steps might be necessary to convert to a unitary

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2. Three weeks after the Court’s decision in Jenkins, the plaintiffs, the school district, and the State of Missouri reached a tentative agreement phasing out funding for desegregation remedies over the next three years. See Kevin Q. Murphy et al., State, District Reach Accord: Desegregation Funding to End by 1999 in KC School District, K.C. Star, July 8, 1995, at A1. The parties have yet to agree on a final settlement of the litigation. See Donna McGuire et al., Scott, State Goes After School Funds: District Could Lose Tens of Millions in 1996–97 Year, K.C. Star, Oct. 27, 1995, at A1. On October 26, 1995, Missouri Attorney General Jay Nixon filed a motion seeking an end to all desegregation programs in the Kansas City, Missouri, School District (KCMSD) by June 1996, as well as asking the school district to repay the state $78 million for the state’s share of previous salary assistance. Id.
system in which racial discrimination would be eliminated root and branch." Now, however, the Court appears reflexively hostile to extensive desegregation remedies and prolonged judicial supervision of public schools. Accordingly, where the school district has implemented its desegregation plan in good faith, the Court implicitly presumes that the district court should return control to local officials as soon as practicable, even if some of the effects of past discrimination remain.

_Jenkins_ also demonstrates how the Court intends to bring the era of court-enforced desegregation to a close. The Court has avoided any explicit reexamination of the constitutional principles that underlie remedies for school segregation. Indeed, it has offered no analytically defensible rationale to justify its scaling back of court-ordered desegregation. Instead, as _Jenkins_ exemplifies, the Court has preferred relatively narrow, case-specific reasons for ruling against the extension or continuation of desegregation remedies and in favor of expediting the return of control over public schools to local authorities. To borrow from the Court's own terminology, it has embarked on a de facto, rather than a de jure, dismantling of federal court supervision of formerly segregated school districts. Thus, _Jenkins_ signals not only that the end of court-ordered desegregation is near, but that the Court will dispose of it quietly, gradually, and without explicitly stating its justifications.

This message is especially clear once one views _Jenkins_ as the last in a trilogy of primary school desegregation cases decided by the Rehnquist Court. In _Board of Education v. Dowell_, _Freeman v. Pitts_, and _Jenkins_, the Court reached consistent outcomes, curtailing desegregation remedies and expediting the return of control over formerly segregated school districts to local officials, even if it chose different analytical routes. For instance, in _Freeman_ the Court emphasized the importance of deferring to district courts' broad equitable powers, while in _Jenkins_ it subjected the district court's assertion of remedial authority to exacting scrutiny. And although none of the decisions explicitly questioned the principles

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4. See Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (distinguishing de jure from de facto discrimination). More precisely, the Court has intentionally abandoned court-enforced desegregation, but implicitly and incrementally rather than candidly and definitively.
7. See id. at 487–89.

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of the Court’s desegregation jurisprudence, each contained rhetoric tacitly encouraging the abandonment of court-enforced desegregation.

What may be driving the Court’s shift is an implicit reassessment of the doctrinal principles, originally adopted in *Green v. County School Board*\(^9\) that form the basis of the Court’s desegregation jurisprudence. In recent concurring opinions, Justice Scalia and Justice Thomas have questioned these principles, arguing that the Court substantially should reform its approach to desegregation remedies. They have contended that *Green’s* premises have grown obsolete, or that *Green’s* principles do not reflect a faithful interpretation of *Brown v. Board of Education*\(^10\) or the Equal Protection Clause. Perhaps a majority of the Court has been persuaded by one of these arguments but, due to *Green’s* symbolic importance, is unwilling to state so explicitly.

Even if one of these rationales accounts for the Court’s recent desegregation decisions, however, the change in its approach still would be unjustified. Although these arguments are more intellectually coherent than the Court’s uncandid, case-by-case approach, neither countenances the Court’s retreat from court-ordered desegregation.

This article explains how *Jenkins* reveals an important shift in the Court’s approach to school desegregation cases—a shift that presages the end of court-enforced desegregation—and how the Court has failed to articulate any principled rationale to justify this change. Part II briefly describes the evolution of desegregation remedies law. It explains how the Court in *Green* adopted a corrective (rather than prohibitory) approach to remedies for school segregation, and how this approach’s practical implications are in tension with some of the basic tenets of the Rehnquist Court’s more recent holdings. Part III surveys the history of the effort to desegregate the Kansas City, Missouri, School District (KCMSD), including the Supreme Court’s ruling in *Jenkins*. Part IV focuses on the Court’s reasoning in *Jenkins*. It demonstrates that the Court’s analysis was disingenuous,\(^11\) thereby showing that the decision reflected the Court’s extrinsic goal of ending desegregation remedies in Kansas City’s schools. Part V places *Jenkins* in the context of the Rehnquist Court’s two previous primary school desegregation decisions. The results and rhetoric of the three cases make evident that the Court’s analytical premises have implicitly shifted. Finally, par: VI explores

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\(^10\) 347 U.S. 483 (1954) (*Brown I*).
more intellectually coherent rationales that could explain the Court’s implicit decision to scale back the availability and breadth of desegregation remedies. Although these arguments are more analytically defensible than the Court’s current approach, they fail to justify the Court’s quiet revolution in desegregation law.

II. BROWN, GREEN, AND THE CORRECTIVE APPROACH TO DESEGREGATION REMEDIES

In Brown, the Court emphatically ruled that de jure school segregation violated the Equal Protection Clause: “[T]he field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” But the rationale for Brown, and therefore the precise characteristic of school segregation that offended the Constitution, was unclear. In one passage, the Court emphasized the importance of public education generally, concluding that “[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” At the same time, the Court stressed the detrimental psychological impact of segregation on African-American children, stating that separating children “of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” These alternative rationales obfuscated such issues as whether Brown applied only to de jure segregation or to de facto segregation as well, and whether segregation was unconstitutional only in public schools or in all facets of public life. Thus, while Brown’s core message was clear, what it required of school districts was uncertain.

12. Id. at 495.


15. Id. at 494; see also Drew S. Days, Vindicating the Promise of Brown—School Desegregation and the Civil Rights Act—Past, Present, and Future, 26 Pac. L.J. 772, 773 (1995) (noting “three faces” of Brown—one declaring separate but equal unconstitutional in principle, one discussing detrimental impact of segregation on black children, and one discussing provision of public education as most important function of state and local government).
The Court's equivocal opinion in Brown II a year later did little to resolve these questions. In deliberately vague language, the Court ruled that segregated school systems were required to "make a prompt and reasonable start" toward "achieving a system of determining admission to the public schools on a nonracial basis."\(^{16}\) Although the Court warned that "the vitality of [Brown I's] constitutional principles cannot be allowed to yield simply because of disagreement with them,"\(^{17}\) it nevertheless permitted school districts to dismantle their segregated systems "with all deliberate speed."\(^ {18}\) This phrasing further confused the issue of how rapidly school districts needed to desegregate; indeed, the phrase itself was oxymoronic. Hence, after the two Brown decisions, what the Constitution required of segregated school districts in concrete terms remained unclear. Most notably, neither Brown decision definitively answered whether a formerly segregated school system's abandonment of intentional discrimination was sufficient to satisfy its constitutional obligations.

This uncertainty continued for the next thirteen years. In many respects, practical considerations prevented the Court from addressing these issues more explicitly during this period. Predictably, southern resistance to desegregation was fierce.\(^ {19}\) Eight southern states adopted resolutions of interposition declaring Brown illegitimate and denying the Supreme Court's power to outlaw segregation, and enacted legislation designed to thwart any efforts toward integration.\(^ {20}\) Nineteen of the twenty-two Senators and eighty-two of the 105 Representatives from the eleven states of the old Confederacy (seventy-seven of eighty-three Representatives excluding Texas) signed the Southern Manifesto in 1956, which declared Brown a "clear abuse of judicial power" and pledged "to use all lawful means to bring about a reversal of this decision.

\(^{17}\) Id. at 300.
\(^{18}\) Id. at 301.
which is contrary to the Constitution."\(^2\) In 1959, public schools in Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Florida remained completely segregated;\(^2\) as late as 1964, only 0.48 percent of African-American elementary or secondary school students in the South (excluding Texas and Tennessee) attended school with whites.\(^2\) In this climate, an announcement from the Court that Brown required no more than the abandonment of state-imposed segregation would have been seen as a capitulation to public pressure. This, in turn, would have undermined significantly the Court's legitimacy and hindered efforts to enforce even a narrow reading of Brown.

At the same time, interpreting Brown's mandate more expansively so as to require school districts to remedy the effects of segregation (if that is what Brown required) would have been futile. Congress and the White House essentially did nothing to support the implementation of school desegregation.\(^2\) Although President Eisenhower reluctantly sent the Army's 101st Airborne Division to Little Rock, Arkansas, to desegregate Central High School in 1957,\(^2\) he refused to endorse the rightness of Brown,\(^2\) subtly dignifying southern resistance.\(^2\) Members of Congress,


\(^{22}\) Douglas, supra note 20, at 94.


\(^{24}\) Id. at 46.

\(^{25}\) Taylor Branch, Parting the Waters 222-24 (1988). Eisenhower's reluctance to use federal executive power to enforce Brown was deeply ingrained. At a press conference two months before the Little Rock crisis, he stated: "I can't imagine any set of circumstances that would ever induce me to send federal troops into ... any area to enforce the orders of a federal court .... I would never believe that it would be a wise thing to do in this country." 2 Stephen E. Ambrose, Eisenhower: The President 410 (1984). A year earlier, Eisenhower had refused to intervene after mob violence erupted in Clinton, Tennessee, and in Mansfield, Texas, in response to court-ordered desegregation. Id. at 336.

\(^{26}\) In 1956, Eisenhower stated, "I think it makes no difference whether or not I endorse [Brown]. The Constitution is as the Supreme Court interprets it; and I must conform to that and do my very best to see that it is carried out in this country." Ambrose, supra note 25, at 338; see also Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 131 (1994) (noting that, in addition to his public equivocation, "[p]rivately, Eisenhower criticized the Brown decision in strong terms on numerous occasions"). In fact, the Eisenhower Administration successfully fought against legislation that would have given the Justice Department the authority to bring suits on behalf of desegregation plaintiffs in 1957. Rosenberg, supra note 23, at 46.

\(^{27}\) Ambrose, supra note 25, at 409 ("The President's moderation, the southerners felt, gave them license to defy the Court."); Alexander M. Bickel, The Least Dangerous Branch 266 (2d ed. 1986); Greenberg, supra note 19, at 213 (stating that Eisenhower's equivocal statements about Brown,
through the Southern Manifesto and other means, openly encouraged school districts' recalcitrance. For instance, in a typical speech in 1956, Senator James Eastland told constituents in Mississippi that “[o]n May 17, 1954, the Constitution of the United States was destroyed because the Supreme Court disregarded the law and decided integration was right. . . . You are not required to obey any court which passes out such a ruling. In fact, you are obligated to defy it.” Many judges in the South refused to enforce the law, upholding statues clearly designed to evade Brown, sanctioning delay by school officials, and expressly approving the continuation of segregation.

The Supreme Court clearly was aware of the lack of support for school desegregation. Thus it knew that even if Brown required school districts to do more than simply refrain from intentional discrimination, there was no hope of enforcing such a holding.

The political climate surrounding civil rights began to change, however, in the middle 1960s. Events in the modern civil rights movement made continuing prejudice against African-Americans a national political issue. In particular, the violent resistance to the desegregation of the University of Mississippi by James Meredith, the

“which could be read as a rejection of the wisdom in the Court's decision, surely encouraged some to express themselves in more extreme fashion”; Kluger, supra note 21, at 753 (“Eisenhower, either by design or by obtuseness, comforted and dignified those who were ranged against the Court.”).

28. Greenberg, supra note 19, at 213 (contending that “if the executive branch was derelict [in supporting Brown], Congress was downright antagonistic”); Kluger, supra note 21, at 752–53.

29. Wilkinson, supra note 13, at 69. In introducing the Southern Manifesto on the House floor, Representative Smith of Virginia stated that the Supreme Court in Brown had “threaten[ed] the liberties of the people and the destruction of the reserved powers of the respective States, in contravention of the principles of that Constitution which all officials of all the three departments are sworn to uphold.” 102 Cong. Rec. H4515 (daily ed. Mar. 12, 1956) (statement of Rep. Smith). And on a separate occasion, Senator Strom Thurmond of South Carolina called for the impeachment of justices and called the Court “a great menace to this country.” Greenberg, supra note 19, at 213. In the wake of Brown, several senators, including Thurmond, Eastland, and Herman Talmadge of Georgia, joined groups such as the White Citizens Council, whose sole purpose was to preserve segregation. Id. at 216.

30. Rosenberg, supra note 23, at 88–91. For instance, in one Georgia case, a federal district court judge refused to enforce Brown and instead “held extensive hearings . . . to uphold the thesis that Negroes were of a lower standard of 'educability' than white students.” Stell v. Board of Pub. Educ., 387 F.2d 486, 490 (5th Cir. 1967).


33. See Branch, supra note 25, at 656–72. Riots at Oxford, Mississippi, in September 1962—provoked largely by Governor Ross Barnett's refusal to permit the desegregation of Ole Miss—
Southern Christian Leadership Conference’s (SCLC) campaign to desegregate lunch counters in Birmingham, Alabama, and voter registration efforts in Mississippi exposed the intensity and virulence of southern racism. No longer was the question of segregation a regional matter that the rest of the country could ignore. The year after the March on Washington, at which Martin Luther King delivered his “I Have a Dream” speech, President Johnson signed into law the Civil Rights Act of 1964, which, among other things, allowed the Justice Department to bring suits against school districts on behalf of desegregation plaintiffs. A year later, Congress passed the Elementary and Secondary Education Act of 1965 (ESEA), which made billions of dollars available to public school districts. Because Title VI of the Civil Rights Act forbid racial discrimination by entities receiving federal funds, the Department of Health, Education, and Welfare (HEW) could make the disbursement of these funds contingent on school districts’ abandonment of segregation. Gradually, this financial incentive to desegregate provided by the ESEA, resulted in two deaths and hundreds of injuries, and caused President Kennedy to send 10,000 federal troops to quell the disturbance. Id. at 662–70.

34. See id. at 756–78. In the course of the anti-segregation demonstrations, Commissioner of Public Safety Bull Conner turned the city’s high-powered fire hoses and police K-9 units on defenseless African-American children, injuring hundreds. Id. Also significant in raising national consciousness was the bombing of Birmingham’s Sixteenth Street Baptist Church in September 1963, which occurred just after the SCLC and city leaders had reached an agreement to desegregate the city’s public accommodations. Id. at 888–92. The bomb killed four young girls who were attending Sunday school. Id.

35. Most notoriously, a rural deputy sheriff, Cecil Price, and a group of accomplices murdered three civil rights volunteers in June 1964 near Philadelphia, Mississippi. See Juan Williams, Eyes on the Prize: America’s Civil Rights Years, 1954–1965, at 229–49 (1987). The three volunteers disappeared on June 21, 1964, just as the Student Nonviolent Coordinating Committee (SNCC) was launching its 1964 Summer Project to register blacks to vote. Id. at 230. Instrumental to attracting national attention was that two of the volunteers—Andrew Goodman and Michael Schwerner—were whites from New York City. Id. The third volunteer was James Chaney, an African-American native of Mississippi. Id. at 231. Their disappearance attracted such notoriety that, while the search for the men continued, President Johnson met with the parents of Goodman and Schwerner at the White House. Id. Finally, on August 4, 1964, FBI agents discovered the bodies of the three men buried in an earthen dam. Id. at 234. They had each been shot to death, and Chaney had been savagely beaten before being killed. Id. at 235. Murder charges against Price and his accomplices, brought in state court, were ultimately dropped, but they were later were convicted of violating the volunteers’ federal civil rights. Id.


37. Id. § 407, 78 Stat. 248. On the connection between these events in the civil rights movement and the passage of federal civil rights legislation, see Klarman, supra note 26, at 129–49.


40. See Rosenberg, supra note 23, at 47–50; Klarman, supra note 26, at 43 & n.160.
coupled with the Justice Department’s active involvement in desegregation litigation, caused many school systems to abandon their de jure policies and desegregate their schools. By the 1966–67 school year, 16.9 percent of African-American children in the South attended integrated elementary and secondary schools.\footnote{Rosenberg, supra note 23, at 50.}

By 1968, then, the climate was more conducive for the Supreme Court to clarify the remedies mandated by \emph{Brown}, and the case presenting that opportunity was \emph{Green}. Until 1965, New Kent County, Virginia, had enforced an official policy of segregated education; it operated one combined elementary and high school for white students and one school for blacks.\footnote{Green v. County Sch. Bd., 391 U.S. 430, 432–33 (1968). The County “initially established and maintained [the de jure system] under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education.” \textit{Id.} at 432. It retained the de jure system until 1965, “presumably on the authority of several statutes enacted by Virginia in resistance to the \emph{Brown} decisions.” \textit{Id.} at 433.} The County was residentially integrated, so students were bused in both directions across the County to the one-race schools.\footnote{Bowman v. County Sch. Bd., 382 F.2d 326, 330 (4th Cir. 1967) (en banc) (Sobeloff, J., concurring) (explaining that “eleven buses traverse the entire county to pick up the Negro students and carry them to the Watkins school, located in the western half of the county, and ten other buses traverse the entire county to pick up the white students for the New Kent school, located in the eastern half of the county”), rev’d, 391 U.S. 430 (1968).}

Prior to the 1965–66 school year, the school board adopted a “freedom of choice” plan, which theoretically permitted all students in the district to attend either of the two schools.\footnote{Green, 391 U.S. at 433–34. The County adopted the plan so it could remain eligible for federal financial assistance from HEW. \textit{Id.}} The plan resulted in little integration. In 1967, only 115 black students attended the formerly all-white school, and no white students attended the all-black school; thus, eighty-five percent of the County’s African-American students still attended an all-black school.\footnote{Bowman, 382 F.2d at 327 (stating that plaintiffs “contend[ed] that compulsive assignments to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due”); Lino A. Graglia, \textit{When Honesty Is “Simply . . . Impractical” for the Supreme Court: How the Constitution Came to Require Busing for School Racial Balance}, 85 Mich. L. Rev. 1153, 1158 (1987) (book review) (noting that NAACP Legal Defense Fund attorneys representing plaintiffs in \emph{Green} had “stipulated that the school system was being operated free of racial discrimination”).} The plaintiffs did not allege that the school board had adopted the “freedom of choice” plan with discriminatory intent, but that \emph{Brown} required more of formerly de jure school districts than race neutrality.\footnote{Id. at 441.} To comply with \emph{Brown}, they asserted, New Kent County needed to produce actual integration in its schools.
The crucial question posed by *Green* was whether *Brown* endorsed a prohibitory or a corrective approach to desegregation remedies. According to the prohibitory approach, segregation's harm ends once it no longer carries official sanction. Under this view, *Brown* required formerly segregated school districts to abandon government-imposed segregation and adopt racially neutral policies, nothing more. Remedies should be forward-looking; upon a finding of liability, district courts should order school districts to refrain from discriminating in the future. The corrective approach, in contrast, envisions the harm caused by segregation, and therefore the appropriate remedy, much more broadly. Under the corrective theory, "[t]he violation consists of acts and effects." The victims of segregation are injured not only by state-imposed segregation, but also by its continuing impact after the school district has abandoned its de jure policies. Thus, formerly segregated school districts must not just refrain from intentional discrimination; they must also affirmatively eradicate any ongoing effects, such as de facto segregation or reduced student achievement, traceable to the de jure system.

Arguably, the most doctrinally coherent reading of *Brown I* and *Brown II* saw those decisions as endorsing the prohibitory approach.

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47. See Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728, 738–54 (1986) (contrasting prohibitory and corrective approaches to desegregation remedies, and explaining why *Green* endorsed the latter) [hereinafter Gewirtz, *Choice in the Transition*]. Gewirtz has explained the essential differences between the two approaches as follows:

The *prohibitory* approach is narrow; ... it views the goal of antidiscrimination law as simply stopping new violations of the [antidiscrimination] principle. It is completely future-oriented. The corrective conception, by contrast, requires significant measures to eliminate the ongoing effects of discrimination; it requires remedial intervention that goes beyond the prohibitions of the antidiscrimination principle itself, since merely assuring prospective adherence to that principle will not undo continuing effects of past violations.

*Id.* at 731.

48. *Id.* at 739 (noting that under prohibitory approach "the remedy is limited to ordering new violations to cease").

49. Liebman, *supra* note 19, at 1526 (explaining that under prohibitory approach, "[s]chool officials found to be utilizing discriminatory admissions practices [w]ould be ordered to desist and to admit black children to their schools on a 'nondiscriminatory basis' of those officials' choice").


51. Liebman, *supra* note 19, at 1501 (stating that, "[a]ccording to the Correction theory, segregation involves an official's or agency's evil act with evil effects").

52. Mark Tushnet has written that the view that *Brown* did not require integration but "merely forbids the use of governmental power to enforce segregation" ... was almost universally shared in the years immediately following *Brown.* Mark Tushnet, *The Significance of Brown v. Board of Education,* 80 Va. L. Rev. 173, 175 (1994) (quoting Briggs v. Elliot, 132 F. Supp. 776, 777
The Court in *Brown I* had emphasized the unlawfulness of segregation “when it has the sanction of law.”\(^{53}\) The Court stated that “[s]egregation with the sanction of the law... has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”\(^{54}\) This language at least implied that segregation persisting after the abandonment of de jure discrimination—unaccompanied by the force of law—did not violate the Constitution; such lingering de facto segregation, because it no longer carried the stigma inherent in official discrimination, did not constitute an injury of constitutional significance. Thus, a school district that no longer intentionally discriminated on the basis of race had fulfilled the mandate of *Brown*, even if its schools remained racially imbalanced.

Likewise, in *Brown II* the Court stated that the relief to which the plaintiffs were entitled was their “admission to public schools as soon as practicable on a nondiscriminatory basis.”\(^{55}\) The Court ordered the defendant school districts “to achieve a system of determining admission to the public schools on a nonracial basis.”\(^{56}\) This language seemed to suggest that the Court merely contemplated the end of race-based policymaking by school districts. The remedy was a prohibition on school systems’ use of race in assigning their students to particular schools. Nowhere in either of the *Brown* decisions did the Court insinuate that school systems also might be affirmatively obligated to undo the ongoing effects of their past de jure discrimination.

The Court’s few pronouncements on school desegregation between 1955 and 1968 also tended to support the prohibitory approach.\(^{57}\) In *Goss* (E.D.S.C. 1955)). According to Tushnet, although black plaintiffs challenged facially neutral policies in these years, they did so “only on the ground that they were government actions used disingenuously to perpetuate segregation.” Id. at 176. This hypothesis is corroborated by a statement made in 1959 by Jack Greenberg, one of the NAACP Legal Defense Fund attorneys who litigated *Brown*. He then stated that if “there were complete freedom of choice, or geographical zoning, or any other nonracial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection.” See Greenberg, *supra* note 19, at 383. Greenberg subsequently disavowed this opinion, stating during oral argument of Raney v. Board of Educ., 391 U.S. 443 (1968) (a companion case to *Green*), that “I did not know then what I know now.” Greenberg, *supra* note 19, at 383.


\(^{54}\) Id.

\(^{55}\) *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955) (*Brown II*).

\(^{56}\) Id. at 300–01.

\(^{57}\) See *Freeman v. Pitts*, 503 U.S. 467. 503–04 (1992) (Scalia, J., concurring) ("The constitutional right is equal racial access to schools, not access to racially equal schools ... . We apparently envisioned no more than this in our initial post-*Brown* cases.").
v. Board of Education, the Court rejected a minority-to-majority transfer plan that permitted students to transfer from schools in which they were a racial minority to schools where their race predominated.

The Court ruled that, because the plan made "[c]lassifications based on race," which "are ‘obviously irrelevant and invidious,’" it was "no less unconstitutional than [a plan] us[ing race] for original admission or subsequent assignment to public schools." But the Court noted that it "would have [been] an entirely different case" if the opportunity to transfer had been "made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer." And in Cooper v. Aaron (the decision culminating the litigation to desegregate Little Rock's Central High School), the Court equated "desegregation" both with "the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools," and with "the elimination of racial discrimination in the public school system."

But the Court charted a different course in Green. It held that New Kent County's "freedom of choice" plan, although not adopted with discriminatory intent, was insufficient to discharge the school board's duties under Brown. The Court emphasized that desegregation plans were to be judged by their effectiveness, not the intent with which they were adopted. That a school board has abandoned its facially discriminatory policies "merely begins, not ends, our inquiry whether the

59. Id. at 685–86.
60. Id. at 687 (quoting Steele v. Louisville & Nashville R.R., 323 U.S. 192, 203 (1944)).
61. Id. at 688.
62. Id. at 687.
65. Green v. County Sch. Bd., 391 U.S. 430, 441 (1968) ("The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system.").
66. Id. at 437 (stating that the district court "must measure the effectiveness of respondent School Board's 'freedom-of-choice' plan to achieve [the] end' of a racially nondiscriminatory school system); id. at 439 ("The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation.").
Board has taken steps adequate to abolish its dual, segregated system." The Board has taken steps adequate to abolish its dual, segregated system."

Facially neutral policies, in and of themselves, are "only a means to a constitutionally required end—the abolition of the system of segregation and its effects." Thus, any desegregation plan "will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." Specifically, effectiveness meant the elimination of existing conditions traceable to the de jure system. In Green, these conditions were racial imbalances in the various facets of the school systems' operations, such as student assignments, staff and faculty assignments, transportation, extracurricular activities, and school facilities. School boards like New Kent County's that had "operat[ed] state-compelled dual systems were...charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Because the County's freedom of choice plan failed to eliminate these imbalances—failed to achieve actual integration—the school board had not discharged its duties under Brown.

The Court's decision in Green endorsed two distinct principles. First, Green embraced the corrective approach to desegregation remedies, holding that Brown required formerly segregated school districts not just to refrain from discrimination but to eradicate the effects of de jure segregation. Current conditions in a nonunitary school district that are

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67. Id. at 437.
68. Id. at 440 (emphasis added) (quoting Bowman v. County Sch. Bd., 382 F.2d 326, 333 (4th Cir. 1967) (en banc) (Sobeloff, J., concurring), rev'd, 391 U.S. 430 (1968)).
69. Id. at 439.
70. Id. at 435 ("Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.").
71. Id. at 437–38 (emphasis added).
72. Gewirtz, Choice in the Transition, supra note 47, at 739–40 (noting that "Green cemented the Court's commitment to a corrective conception of an antidiscrimination remedy").
73. The term "unitary" refers to a school system—or an aspect of a school system—that no longer contains any vestiges of the prior regime of state-imposed segregation. See Board of Educ. v. Dowell, 498 U.S. 237, 246 (1991). Conversely, a school district is "nonunitary" if vestiges of the de jure system remain. A formerly segregated school district that has achieved "unitary status" has satisfied the requirements of Brown; its legal obligations are the same as a school district that never unlawfully discriminated. Bradley W. Joondeph, Note, Killing Brown Softly: The Subtle Undermining of Effective Desegregation in Freeman v. Pitts, 46 Stan. L. Rev. 147, 150 (1993). Thus, upon a finding of unitary status, judicial supervision ends, and control returns to local officials. Id. Similarly, a school district achieves "partial unitary status" when it removes all vestiges of
traceable to the de jure system, such as racial imbalances in student assignments or reduced student achievement, are “vestiges” of the school district’s past discrimination; to comply with the Constitution and end federal court supervision, formerly segregated school districts must eliminate all such vestiges of the de jure era. This means that in cases like Green, where de facto segregation persists after de jure segregation ends, school districts must eliminate those racial imbalances—in essence, affirmatively integrate their schools—to comply with Brown.

Second, Green created a presumption of causation linking current conditions in nonunitary school districts to those districts’ past de jure segregation. That is, Green shifted the burden of proof with respect to the cause of current conditions allegedly traceable to past discrimination, such as ongoing de facto segregation or reduced student achievement.74 In any district where there has been a de jure violation, such conditions are presumed to be the result of the past segregation. School districts can rebut this presumption by establishing that these conditions are the result of other factors, such as intervening demographic shifts.75 But unless the school system makes such a demonstration, the court will consider those conditions vestiges of the de jure system that the school district must affirmatively eliminate to comply with the Constitution and end judicial supervision.

Together, these two principles require that the remedies in most desegregation cases be extensive and intrusive. Ridding a formerly de jure school system of all vestiges of discrimination is no small task; it essentially demands the elimination of all significant racial imbalances in all facets of the system’s operations, including student and faculty assignments, extracurricular activities, and transportation. In cases like Jenkins, where de jure segregation has caused a reduction in student achievement, the vestiges of discrimination may be even more intractable. And because of Green’s presumption of causation, the only way for a nonunitary school district to avoid responsibility for remedying discrimination from one or more discrete aspects of its operations, such as student assignments, faculty assignments, or extracurricular activities. See id. at 157–58.

74. See Liebman, supra note 19, at 1511. Liebman attributes this presumption to the Court’s decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), rather than Green, calling it the Swann “continuing-effect” presumption. Liebman, supra note 19, at 1511. Although Swann was the first decision in which the Court articulated this presumption explicitly, it was reiterating what it had decided implicitly in Green. See Gewirtz, Choice in the Transition, supra note 47, at 751.

75. See, e.g., Freeman v. Pitts, 503 U.S. 467, 496–97 (1992) (holding that, because current racial imbalances in school district’s student assignments were attributable to intervening demographic changes, school district had achieved partial unitary status with respect to student attendance).
all such conditions is to prove that those conditions are unrelated to past discrimination. Until the school district becomes actually integrated at some point subsequent to the finding of liability, proving the lack of any causal connection is nearly impossible.76

Nonetheless, Green's basic principles have endured. The Court expressly has reaffirmed the corrective approach to desegregation remedies in nearly every desegregation case subsequent to Green, making clear that, as a doctrinal matter, "[t]he duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system."77 And in several opinions, the Court formally has recognized the Green presumption of causation, a principle that was merely implicit in Green itself.78 These precepts have justified the imposition of extensive desegregation remedies by federal courts in hundreds of public school districts, and they have resulted in federal judicial supervision over many school districts lasting more than twenty years.79 Indeed, federal courts

76. United States v. Fordice, 505 U.S. 717, 745 (1992) (Thomas, J., concurring) (characterizing Green presumption as "often irrebuttable in practice"); Freeman, 503 U.S. at 505 (Scalia, J., concurring) (calling the presumption "effectively irrebuttable (because the school district cannot prove the negative)").

77. Freeman, 503 U.S. at 485; see also Missouri v. Jenkins, 115 S. Ct. 2038, 2049 (1995) ("The ultimate inquiry is . . . whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable") (citations and quotation marks omitted); Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991) (stating that district courts must assess "whether the vestiges of discrimination ha[ve] been eliminated to the extent practicable"); Miliken v. Bradley, 433 U.S. 267, 289-90 (1977) (Miliken II) ("The burden of state officials is . . . to take the necessary steps "to eliminate from the public schools all vestiges of state-imposed segregation.") (quoting Swann, 402 U.S. at 15); Davis v. Board of Sch. Comm'rs, 402 U.S. 33, 37 (1971) ("Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.").

78. See, e.g., Fordice, 505 U.S. at 745 (Thomas, J., concurring) ("[O]ur decisions following Green indulged the presumption, often irrebuttable in practice, that a presently observable imbalance has been proximately caused by intentional state action during the prior de jure era").; Freeman, 503 U.S. at 494 ("The school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation."); id. at 505 (Scalia, J., concurring) ("[O]nce state-enforced school segregation is shown to have existed in a jurisdiction in 1954, there arises a presumption, effectively irrebuttable (because the school district cannot prove the negative), that any current racial imbalance is the product of that violation, at least if the imbalance has continuously existed."); Swann, 402 U.S. at 26 (stating that where there exist racially identifiable schools in a nonunitary school district, "the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part").

79. See, e.g., United States v. Franklin Parish Sch. Bd., 47 F.3d 755 (5th Cir. 1995) (judicial supervision began in 1970 and is still in place); Dowell v. Board of Educ., 8 F.3d 1501 (10th Cir. 1993) (judicial supervision over Oklahoma City schools lasted from 1960 until 1991); Keyes v. Congress of Hispanic Educators, 902 F. Supp. 1274 (D. Colo. 1995) (terminating judicial supervision over Denver schools after school district had operated under desegregation decree for 25
continue to supervise scores of formerly segregated school districts today, even in cases where de jure segregation ended in 1954. These consequences of the Court's desegregation remedies jurisprudence, however, are in fundamental tension with three of the Rehnquist Court's core values. First, the remedial framework dictated by Green effectively requires that desegregation remedies be race-

years); Lee v. Geneva County Bd. of Educ., 892 F. Supp. 1387 (M.D. Ala. 1995) (school district, found liable for segregation in 1967, still under judicial supervision); Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341 (D.S.C. 1995) (school system still under court supervision, first found liable in 1964), rev'd in part, 84 F.3d 707 (4th Cir. 1996); Tasby v. Woolery, 869 F. Supp. 454 (N.D. Tex. 1994) (finding that Dallas Independent School District had achieved unitary status after being under court supervision since 1955); Tim Bryant, Delay in Desegregation Hearing Sought, St. Louis Post-Dispatch, Jan. 20, 1996, at A6 (St. Louis schools under judicial supervision since 1972); Tim Cornell, Hub Eyes Greater School Choice, Boston Herald, Jan. 7, 1996, at 1 (Boston school district under court order since 1974); John Egerton, Putting a Finer Finish on Integrated Metro Schools, Tennessean, Jan. 28, 1996, at 1D (Nashville, Tennessee, schools under court supervision since 1955); James Heany, School Woes Pose a Big Hurdle, Buffalo News, Jan. 24, 1996, at A1 (discussion settlement in Buffalo desegregation case, which had lasted since mid-seventies); Sharon L. Jones, Was Court Oversight of Schools Worth It?, San Diego Union-Trib., Dec. 20, 1995, at A1 (San Diego schools under court supervision since 1967); Peter Shinkle, Change of Heart Underscores Shift in Desegregation, Sunday Advocr., Mar. 31, 1996, at 1B (discussing 40-year-old desegregation case in East Baton Rouge Parish, Louisiana); Susan C. Thomson, Little Rock Schools Chief Ready to Meet St. Louis, St. Louis Post-Dispatch, Feb. 6, 1996, at 1A (Little Rock, Arkansas, schools under supervision since 1957); Linda K. Wertheimer, Modified Busing on Easy Road? Orange Stands Apart from Other Districts, Orlando Sentinel, Feb. 5, 1996, at C1 (Orange County, Florida, school system under supervision since 1971); All Things Considered: Alternatives Sought to Replace Unliked Busing System (NPR radio broadcast, Jan. 15, 1996) (discussing ongoing desegregation litigation in Hillsborough County, Florida, where the school district has been under judicial supervision since 1971); 80. The precise number of formerly de jure school districts that remain under the supervision of federal courts is unclear. A recent survey indicated that approximately 13% of U.S. school districts had some sort of desegregation plan in place for the 1991-92 school year. David J. Armor, Forced Justice: School Desegregation and the Law 166 (1995). Of these plans, roughly half were imposed by a court or some other governmental entity. Id. at 213. These figures indicate that the number of school districts operating under court-ordered desegregation plans in 1992 was somewhere between 500 and 2000. Cf. Kevin Brown, After the Desegregation Era: The Legal Dilemma Posed by Race and Education, 37 St. Louis U. L.J. 897, 898 (1993) (stating that, in summer of 1993, there were “over 500 school districts under some form of court supervision”); Peter Applebome, Opponents’ Moves Refueling Debate on School Busing, N.Y. Times, Sept. 26, 1995, at A1 (reporting that federal government has filed briefs in 513 ongoing school desegregation cases, and that there may be at least that many cases in which federal government is not involved). This figure, however, probably understates the impact of these court-ordered plans, as a greater percentage of larger school districts are still implementing desegregation remedies. Armor, supra, at 166. The survey for the 1991-92 school year cited by Armor revealed that “about 32% of all medium-sized and larger school districts are subject to a current desegregation plan.” Id.

81. In Jenkins, for instance, the State and the KCMSD abandoned their policies of de jure segregation in 1954, but the school district has yet to achieve unitary status and is still under federal court supervision. And the schools in Topeka, Kansas—original defendants in Brown I—are still under the jurisdiction of the federal courts. See Brown v. Board of Educ., 978 F.2d 585 (10th Cir. 1992) (Brown III), cert. denied, 509 U.S. 903 (1993).
conscious. If desegregation plans must be effective, and effectiveness means actual integration, then district courts must consider race in assessing whether a school system's desegregation plan has produced sufficient racial balance. Where effective desegregation has not occurred, district courts must take race into account in ordering remedies—such as grade reorganization, gerrymandered attendance zones, or busing—that achieve actual integration. But race-conscious governmental action is anathema to the Rehnquist Court.82 In recent decisions, the Court has stated that "classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality'"83 and "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."84 The Court has held that all racial classifications, including those aimed at remedying identified acts of past discrimination, are unconstitutional unless "they are narrowly tailored measures that further compelling governmental interests."85

Second, prolonged federal court supervision of public school districts violates traditional norms of federalism, principles that have taken on greater constitutional significance under the Rehnquist Court.86 The

82. See, e.g., Shaw v. Hunt, 64 U.S.L.W. 4437, 4400 (U.S. June 13, 1996) ("Racial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'") (quoting McLaughlin v. Florida, 379 U.S. 184, 192 (1964)); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2118 (Scalia, J., concurring in part) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."); id. at 2119 (Thomas, J., concurring in part) ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.").


84. Id.

85. Adarand Constructors, 115 S. Ct. at 2113; see also Miller v. Johnson, 115 S. Ct. 2475, 2482 (1995) ("Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest.").

remedies required by *Green* have resulted in federal courts supervising and controlling formerly de jure school districts for as many as thirty years, placing federal judges in a role traditionally reserved for state and local authorities. Such protracted federal court supervision is in tension with the Rehnquist Court's suspicion of federal encroachment on matters traditionally of state and local concern, particularly public education. For instance, the Court recently held in *United States v. Lopez* that Congress exceeded its power under the Commerce Clause in criminalizing the possession of firearms near public schools largely because public education is a subject over which "States historically have been sovereign." Thus, according to the Rehnquist Court's vision of the appropriate allocation of power between the federal and state governments, a remedial framework producing prolonged federal supervision over public school districts is necessarily suspect.
Finally, judicial supervision of public school districts conflicts with the Rehnquist Court's complimentary emphases on judicial restraint and courts' limited institutional competence. Until formerly de jure school districts achieve unitary status, supervising federal courts must make several educational policy decisions. To evaluate the promise or success of a desegregation plan, a court must immerse itself in the details of public school administration: the drawing of attendance zones, the hiring and transferring of faculty and staff, the location of new schools or magnet schools, capital improvements to the school district's facilities, and perhaps even curricular choices. The law of desegregation remedies has placed federal judges in the position of making many important educational policy decisions that would otherwise be made by local, politically accountable authorities. Such responsibilities are well beyond that considered appropriate under a more restrained vision of the judiciary's institutional competence, forcing courts to fulfill largely legislative and executive functions. Advocates of judicial restraint argue

90. See, e.g., Missouri v. Jenkins, 115 S. Ct. 2038, 2061 (1995) (O'Connor, J., concurring) ("The necessary restrictions on [federal courts'] jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills."). An excellent illustration of this strain in the Rehnquist Court's jurisprudence has been its decisions involving the constitutional rights of prisoners. In a series of rulings, the Court has reiterated that prison regulations are constitutional so long as they are reasonably related to legitimate penological objectives, even when the regulations substantially encroach on inmates' fundamental rights. See, e.g., Washington v. Harper, 494 U.S. 210 (1990) (upholding state policy that permitted corrections officials to administer antipsychotic drugs to inmates against their will without prior hearings); Thornburgh v. Abbott, 490 U.S. 401 (1989) (upholding Federal Bureau of Prisons regulation permitting wardens to screen magazines sent to inmates and to reject those detrimental to security or discipline); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (upholding prison regulations that prevented Muslim inmates from attending particular congregational service); Turner v. Safley, 482 U.S. 78 (1987) (upholding regulations that restricted correspondence between inmates at different institutions to that between family members and that concerning legal matters unless correspondence was in "best interests" of inmates). In so holding, the Court has emphasized that it generally is not the judiciary's place to stand in judgment of how prison administrators carry out their duties. See Harper, 494 U.S. at 224; O'Lone, 482 U.S. at 350; Safley, 482 U.S. at 89. For instance, the Court stated in Abbott that, "[a]cknowledging the expertise of [prison] officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators." Abbott, 490 U.S. at 407-08. And in O'Lone the Court pronounced: "We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to substitute our judgment on . . . difficult and sensitive matters of institutional administration for the determinations of those charged with the formidable task of running a prison." O'Lone, 482 U.S. at 353 (citation omitted) (quoting Block v. Rutherford, 468 U.S. 576, 588 (1984)); see also id. at 350 (emphasizing "the respect and deference that the United States Constitution allows for the judgment of prison administrators").

that courts possess neither the expertise nor the political legitimacy to make these decisions.\textsuperscript{92} Given these tensions, it is unsurprising that the Rehnquist Court might seek to curtail the availability and extensiveness of desegregation remedies. Indeed, its two desegregation decisions prior to \textit{Jenkins}—\textit{Board of Education v. Dowell} and \textit{Freeman v. Pitts}—ended or scaled back desegregation remedies in Oklahoma City and DeKalb County, Georgia, respectively, hastening the end of judicial supervision in both communities. It is against this background that the Court approached the issues presented in \textit{Jenkins}.

III. A BRIEF HISTORY OF THE \textit{JENKINS} LITIGATION

The segregation of Kansas City's public schools dates to 1821, when Missouri entered the Union as a slave state as part of the Missouri Compromise.\textsuperscript{93} Until the Civil War, Missouri law prohibited the creation of schools for African-American children.\textsuperscript{94} In 1865, at the conclusion of the Civil War, Missouri immediately amended its constitution to include a Jim Crow provision mandating separate schools for "white and colored children,"\textsuperscript{95} and the state legislature enacted various statutes requiring the same.\textsuperscript{96} Missouri schools remained segregated by law until the Supreme Court decided \textit{Brown I} in 1954. Shortly thereafter, the Missouri Attorney General issued an advisory opinion stating that the state's school segregation laws were no longer enforceable.\textsuperscript{97} The state legislature repealed the state's segregation statutes in 1957, and the provision in

\begin{footnotesize}
\textsuperscript{92} See id. ("When [federal courts] presume to have the institutional ability to set effective educational, budgetary, or administrative policy, [they] transform the least dangerous branch into the most dangerous one.").

\textsuperscript{93} 2 D.W. Meinig, \textit{The Shaping of America: A Geographical Perspective on 500 Years of History} 453 (1993). Under the terms of the Missouri Compromise, Missouri entered the Union as a slave state while (1) Maine simultaneously entered the union as a free state, and (2) the latitude of Missouri's southern border—36°30' North—was set as the northern limit of slavery in the remaining western territories. \textit{Id.}

As Justice Ginsburg pointed out in her dissent, racial segregation in Missouri actually is traceable to 1724, when Louis XV of France issued the Code Noir, a slave code for the Colony of Louisiana, which at that time encompassed Missouri. Missouri v. Jenkins, 115 S. Ct. 2038, 2091 (1995) (Ginsburg, J., dissenting).

\textsuperscript{94} Act of Feb. 16, 1847, § 1, 1847 Mo. Laws 103 ("No person shall keep or teach any school for the instruction of negroes or mulattoes, in reading or writing, in this State.").

\textsuperscript{95} Mo. Const. art. IX, § 2 (1865); see also Liddell v. Missouri, 731 F.2d 1294, 1305 (8th Cir.) (en banc), cert. denied, 469 U.S. 816 (1984).

\textsuperscript{96} See, e.g., Act of Mar. 29, 1866, § 20, 1865 Mo. Laws 177.

\end{footnotesize}
Missouri's constitution was finally excised in 1976. One year later, the tortuous litigation to desegregate Kansas City's schools began.

A. The Original Finding on Liability and Remedial Orders

In 1977, four members of the Kansas City School Board, their children (KCMSD students), and the KCMSD itself brought suit against the States of Kansas and Missouri, three federal agencies, and several suburban school districts in Kansas and Missouri. The plaintiffs alleged that, prior to 1954, the various defendants intentionally discriminated against the KCMSD and its African-American students by maintaining or contributing to a racially segregated system of education, and that they subsequently had failed to fulfill their constitutional obligation to dismantle the dual system. In 1978, the district court dismissed the claims against the State of Kansas and the Kansas suburban school districts for want of personal jurisdiction, and it realigned the KCMSD as a defendant. The remaining plaintiffs—KCMSD students and their parents—then filed an amended complaint, making the same allegations against the school district, although their relationship remained (and has continued to be) one of "friendly adversaries." In addition, the KCMSD made a cross-claim against the State of Missouri seeking indemnification for desegregation costs in the event the school district was found liable.

The trial on liability began in early 1984. After the plaintiffs had presented their case, the district court dismissed all claims against the Missouri suburban school districts. The court found that the plaintiffs

98. Id.
99. School Dist. v. Missouri, 460 F. Supp. 421, 427 (W.D. Mo. 1978). The Kansas-Missouri border forms the western boundary of the KCMSD, so many of the surrounding school districts are in Kansas. The three federal agencies involved in the litigation were HEW, the Department of Housing and Urban Development (HUD), and the Department of Transportation (DOT).
100. Id. at 427–28.
101. Id. at 442, 445.
103. Jenkins, 593 F. Supp. at 1488–89.
104. Between Brown I and the trial on liability, the racial composition of the KCMSD changed dramatically. In the 1954–55 school year, 18.9% of the district's students were African-American. Jenkins, 593 F. Supp. at 1492. In the 1984–85 school year, 68.3% of KCMSD students were black, and white enrollment had dwindled to 26.7%. Jenkins v. Missouri, 639 F. Supp. 19, 36 (W.D. Mo. 1985), aff'd as modified, 807 F.2d 657 (8th Cir. 1986), cert. denied, 484 U.S. 816 (1987). The remaining enrollment was comprised of Hispanic students (3.7%) and other minority groups (1.3%). Id.
had failed to show that the suburban districts "had acted in a racially
discriminatory manner that substantially caused racial segregation in
another district." Thus, a desegregation plan that mandated student
transfers across district lines between the KCMSD and the suburban
school districts (an interdistrict transfer plan) was unwarranted. The court
also rejected the plaintiffs' claims against the three federal agencies,
finding that none had engaged in intentional discrimination causing
segregation in Kansas City's public schools.

The district court did find, however, that the State of Missouri and the
KCMSD were liable for continuing racial segregation within the
KCMSD (intradistrict segregation). Until 1954, the State of Missouri
had "mandated that all schools for blacks and whites in this State were to
be separate," and the KCMSD, like "[e]ach school district in Missouri[,] had] participated in this dual system." The district court
determined that "[v]estiges of that dual system still remain," and that
"the State and the KCMSD had and continue to have an obligation to
disestablish that system." In addition, the court ruled in favor of the
KCMSD in its cross-claim against the State for the State's role in failing
to desegregate the school district.

The district court then proceeded to make findings, both in its liability
decision and in a series of subsequent orders, that detailed the lingering
effects of unconstitutional segregation within the KCMSD. Unlike most
desegregation cases, the most notable effect was not racial imbalances in
various facets of the school district, such as student and faculty
assignments. Rather, the court concluded that "[s]egregation ha[d] caused a system wide reduction in student achievement in the schools of

105. Jenkins, 593 F. Supp. at 1488; see also id. at 1490 ("[N]o interdistrict constitutional violation by any suburban school district was shown.").
106. Id. at 1488, 1506. The district court dismissed plaintiffs' claims against HEW and DOT at the conclusion of the plaintiffs' presentation of evidence. Id. at 1488. Plaintiffs' claim against HUD went to trial, after which the court found HUD was not liable. Id. at 1506.
107. Id. at 1506.
108. Id. at 1503–04.
109. Id. at 1490.
110. Id. at 1493.
111. Id. at 1504.
112. Id. at 1505.
113. Cf. Green v. County Sch. Bd., 391 U.S. 430, 435 (1968) (involving school district where "[r]acial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities").
the KCMSD.\textsuperscript{114} Only a handful of the KCMSD's fifty elementary schools showed student test scores at or above national norms for reading and mathematics.\textsuperscript{115} The court attributed the student achievement to "the inferior education indigenous of the state-compelled dual school system."\textsuperscript{116} The court also found that de jure segregation had triggered demographic shifts in Kansas City that contributed to the KCMSD's racial isolation. Specifically, the court stated in an unpublished order that the defendants' constitutional violations had "led to white flight from the KCMSD to suburban districts . . . [and to] private schools."\textsuperscript{117}

To address these vestiges of the de jure system, the court ordered a wide range of compensatory programs "appropriate to remedy the ill effects of the unconstitutional segregation and to attract and maintain non-minority enrollment."\textsuperscript{118} The Supreme Court had approved such compensatory programs as a remedy to de jure segregation in \textit{Milliken v. Bradley (Milliken II)}.\textsuperscript{119} In that case, the district court had found that a

\begin{quote}
[F]orced segregation ruins attitudes and is inherently unequal: "[Segregation] may affect their hearts and minds in a way unlikely ever to be undone." The general attitude of inferiority among blacks produces low achievement which ultimately limits employment opportunities and causes poverty. While it may be true that poverty results in low achievement regardless of race, it is undeniable that most poverty-level families are black . . . The Court finds the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District.
\end{quote}


\textit{Jenkins}, 639 F. Supp. at 24. The court specifically found that "[t]est results from the Iowa Test of Basic Skills in grades 1 through 6 show that there are only a few elementary schools of the 50 in the KCMSD which are presently performing at or above the national norm in reading and mathematics. This is especially true in regard to the basic skill of reading." \textit{Id}.

\textit{Jenkins}, 593 F. Supp. at 1492; \textit{see also Jenkins}, 639 F. Supp. at 28 (stating that "education process ha[d] been further ‘bogged down’ in the KCMSD by a history of segregated education").

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\textit{Jenkins}, 639 F. Supp. at 24. As discussed in detail \textit{infra}, the question of whether segregation in KCMSD caused white students to leave the district, and therefore whether attracting and maintaining nonminority enrollment was a permissible objective for the district court's remedy, was the primary issue addressed by the Supreme Court in \textit{Jenkins}. See \textit{Jenkins}, 115 S. Ct. at 2048-55. These questions are addressed later. \textit{See infra} notes 236-293 and accompanying text.

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\textit{Jenkins}, 639 F. Supp. at 24. As discussed in detail \textit{infra}, the question of whether segregation in KCMSD caused white students to leave the district, and therefore whether attracting and maintaining nonminority enrollment was a permissible objective for the district court's remedy, was the primary issue addressed by the Supreme Court in \textit{Jenkins}. See \textit{Jenkins}, 115 S. Ct. at 2048-55. These questions are addressed later. See \textit{infra} notes 236-293 and accompanying text.
variety of measures, such as a remedial reading and communications skills program, an in-service teacher training program, and the reform of biased testing procedures, were necessary to return students in Detroit public schools to the position they would have enjoyed had the school district and the State of Michigan not engaged in unlawful discrimination. The Supreme Court held that desegregation remedies need not be limited to initiatives that promote greater racial balance in student or staff assignments within a school district even if the constitutional violation related only to those factors. "[D]iscriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a long standing segregated system."

The compensatory measures (or Milliken II programs) ordered by the district court in Jenkins covered virtually every aspect of the KCMSD's operations. The court ordered the KCMSD to hire more certified librarians, reduce instructors' teaching loads, add more art and music classes to the curriculum, and hire several guidance counselors. It also ordered the district to reduce its class sizes and to implement summer school, full-day kindergarten, before- and after-school tutoring, and early childhood development programs. In addition, the court mandated the

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120. Milliken II, 433 U.S. at 274–77; see also id. at 282 ("These specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive de jure racial segregation.").

121. Id. at 283.

122. Id. The Court further observed:

Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. . . .

Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. . . . The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task.

Id. at 287–88.


124. Id. at 28–33.
implementation of an "effective schools" program, an extensive magnet school plan, and a $200 to $300 million capital improvement plan.\textsuperscript{125}

\textbf{B. The KCMSD Litigation, 1987–1994}

Both sides appealed the district court's judgment.\textsuperscript{126} The plaintiffs challenged the court's refusal to order a mandatory interdistrict transfer plan involving the suburban school districts, while the State and the KCMSD contested the scope of the remedies and the allocation of costs between the defendants.\textsuperscript{127} The Eighth Circuit altered the district court's orders slightly, so that the costs of reducing KCMSD class sizes be divided equally between the State and the school district,\textsuperscript{128} but it affirmed the district court's judgment in all other respects. Both sides petitioned the Supreme Court for certiorari, and the Court denied both petitions.\textsuperscript{129}

In 1987, as part of the compensatory education remedies, the district court also directed the KCMSD and the State jointly to fund salary assistance for KCMSD teachers and staff.\textsuperscript{130} The court stated that "the KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program," and that it was "essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty."\textsuperscript{131} The Eighth Circuit affirmed the district court's judgment,\textsuperscript{132} and while the Supreme Court granted the State's petition for certiorari, it did so only to

\textsuperscript{125} Id. at 33–35, 39–41 (ordering effective schools and magnet school plan); Jenkins v. Missouri, 855 F.2d 1295, 1306 (8th Cir. 1988) (referring to $200 to $300 million capital improvement plan), cert. denied, 490 U.S. 1034 (1989).

\textsuperscript{126} See Jenkins v. Missouri, 807 F.2d 657, 660 (8th Cir. 1986), cert. denied, 484 U.S. 816 (1987).

\textsuperscript{127} Id. at 660–61.

\textsuperscript{128} Id. at 684.


\textsuperscript{130} Jenkins v. Missouri, 672 F. Supp. 400, 410 (W.D. Mo. 1987), aff'd in part and rev'd in part, 855 F.2d 1295 (8th Cir. 1988), cert. denied, 490 U.S. 1034 (1989). During that same year, the KCMSD sought approval from the district court for its long-range capital improvement plan. The plan called for the renovation and construction of approximately 72 schools at a cost of $265 million. \textit{Id.} at 403. The State opposed the school district's motion and instead proposed a capital improvement plan costing roughly $61 million. \textit{Id.}

\textsuperscript{131} Id. at 403.

\textsuperscript{132} Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988), cert. denied, 490 U.S. 1034 (1989).
review that aspect of the district court’s opinion that ordered the school
district to raise local property taxes.133

In 1992, the KCMSD asked for the continuation of salary relief for the
1992–93 school year through the 1994–95 school year.134 The existing
salary assistance from the State, both from the original 1987 order as
well as a subsequent settlement between the parties in 1990, expired at
the conclusion of the 1991–92 school year.135 Thus, without a
continuation of assistance, teacher salaries would have reverted to their
1986–87 levels, from an average starting salary of $22,215 to roughly
$17,000.136 The State argued that continued salary relief was not justified
because the increase in salaries had produced “no demonstrable effect on
improving the KCMSD’s ability to implement the desegregation
remedy.”137 After a four-day hearing, the court rejected the State’s
arguments and ordered the continuation of salary assistance on two
grounds. First, it was “critical to the success of the desegregation plan
that the employees who carry it out are compensated at or near the
relevant market rates of compensation so that the District can attract and
retain employees with the training and experience necessary to
implement the Court’s plan.”138 Second, “[i]n order to improve the
desegregative attractiveness of the KCMSD, the District must hire and
retain high quality teachers, administrators and staff.”139

Also in 1992, the State filed a motion to have the school district
declared unitary with respect to the desegregation plan’s compensatory
education programs.\textsuperscript{140} Such a partial finding of unitary status would have meant that the school district had achieved constitutional compliance with respect to implementation of the compensatory programs.\textsuperscript{141} The State based its argument on the Supreme Court's decision earlier that spring in \textit{Freeman v. Pitts}.

\textsuperscript{142} The State contended that the compensatory education programs had been fully implemented, and that the district court should therefore have relieved the State of its obligation to continue funding them.\textsuperscript{143} The district court did not explicitly address the State's \textit{Freeman} arguments,\textsuperscript{144} but it ordered the State to continue funding its share of the compensatory programs for the 1992–93 school year.\textsuperscript{145}

The State appealed both the salary relief order and the denial of its motion for partial unitary status, and the Eighth Circuit affirmed both rulings.\textsuperscript{146} On the salary relief order, the court of appeals reiterated that the relevant harm was "the systemic reduction of student achievement and white flight[,] which require as part of the remedy quality education programs and magnet schools."\textsuperscript{147} The court found no error in the district court's conclusion that the salary relief was "necessary to implement the desegregation plan," and the record contained "substantial evidence" supporting the factual findings underpinning the order.\textsuperscript{148} As to the State's motion for partial unitary status, the court of appeals conceded that the district court had not explicitly addressed the State's arguments, but found it clear that the district court had considered and rejected them.\textsuperscript{149} The court looked to comments made by the district court from the bench and in subsequent orders, which revealed the district court's conviction that there remained vestiges of the unconstitutional dual system in the KCMSD.\textsuperscript{150} Specifically, the district court's order of April 16, 1993, had stated that "there had been a trend of improvement in

\textsuperscript{141} See supra note 73.
\textsuperscript{142} 503 U.S. 467 (1992).
\textsuperscript{143} See Jenkins, 11 F.3d at 760.
\textsuperscript{144} Jenkins, 1992 WL 551569; see also Jenkins, 11 F.3d at 760 (noting that district court rejected State's \textit{Freeman} arguments "without comment").
\textsuperscript{145} Jenkins, 1992 WL 551569, at *3.
\textsuperscript{146} Jenkins, 11 F.3d 755.
\textsuperscript{147} Id. at 767.
\textsuperscript{148} Id. at 768.
\textsuperscript{149} Id. at 760 ("In granting the funding, it is evident that the district court rejected the State's arguments.").
\textsuperscript{150} See id. at 761–63.
academic achievement, but that the school district was far from reaching its maximum potential because KCMSD is still at or below national norms at many grade levels." An equally divided Eighth Circuit denied rehearing en banc.\(^{152}\)

C. The Supreme Court's Decision in Jenkins

In a five to four decision, the Supreme Court reversed.\(^{153}\) Chief Justice Rehnquist, writing for the Court, first addressed the district court's salary relief order. Invoking the well-settled principle that "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation,"\(^{154}\) he stated that a district court's desegregation remedy "must directly address and relate to the constitutional violation itself."\(^{155}\) The essential question was therefore whether the salary increases "rest[ed] upon their serving as proper means to the end of restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct."\(^{156}\)

The starting point for the Court's analysis was its decision in \textit{Milliken v. Bradley (Milliken I)}.\(^{157}\) In that case, the Court had stated that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."\(^{158}\) Thus, "[t]he proper response to an intradistrict violation is an intradistrict remedy that serves to eliminate the racial identity of the schools within the effected [sic] school district by eliminating, as far as practicable, the vestiges of \textit{de jure} segregation in all facets of their operations."\(^{159}\) In \textit{Jenkins}, the district court had explicitly found that there had been no interdistrict violation when it dismissed the surrounding suburban school districts, so the appropriate remedy was "to eliminate to the extent practicable the vestiges of prior \textit{de jure} segregation within the KCMSD: a system-wide reduction in student achievement and the existence of 25 racially

\(^{151}\) Id. at 761–62.
\(^{154}\) Milliken v. Bradley, 433 U.S. 267, 280 (1977) (\textit{Milliken II}).
\(^{155}\) Jenkins, 115 S. Ct. at 2049 (quoting \textit{Milliken II}, 433 U.S. at 282).
\(^{156}\) Id.
\(^{158}\) Id. at 745.
\(^{159}\) Jenkins, 115 S. Ct. at 2050 (citations omitted).
identifiable schools with a population of over 90 percent black students."

In the Court's view, the salary assistance order was an illicit interdistrict remedy that exceeded the limits imposed by \textit{Milliken I}. The Court reasoned that, because the purpose of the salary relief was to enhance the KCMSD's "desegregative attractiveness," it was designed to have interdistrict effects. That is, by attempting to attract nonminority students from outside the KCMSD, the challenged order sought to remedy interdistrict racial imbalances. The Court found that this objective was beyond the district court's remedial power, for it constituted an interdistrict remedy for a violation confined to a single school district. "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."

The Court also was troubled by the open-endedness of the district court's pursuit of "desegregative attractiveness" and "suburban comparability." While every improvement or increased expenditure in the KCMSD might theoretically attract a larger nonminority enrollment, "this rationale is not susceptible to any objective limitation." These justifications permitted the district court "limitless authority" to impose its own educational policy choices on the KCMSD and the State. Nor are these rationales susceptible to limits of duration. Even though the KCMSD currently spends roughly twice as much per student as the surrounding school districts, the district court has continued to order more programs and greater expenditures in the name of desegregative attractiveness. There simply is no definable limit to ascertain when the

\begin{enumerate}
\item Id.
\item Id. at 2051 (calling order's "purpose [of] attract[ing] nonminority students from outside the KCMSD schools" an "interdistrict goal").
\item Id. ("[T]his interdistrict goal is beyond the scope of the \textit{intradistrict} violation identified by the District Court.").
\item Id.
\item See id. at 2050, 2054–55.
\item Id. at 2054.
\item Id. ("This case provides numerous examples demonstrating the limitless authority of the District Court operating under this rationale."); \textit{see also Missouri v. Jenkins, 495 U.S. 33, 76 (1990) (Kennedy, J., concurring)} (contending that district court has used desegregative attractiveness "as the hook on which to hang numerous policy choices about improving the quality of education in general within the KCMSD").
\item Jenkins, 115 S. Ct. at 2054 (noting that per pupil expenditures excluding capital costs in surrounding suburban districts ranged from $2354 to $5956, whereas KCMSD spent $7665.18 per student).
\end{enumerate}
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KCMSD has become sufficiently "attractive." This, the Court stated, flouted its well settled principles that the "local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution."\(^ {168}\)

The Court's discussion of the partial unitary status issue was more brief. The Court noted that the district court's failure to explicitly address the State's Freeman arguments "needlessly complicated" the Court's review.\(^ {169}\) Thus, like the court of appeals, the Supreme Court turned to the district court's subsequent order mentioning student achievement to illuminate the court's decision to deny the State's motion for partial unitary status.\(^ {170}\) The Court held that the district court's conclusion that the KCMSD was not desegregated to the extent practicable "because the District is still at or below national norms at many grade levels" constituted error: "[T]his clearly is not the appropriate test to be applied in deciding whether a previously segregated district has achieved partially unitary status."\(^ {171}\) Student achievement is the result of many factors, several of which are "beyond the control of the KCMSD and the State."\(^ {172}\) And "[s]o long as these external factors are not the result of segregation, they do not figure in the remedial calculus."\(^ {173}\) By basing its denial of the State's motion on student test scores, the district court had "unwarrantably postpone[d] the day when the KCMSD will be able to operate on its own."\(^ {174}\)

IV. SIGNS IN THE REASONING: THE IMPLICIT MESSAGE OF JENKINS

The Court's decision in Jenkins certainly disappointed proponents of court-enforced desegregation in Kansas City itself.\(^ {175}\) Although Jenkins

\(^{168}\) Id. (citation omitted).

\(^{169}\) Id. at 2055.

\(^{170}\) See id.

\(^{171}\) Id.

\(^{172}\) Id. at 2056.

\(^{173}\) Id.

\(^{174}\) Id.

technically reversed only the district court's salary assistance order, it also called into question most of the school district's other remedial programs, such as those providing for magnet schools and capital improvements, as the district court had justified those, too, at least in part on the rejected goal of desegregative attractiveness. *Jenkins* therefore hastened the end of state-funded desegregation remedies in the KCMSD, concluding one of the most extensive efforts in American history to improve educational opportunities as a remedy to de jure segregation.

The State of Missouri and the KCMSD together have spent between $1.2 billion and $1.7 billion on improvements to the school district. In many respects, the KCMSD is now state-of-the-art; it offers students, among other things, a 3500 square-foot dust-free diesel mechanics room, a model United Nations facility wired for language translation, a 2000 square-foot planetarium, and a temperature-controlled art gallery. But the State has borne most of the costs of these improvements, so when state funding ends, the KCMSD will be unable to maintain these programs and facilities. The Supreme Court's decision in *Jenkins* already has forced the district to scale back some of the compensatory programs for the 1995–96 school year. At the same time, student achievement in

"touch[ed] on quality of life, residential retention and economic development of Kansas City as a whole, and so I am very concerned").

176. *See supra* note 2.

177. *See Jenkins v. Missouri*, 19 F.3d 393, 397 (8th Cir. 1994) (denial of rehearing en banc) (Beam, J., dissenting) ("Some observers have described it as the most ambitious and expensive remedial program in the history of school desegregation."), rev'd, 115 S. Ct. 2038 (1995); Theodore M. Shaw, *Missouri v. Jenkins: Are We Really a Desegregated Society?*, 61 Fordham L. Rev. 57, 59 (1992) ("In Kansas City we have seen the most extensive and expensive 'desegregation' remedy ever ordered by any court.").


181. For instance, the district has suspended its program of providing free transportation for students attending KCMSD magnet schools who reside outside the district and has stated that it may have to charge such students tuition beginning in the 1996–97 school year. Donna McGuire, *Schools See Loss from Suburbs: Desegregation Ruling's Fallout Begins to Settle on the KC Magnet Program*, K.C. Star, Aug. 23, 1995, at A1. As a result, roughly 40% of the 1580 suburban students who had planned to attend KCMSD magnet schools for the 1995–96 school year have withdrawn from the program. *Id.*
the district remains disappointingly low; KCMSD students still rank well below national norms in test scores for reading and math at most grade levels. Discouragingly, the Court’s decision in Jenkins means that desegregation remedies will soon end in Kansas City without their having significantly improved the educational outcomes of KCMSD students, the central objective of the desegregation project.

Beyond Kansas City, however, the Court’s explicit holdings in Jenkins appear comparatively benign. The decision did not announce doctrinal principles significantly detrimental to the future of court-enforced desegregation. First, the relevant harm in Jenkins was a system-wide reduction in student achievement. The principles announced by the Court therefore bear most directly on cases involving a similar harm, for example, Milliken II cases. In the vast majority of school desegregation cases, however, the relevant harm is continuing racial imbalances in various facets of the school district’s operations, such as faculty or student assignments. Thus, the future applicability of Jenkins’s two explicit holdings likely will be confined to the minority of school desegregation cases in which the district court has found a reduction in student achievement and consequently ordered compensatory programs.

Second, within the category of Milliken II cases, the Court’s holdings were neither pathbreaking nor surprising. That an interdistrict remedy is inappropriate in a case involving a purely intradistrict violation has been well settled for more than twenty years, since the Court decided Milliken I. Jenkins expands this principle to some degree by characterizing the district court’s salary relief order as an interdistrict remedy, even though it placed affirmative obligations only on the KCMSD. But no other federal district court ever has explicitly justified remedial compensatory educational programs in a desegregation remedy on the ground of “desegregative attractiveness” or “suburban comparability.” Moreover, the Court’s pronouncement that a district court cannot tie a school district’s achievement of unitary status to its students’ test scores relative to national norms, although undecided prior to Jenkins, was predictable and understandable. The relationship between past discrimination and

182. See, e.g., Farney, supra note 178, at A6 (reporting that “[t]est scores show that Kansas City students generally meet or exceed national test-score averages in grades kindergarten through three, begin tailing off in middle school and slip badly in high school”).

183. See, e.g., Freeman v. Pitts, 503 U.S. 467, 480–84 (1992) (discussing racial imbalances in school district’s student assignments, faculty and staff assignments, and quality of education).

current test scores is tenuous and extraordinarily difficult to verify empirically, and the Court consistently has held that desegregation remedies must be limited to alleviating conditions more directly and verifiably traceable to the constitutional violation. 185 To mandate the continuation of court supervision until student achievement reached some specified level would hold a school district hostage to a variety of forces over which it has no control, and the effects of which it lacks the resources to combat.

But while Jenkins’ s explicit holdings were relatively unremarkable, the way the Court reached its decision was not. The reasoning of the majority opinion contained at least three significant flaws, where the Court either ignored or misconstrued well established doctrinal principles. And each of these missteps was crucial to permitting the Court to reach a holding that substantially undermined the continuation of desegregation remedies in the KCMSD. Jenkins therefore shows that the Court is willing to forego doctrinal consistency to achieve the extrinsic goals of curtailing desegregation remedies and expediting the return of control over school districts to local officials. As such, Jenkins reveals first that the Court’s approach to desegregation cases has changed, and second that the Court is unwilling to provide an explicit rationale for this shift.

A. Conceptualizing “Interdistrict Remedy” Expansively

The first telling aspect of the Court’s reasoning in Jenkins was its construction of the term “interdistrict remedy.” The Court rejected the district court’s salary relief order because it exceeded the scope of the court’s remedial authority. 186 Salary assistance that aimed in part to attract nonminority students to the KCMSD constituted an interdistrict remedy to an intradistrict constitutional violation. 187 A crucial step in the Court’s analysis, then, was to characterize the salary relief order as an interdistrict remedy: Because the salary assistance was “not designed solely to redistribute the students within the KCMSD in order to eliminate racially identifiable schools” but instead “to attract nonminority students from outside the KCMSD,” it was an “interdistrict

185. See, e.g., Milliken v. Bradley, 433 U.S. 267, 281–82 (1977) (Milliken II) (“The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself.”).
186. See supra notes 153–68 and accompanying text.
goal” that was “beyond the scope of the intradistrict violation identified by the District Court.”

But this conceptualization of the challenged order is, at best, counterintuitive. The order commanded only that the State continue to assist the school district in funding KCMSD faculty and staff salaries, so that those salaries would be competitive with those offered by surrounding school districts. The affirmative obligations imposed by the order were purely intradistrict; they affected only the salaries of KCMSD faculty and staff. The only sense in which the order was “interdistrict” was that it was partly designed to enhance the KCMSD’s attractiveness relative to surrounding schools, and thereby potentially entice some students attending schools outside the school district to enroll in KCMSD schools.

The best understanding of the salary relief order is not as an interdistrict remedy but as an intradistrict remedy with potential interdistrict effects. As such, it was virtually indistinguishable from any other compensatory education remedy in a desegregation case. As the Court acknowledged in the majority opinion in Jenkins, any remedial program that improves the quality of education in a formerly segregated district will enhance that school district’s attractiveness relative to surrounding schools. What distinguishes the salary relief order in Jenkins is only that the district court explicitly justified its imposition in part on the remedy’s ability to have such an interdistrict effect. But this hardly transforms an otherwise purely intradistrict remedy into an interdistrict remedy. Moreover, to the extent that the district court did intend the order to have an interdistrict effect, that effect was so unintrusive on the autonomy of surrounding school districts as to be de minimis. The order required nothing of any school district other than the KCMSD. Any transfer of students into Kansas City schools due to the educational improvements in the district was purely voluntary.

Whether the salary relief order was an intradistrict or an interdistrict remedy might have been murkier had the district court explicitly made the KCMSD’s achievement of unitary status contingent on its attraction of a minimum number of nonminority students from outside the district. In that case, the remedy would have explicitly required a particular interdistrict effect—the redistribution of nonminority students between

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188. Id. at 2051.
189. Id. at 2054 (“It is certainly theoretically possible that the greater the expenditure per pupil within the KCMSD, the more likely it is that some unknowable number of nonminority students not presently attending schools in the KCMSD will choose to enroll in those schools.”).
the KCMSD and the surrounding suburban districts—and mandated that the compensatory programs remain in place until that effect had occurred. This would have come closer to blurring the line between an intradistrict and an interdistrict remedy because it would have more closely approximated requiring innocent school districts to participate in an interdistrict transfer of students. But the district court imposed no such requirement in Jenkins; it merely justified the continuation of salary assistance in part on the ground that it might induce more nonminority students to enroll voluntarily in KCMSD schools. It therefore was virtually indistinguishable from any other Milliken II remedial program.

The curiousness of the Court’s conceptualization of the term “interdistrict remedy” is made more clear by comparing Jenkins’s salary relief order to the interdistrict remedy rejected in Milliken I, the decision on which the Court relied exclusively in overturning the order. Milliken I, which involved the Detroit public school system, is the only other Supreme Court decision in which the interdistrict/intradistrict distinction affected the case’s outcome. As in Jenkins, the district court had found that the school district and the State of Michigan were liable for the maintenance of de jure segregation in Detroit’s public schools, when the district court made its liability finding, the student population in Detroit schools was roughly sixty-four percent African-American, while nearly all of the students in the school districts surrounding Detroit were white. Thus, regardless of how integrated the schools were within the district, a purely intradistrict remedy would have left “the entire Detroit public school system racially identifiable.”

The district court concluded that the Constitution required the implementation of a desegregation plan that guaranteed Detroit students, the victims of intentional discrimination, an integrated education. It therefore ordered a metropolitan-wide remedy involving fifty-three

190. See id. at 2048–53.
192. Id. at 721–22.
195. Milliken I, 418 U.S. at 739 (quoting earlier order of the district court).
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suburban school districts.\textsuperscript{196} The plan called for extensive mandatory busing, sending suburban students to inner-city schools and vice-versa; it assured that there would be a measure of racial balance in the public schools of the entire Detroit metropolitan area.\textsuperscript{197} And the court mandated suburban school districts’ participation, even though the plaintiffs had not claimed that any of them had violated the Constitution.\textsuperscript{198}

The Supreme Court held that the district court’s remedy exceeded the scope of the relevant constitutional violations.\textsuperscript{199} The Court stated that school district “[b]oundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.”\textsuperscript{200} Particularly troublesome to the Court were the scope of the remedy, its intrusion on the autonomy of school districts that had committed no constitutional violations, and its placement of the district court in the role of administrator of a consolidated, “super” school district.\textsuperscript{201} “Entirely apart from the logistical and other serious problems attending large-scale transportation of students, the consolidation [of the fifty-four districts] would give rise to an array of other problems in financing and operating this new school system.”\textsuperscript{202} The district court’s plan effectively granted itself legislative authority to resolve the myriad

\textsuperscript{196} Id. at 733–34.
\textsuperscript{197} Id. at 733–36; see also Wilkinson, supra note 13, at 221 (noting that, under district court’s desegregation plan in Milliken, “the racial composition of the schools throughout the new district would supposedly be similar”).
\textsuperscript{198} Milliken I, 418 U.S. at 729–30.
\textsuperscript{199} Id. at 745.
\textsuperscript{200} Id. at 741.
\textsuperscript{201} Id. at 741–47.
\textsuperscript{202} Id. at 743. The Court listed specifically several of the questions raised by the district court’s remedy that it found most troubling:

What would be the status and authority of the present popularly elected school boards? Would the children of Detroit be within the jurisdiction and operating control of a school board elected by the parents and residents of other districts? What board or boards would levy taxes for school operations in these 54 districts constituting the consolidated metropolitan area? What provisions could be made for assuring substantial equality in tax levies among the 54 districts, if this were deemed requisite? What provisions would be made for financing? Would the validity of long-term bonds be jeopardized unless approved by all of the component districts as well as the State? What body would determine that portion of the curricula now left to the discretion of local school boards? Who would establish attendance zones, purchase school equipment, locate and construct new schools, and indeed attend to all the myriad day-to-day decisions that are necessary to school operations affecting potentially more than three-quarters of a million pupils?

Id.
issues regarding the plan’s implementation and implicitly made itself the superintendent of the new metropolitan-wide school district for the indefinite future. Thus, not only did the plan impose substantial costs on innocent school districts, both financially and in terms of restricted autonomy, it also gave the district court “a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.”

The Court clarified its holding in *Milliken I* two terms later in *Hills v. Gautreaux.* In that case, the Court stated that it had found the interdistrict transfer remedy in *Milliken I* impermissible “not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.” Specifically, the district court’s consolidation plan “would have eliminated numerous independent school districts or at least have dispensed important powers,” even though those authorities “were not implicated in unconstitutional conduct.” It was this “substantive impact . . . on separate and independent school districts” that made the *Milliken I* remedy unwarranted. Consequently, “[n]othing in the *Milliken* decision suggest[ed] 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.”

By holding that the salary assistance order in *Jenkins* was an interdistrict remedy, the Court misapplied the principles of *Milliken I.* As *Gautreaux* confirmed, the remedy in *Milliken I* was “interdistrict” because it placed significant affirmative obligations on “innocent”
suburban school systems, usurping much of their legally conferred authority; it essentially abolished the boundaries of fifty-four school districts.\textsuperscript{212} By contrast, the salary assistance order in \textit{Jenkins} imposed no affirmative obligations on any school district other than the one in which the violation occurred, and it did not encroach on any other school system’s autonomy.\textsuperscript{213} The only sense in which the salary relief order was interdistrict was that it was partly designed to induce some purely voluntary interdistrict effects. The Court’s conceptualization of the term “interdistrict remedy” in \textit{Jenkins} ignored this distinction. It simply equated any contemplated interdistrict effects with an interdistrict remedy.

The Court stated in \textit{Jenkins} that “[n]othing in \textit{Milliken} I suggests that the District Court in that case could have circumvented the limits on its remedial authority by requiring the State . . . to implement a magnet program designed to achieve the same interdistrict transfer of students that we held was beyond its remedial authority.”\textsuperscript{214} But this statement of the issue turns the appropriate inquiry on its head. More relevant is that nothing in \textit{Milliken} I indicated that a remedy having such indirect and unintrusive interdistrict effects as the salary relief order should be considered an interdistrict remedy. And left with no guidance from the Court’s previous decisions, the most straightforward and logical understanding of the order is as an intradistrict remedy intended to have some interdistrict impact. Nonetheless, the Court made no effort to wrestle with this conceptual issue. Instead, it broadly expanded the term

\textsuperscript{212} See Gewirtz, \textit{Choice in the Transition}, supra note 47, at 780 (contending that “[t]he point of \textit{Milliken} I ‘is not that a within-Detroit remedy would fully eliminate effects of the violation, but rather that an interdistrict remedy that would clearly have been more effective was thought to impose costs that were too great’—that is, it would excessively interfere with local autonomy”) (quoting Paul Gewirtz, \textit{Remedies and Resistance}, 92 Yale L.J. 585, 647 (1983) [hereinafter \textit{Remedies and Resistance}]).

\textsuperscript{213} Justice Souter observed in his dissent that the salary relief order was not “an interdistrict remedy in the sense that \textit{Milliken} I used the term.” \textit{Jenkins}, 115 S. Ct. at 2087 (Souter, J., dissenting). Paul Gewirtz has similarly noted that:

\textit{[O]}rdering an interdistrict transfer plan simply does not infringe on the interests of local autonomy that were \textit{Milliken} I’s concern. The very individualistic and nonsystemic features of a choice mechanism which make it somewhat troublesome in terms of vindicating victims’ rights make it untroublesome as a threat to the “local autonomy” values identified in \textit{Milliken} I.

Gewirtz, \textit{Choice in the Transition}, supra note 47, at 781; see also id. at 780 (“\textit{Milliken} I reflects the Court’s unease with coercive and disruptive busing-and-consolidation remedies. But an interdistrict transfer provision, which relies on the voluntary choices of individuals, has an altogether different character.”).

\textsuperscript{214} \textit{Jenkins}, 115 S. Ct. at 2052.
“interdistrict remedy” by using it to describe a remedy substantially different than that rejected in *Milliken I*.

**B. Stretching to Hold That the District Court’s Goal of “Desegregative Attractiveness” Was Inappropriate**

The second revealing aspect of the Court’s opinion in *Jenkins* is that it even reached the question of whether the district court’s goal of enhancing the school district’s desegregative attractiveness exceeded its remedial authority. The district court had justified the salary relief order on two separate grounds, both of which independently supported salary assistance as an element of the KCMSD’s desegregation remedies. One of the court’s justifications was to increase the district’s nonminority enrollment through voluntary interdistrict transfers. The district court’s other rationale—that salary relief was a necessary component of the overall program to improve the quality of education in the KCMSD—was less controversial and almost certainly within the district court’s remedial authority. But the Court ignored this justification and only addressed the propriety of the “desegregative attractiveness” rationale. Had the Court first considered the district court’s other justification, current doctrine almost certainly would have mandated that the Court affirm the order, making any assessment of “desegregative attractiveness” gratuitous.

The district court issued the specific remedial order challenged by the State on June 25, 1992.215 In that order, the court approved the continuation of salary relief for KCMSD employees, with the relief to be paid out of the jointly-funded desegregation remedies budget.216 Salary assistance for KCMSD faculty and staff originally became a part of the school district’s desegregation plan in September 1987.217 At that time, the district court found that “the KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program. Therefore, it is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including high quality faculty.”218 Originally conceived, then, the remedy of salary

218. Id. at 410.
assistance was grounded in the goal of improving the quality of education in the school district, a justification that was almost certainly within the scope of the district court’s unchallenged authority to remedy the “system wide reduction in student achievement.”

As discussed earlier, the plaintiffs and the KCMSD sought a continuation of the salary relief in 1992, which the State opposed. After a four-day hearing, the district court approved the continuation of salary assistance. The court justified its order in part as a means “to improve the desegregative attractiveness of the KCMSD”; it stated that, to attract nonminority enrollment and retain its current white students, “the District must hire and retain high quality teachers, administrators and staff.” But this was not the court’s exclusive (or even its primary) justification for salary relief. To the district court, salary assistance was necessary for the KCMSD to implement its overall desegregation plan:

The State’s proposal would cause severe harm to the desegregation effort. It is critical to the success of the desegregation plan that the employees who carry it out are compensated at or near the relevant market rates of compensation so that the District can attract and retain employees with the training and experience necessary to implement the Court’s plan. A salary roll back would result in excessive employee turnover, a decline in the quality and commitment of work and an inability of the KCMSD to achieve the objectives of the desegregation plan.

The district court therefore concluded that “[I]logic and empirical data show that in the absence of desegregation funding for salaries, the District will not be able to implement its desegregation plan.”

219. Jenkins v. Missouri, 639 F. Supp. 19, 24 (W.D. Mo. 1985), aff’d as modified, 807 F.2d 657 (8th Cir. 1986), cert. denied, 484 U.S. 816 (1987). Plaintiffs sought additional salary increases in 1990. Jenkins, 11 F.3d at 766. The district court held hearings lasting several days, after which the two parties reached a settlement. Id. The salary increases were to be paid equally by the State and the KCMSD, with the settlement specifically providing that joint and several liability did not apply. Id.


221. Id. at *9.

222. Id. at *8.

223. Id.

224. Id. at *9; see also id. at *7 (“There is no question but that a salary roll back would have effects that would drastically impair implementation of the desegregation remedy.”).

225. Id. at *6.
The Eighth Circuit affirmed the district court’s order, reiterating that the district court had found that “high quality personnel are necessary . . . to implement specialized desegregation programs intended to improve educational opportunities” and “to ensure that there is no diminution in the quality of its regular education programs.”226 The court of appeals acknowledged that one of the order’s goals was to “regain some portion of the white students who have fled the District and retain those that are still there.”227 But the court also emphasized that the salary relief was designed “to improve the educational lot of the victims of unconstitutional segregation” and to “compensat[e] the victims” of the de jure segregation in the KCMSD.228

As the case came to the Supreme Court, then, the question for review was broader than merely the propriety of the district court’s goal of enhancing the school district’s desegregative attractiveness. Precisely, the issue was whether either of the two justifications articulated by the district court were sufficient to sustain the salary relief order.229 Addressing only the district court’s desegregative attractiveness rationale was insufficient to answer this question, for if either justification supported the order, the Court was obligated to affirm. And because the goal of improving the KCMSD’s quality of education almost certainly justified the salary relief order, any discussion about the goal of desegregative attractiveness should have been unnecessary to the disposition of the issue. By limiting its analysis to whether the district court had exceeded its authority in pursuing the goal of desegregative attractiveness,230 the Court essentially ignored its well settled rule of resolving only those questions necessary to the disposition of the case.231

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227. Id. at 767.
228. Id.
229. As phrased in the State’s petition for certiorari, the question presented was whether the order “directly address[ed] and relat[ed] to the constitutional violation and [was] tailored to cure the condition that offends the Constitution.” See Missouri v. Jenkins, 115 S. Ct. 2038, 2076 (1995) (Souter, J., dissenting). Indeed, Chief Justice Rehnquist wrote in the majority opinion that the Court had “granted certiorari to consider . . . whether the District Court exceeded its constitutional authority when it granted salary increases to virtually all instructional and noninstructional employees of the KCMSD.” Id. at 2046.
230. This is most evident in the two sentences composing the concluding paragraph of the Court’s analysis of the salary relief order. In the first sentence, the Court stated that the district court’s effort to promote desegregative attractiveness “results in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools within the KCMSD that we believe it is beyond the admittedly broad discretion of the District Court.” Jenkins, 115 S. Ct. at 2055. In the next sentence, the Court jumped to invalidating the salary assistance order without any reference to the district court’s additional justification: “In this posture, we conclud[e] that the District
The Court's sidestepping of this rule of self-restraint is understandable, as it enabled the Court to speak much more broadly about the propriety of desegregation remedies in the KCMSD. Salary relief was only one of several compensatory desegregation programs that the district court had justified at least in part on the ground of enhancing the school district's desegregative attractiveness. The district court had also invoked this rationale to support some of the largest aspects of the overall desegregation remedy, including the magnet schools program and capital improvements in the district. Thus, even though the salary relief order was the only aspect of the desegregation remedy before the Court, the decision in Jenkins effectively called into question almost all of the compensatory educational programs in the KCMSD. And the Court clearly was aware of these ancillary consequences. It expressly referred to these other programs—and how the district court had justified them on the ground of desegregative attractiveness—in the majority opinion.

Court's order of salary increases, which was grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD, is simply too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation." Id. (internal quotation marks omitted).

See, e.g., Mills v. Rogers, 457 U.S. 291, 305 (1982) (stating Court's "settled policy to avoid unnecessary decisions of constitutional issues"); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 294 (1982) (recognizing "Court's policy of avoiding the unnecessary adjudication of federal constitutional questions"); FCC v. Pacifica Found., 438 U.S. 726, 734 (1978) (noting that it is Court's "settled practice to avoid the unnecessary decision of [constitutional questions]"); Kremer v. Bartley, 431 U.S. 119, 136 (1977) (recognizing Court's "long-established rule" not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (quoting Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885)); Culombe v. Connecticut, 367 U.S. 568, 635–36 (1961) (Warren, C.J., concurring) ("It has not been the custom of the Court, in deciding the cases which come before it, to write lengthy and abstract dissertations upon questions which are neither presented by the record nor necessary to a proper disposition of the issues raised."). As the Court itself has recognized, "this self-imposed limitation on the exercise of [the] Court's jurisdiction has an importance to the institution that transcends the significance of particular controversies." City of Mesquite, 455 U.S. at 294.


See id. at 34–35 (ordering KCMSD to "conduct extensive surveys within the KCMSD and throughout the Kansas City, Missouri metropolitan area in order to determine what magnet themes appear to be most likely to attract non-minority enrollment").

Id. at 40 ("The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting nonminority enrollment.").

Missouri v. Jenkins, 115 S. Ct. 2038, 2043–44 (1995). In fact, Justice O'Connor noted in her concurrence that other remedial programs ordered by the district court "may also be improper to the
Obviously, as the final arbiter of federal law, the Supreme Court must sometimes go beyond the precise issues presented by a case to make broader statements about an unsettled area of law. And in any given case, whether a particular question is properly before the Court can be uncertain. But to reject a district court’s remedial order without having addressed one of only two of its justifications seems to be a clear breach of the Court’s duty to review only those aspects of a lower court’s decision necessary to affirm or reverse the judgment, particularly when that second justification was almost certainly within the district court’s remedial authority.

C. Rejecting the District Court’s Factual Finding Regarding White Flight from the KCMSD

A third telling facet of the Court’s decision in Jenkins is that it overturned a nine-year-old factual finding by the district court. A critical step to the Court’s analysis was to show that the relevant constitutional violations had not caused any interdistrict effects. The Court could not have held that the district court’s order requiring further salary assistance was a constitutionally unwarranted interdistrict remedy if de jure segregation in the KCMSD had in fact led to such effects. Milliken I expressly empowered district courts to impose interdistrict remedies where the “racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.” Indeed, in several cases subsequent to Milliken I federal courts have approved interdistrict remedies due to the existence of such interdistrict segregative effects. So if segregation

\[236. \text{See id. at 2060 (O’Connor, J., concurring) (“[W]here a purely intradistrict violation has caused a significant interdistrict segregative effect, certain interdistrict remedies may be appropriate.”).}
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\[238. \text{See, e.g., Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404 (8th Cir. 1985), cert. denied, 476 U.S. 1186 (1985); Liddell v. Missouri, 731 F.2d 1294 (8th Cir.) (approving consent decree that contained interdistrict transfer provision), cert. denied, 469 U.S. 816 (1984); United States v. Board of Sch. Comm’rs, 637 F.2d 1101, 1104 (7th Cir.) (approving interdistrict student assignment plan in Indianapolis because district court found that “official action, taken with a discriminatory purpose, was a substantial cause of interdistrict segregation”), cert. denied, 449 U.S. 838 (1980); Morrilton Sch. Dist. No. 32 v. United States, 605 F.2d 222 (8th Cir. 1979), cert. denied, 444 U.S. 1071 (1980); United States v. Missouri, 515 F.2d 1365 (8th Cir. 1975); Hoots v. Pennsylvania, 510 F. Supp. 615, 619 (W.D. Pa.) (holding that interdistrict remedy was appropriate because “racially discriminatory acts of the state ha[d] been a substantial cause of}
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within the KCMSD had caused nonminority students to leave Kansas City schools and enroll in private schools or surrounding suburban districts, there would have existed sufficient interdistrict segregative effects to justify an interdistrict remedy.

But the Court faced a serious obstacle to this line of reasoning: The district court had in fact determined that segregation in the KCMSD had caused white students to leave Kansas City schools, and the court of appeals had affirmed this conclusion on several occasions. The Court traditionally affords a district court’s factual determinations broad deference, particularly when concurred in by a court of appeals, and even more particularly in school desegregation cases. But the Court showed no such deference in Jenkins. Indeed, its rejection of the district court’s factual finding was rather cursory, dismissing it as “inconsistent internally” and “inconsistent with the typical supposition” that white flight results from desegregation rather than de jure segregation. This aspect of Jenkins was extraordinary: It overturned a nine-year-old factual finding concurred in by two lower courts, it offered questionable reasons for doing so, and it directly contradicted the reasoning of an opinion signed by four members of the Jenkins majority just three months earlier.

1. **The District Court’s Finding Regarding White Flight and the Appropriate Standard of Review**

The district court identified the primary harm caused by de jure segregation in the KCMSD as a system-wide reduction in student achievement. But the court also found that segregation in Kansas City schools, while limited to only that school district, had “led to white flight from the KCMSD to suburban districts [and] large numbers of students leaving the schools of Kansas City and attending private schools.” The Eighth Circuit affirmed this factual determination on at least three
separate occasions. In fact, in its 1993 decision ultimately reversed by the Supreme Court in *Jenkins*, the court of appeals indicated that the State might have waived any claim of error regarding the district court’s conclusion regarding white flight. Even those Eighth Circuit judges who believed that the district court’s salary relief order was constitutionally unwarranted concurred in the court’s in the white flight finding. And the Supreme Court’s majority opinion in *Jenkins*

243. In August 1988, on direct appeal from the district court’s initial remedial order, the court of appeals expressly approved the district court’s conclusion that segregation in the KCMSD had “caused it to lose significant numbers of its white students and that regaining those students [was] a necessary part of restoring the victims to the condition they would have enjoyed had there been no constitutional violation.” *Jenkins v. Missouri*, 855 F.2d 1295, 1303 (8th Cir. 1988), aff’d in part and rev’d in part, 495 U.S. 33 (1990). The court of appeals also noted that “the preponderance of black students in the district was due to the State and KCMSD’s constitutional violations,” and that “the existence of segregated schools led to white flight from the KCMSD to suburban districts and to private schools.” *Id.* at 1302.

Three years later, in August 1991, the Eighth Circuit again approved the district court’s factual determination concerning white flight. *Jenkins v. Missouri*, 942 F.2d 487, 492 (8th Cir.), cert. denied, 502 U.S. 967 (1991). The State had appealed a district court order approving a contingency plan that had modified the KCMSD’s admissions policy for its magnet schools. *Id.* at 488. The district court’s white flight finding was material to the dispute because, like the salary relief order, the court had approved the magnet school program partly for purposes of “establishing an environment designed to maintain and attract non-minority enrollment.” *Jenkins*, 855 F.2d at 1301-02. Addressing the State’s argument against the magnet school admissions order, the court of appeals reiterated that it had previously “pointed to district court findings . . . that segregation in KCMSD had caused the departure of whites in the system to private and suburban schools.” *Jenkins*, 942 F.2d at 491. The court of appeals accordingly affirmed the district court’s order, concluding that it saw “no abuse of discretion in the orders entered in this case, no legal error, and insofar as the findings are based upon findings of fact, no findings of fact that are clearly erroneous.” *Id.* at 492.

Finally, in its 1993 decision subsequently reversed by the Supreme Court, the court of appeals again affirmed the white flight finding. *Jenkins v. Missouri*, 11 F.3d 755, 768 (8th Cir. 1993), rev’d, 115 S. Ct. 2038 (1995). It restated that the vestiges of the unconstitutional dual school system identified by the district court were “reduced student achievement and white flight, resulting in the anomaly of a racially isolated school district in the midst of a population with a far different racial makeup.” *Id.* at 764. On these grounds, the district court had approved continued salary assistance both “to improve the educational lot of the victims of unconstitutional segregation” and “to regain some portion of the white students who have fled the District.” *Id.* at 767. The Eighth Circuit concluded that “[t]here was substantial evidence to support the district court’s findings.” *Id.* at 768.

244. Specifically, the court stated that the State had made “no claim that the findings of fact of the district court are clearly erroneous.” *Jenkins*, 11 F.3d at 767.

245. After a three-judge panel affirmed the salary assistance order in 1993, an equally divided en banc Eighth Circuit denied rehearing of the State’s challenge. *Jenkins v. Missouri*, 19 F.3d 393 (8th Cir. 1994) (denial of rehearing en banc), rev’d, 115 S. Ct. 2038 (1995). Judge Beam, joined by the four other judges, dissented from the denial of rehearing. *Id.* at 396-404 (Beam, J., dissenting). Although Judge Beam contended that the salary order should have been overturned, he nonetheless cited the district court’s white flight determination with approval: “‘White flight’[from the KCMSD] to private schools and to the suburbs was rampant,” and “[t]he district court[] correctly recognized that at least part of this problem was the consequence of the de jure segregation previously practiced under Missouri constitutional and statutory law.” *Id.* at 397.
expressly acknowledged that the district court had made this finding, as did Justice Thomas in his concurrence.

Because of trial courts' superior position for assessing the credibility of witnesses and for weighing evidence, their findings of fact come to appellate courts with a presumption of correctness. Rule 52(a) of the Federal Rules of Civil Procedure states that an appellate court can disturb a district court's factual conclusion only if it is "clearly erroneous." Rarely will a federal court of appeals, let alone the Supreme Court, find such error. In addition, the Supreme Court traditionally affords even greater deference to factual determinations concurred in by two lower courts. The Court has referred to this practice as the "two court rule," under which the Court "ordinarily" will not review factual findings made by a district court and approved by the court of appeals.

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246. Jenkins, 115 S. Ct. at 2052 (recognizing "the District Court's statement that segregation has 'led to white flight from the KCMSD to suburban districts').

247. Id. at 2063 (Thomas, J., concurring) (acknowledging that "the District Court indicated that post-1954 'white flight' was another vestige of the pre-1954 segregated system").


249. Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"); see also Jenkins v. Missouri, 855 F.2d 1295, 1300 (8th Cir. 1988) ("We have also recognized the importance of the district court's factual findings, which may not be disturbed unless clearly erroneous.").

250. The Supreme Court has emphasized that the "clearly erroneous" standard is quite deferential. It means that an appellate court cannot disturb a district court's factual determination unless the court "is left with the definite and firm conviction that a mistake has been made." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). That is, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the [appellate court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. City of Bessemer, 470 U.S. 564, 573–74 (1985); see also Amado v. Zant, 486 U.S. 214, 223 (1988) (quoting same). Where "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson, 470 U.S. at 574.

251. Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 275 (1985). The two court rule is a norm of self-restraint created by the Court itself to manage its own procedure. Monaghan, supra, at 275. And although the Court's invocation of the two court rule has been intermittent and its statements about its exact content somewhat vague, see Kevin M. Clermont, Procedure's Magical Number Three: Psychological Bases for Standards of Decision, 72 Cornell L. Rev. 1115, 1132 (1987), the rule has maintained its vitality. See Jenkins, 115 S. Ct. at 2084 (Souter, J., dissenting) (describing two court rule as an "accepted norm of [the Court's] appellate procedure"). For instance, the Court stated as recently as 1984 that its "usual practice" is to "accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals." NCAA v. Board of Regents, 468 U.S. 85, 95 n.15 (1984). And the Court stated four years earlier in Branti v. Finkel, 445 U.S. 507 (1980), that it is the Court's "settled practice [to] accept[] absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred." Id. at 512 n.6; see also Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 317 n.5 (1985) (stating that Court "has frequently noted its reluctance to disturb
must show that there exists some "extraordinary reason" to revisit the factual conclusion, or that the case presents "the most exceptional circumstances," where there is "a very obvious and exceptional showing of error."

findings of fact concurred in by two lower courts") (quoting Rogers v. Lodge, 458 U.S. 613, 623 (1982)); United States v. Doe, 465 U.S. 605, 614 (1984) (explaining that "[t]raditionally [the Court] ha[s] been reluctant to disturb findings of fact in which two courts below have concurred").

Reasons of institutional mission and division of labor between the three tiers of the federal courts counsel the Supreme Court to be even more reluctant than a court of appeals to reject a district court's factual finding. The purpose of the Supreme Court, at least under the modern regime of discretionary review, is to decide annually close to one hundred of the most pressing legal controversies of the day. It emphatically is not to micromanage the factual determinations of the hundreds of federal district courts. In contrast, the courts of appeal have no discretion in the cases that they review. They therefore review every appeal claiming that a district court's finding of fact was clearly erroneous.

When a court of appeals throws out an erroneous factual finding, it is fulfilling its mission as a backstop to review all alleged errors by a district court. But when the Supreme Court decides that a district court's factual finding was clearly erroneous, it expends scarce resources to decide issues with no precedential value. Moreover, if it comes to the Supreme Court after having been affirmed by the court of appeals, that finding has an additional guarantee of trustworthiness. The dissent raised these precise points in Kyles v. Whitley, 115 S. Ct. 1555, 1576-78 (1995) (Scalia, J., dissenting), an opinion signed by four of the justices in the Jenkins majority. See infra notes 255-63 and accompanying text.

252. In Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987), the Court stated that:

The Court of Appeals did not set aside any of the District Court's findings of fact that are relevant to this case. That is the way the case comes to us, and both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task.

Id.


254. Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949), aff'd in part on rehearing, 339 U.S. 605 (1950). In addition, Chief Justice Rehnquist, author of the majority opinion in Jenkins, has endorsed the two court rule on at least two occasions during his tenure on the Court. In United States v. Ceccolini, 435 U.S. 268 (1978), then-Justice Rehnquist invoked the Court's "traditional deference to the "two court rule"" in upholding a district court's factual determination that government investigators would have inevitably discovered certain evidence found during an illegal search. Id. at 273. And in an important school desegregation case in 1974, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), he chastised the Court in his dissenting opinion for effectively circumventing the rule. As in Jenkins, a central question in Keyes concerned the causal relation between segregation in one area of the city and racial imbalances in schools across town, only in Keyes the respective schools were part of the same school district. Id. at 207-13. The Court held that, in all cases of de jure segregation, racial imbalances within a school district's boundaries are presumptively related to the constitutional violation; the Court therefore remanded the case to the district court for further factual findings. Id. at 210, 213-14. Justice Rehnquist contended that the majority had chosen to remand the case, instead of reversing, because of the obstacle of the two court rule: "[I]t would be contrary to settled principles for this Court to upse: a factual finding sustained by the Court of Appeals. 'A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error.'" Id. at
Four justices in the *Jenkins* majority emphasized these grounds for deferring to trial courts' factual findings in a dissenting opinion filed only three months before *Jenkins*. In *Kyles v. Whitley*, the Court granted a prisoner's petition for habeas corpus, ruling that the court of appeals had misapplied *Brady v. Maryland* by failing to assess the cumulative value of evidence withheld by the state. Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, wrote a scathing dissent, in which he castigated the majority for revisiting a largely factual claim. He wrote that the majority "opinion—which considers a fact-bound claim of error rejected by every court . . . that previously heard it—is, so far as I can tell, wholly unprecedented." The only issue in *Kyles*, he contended, was whether the lower courts had misapplied the proper legal standard to the facts, an essentially factual determination. Not only does the Court generally not review factual findings, but it applies its policy of deference to such determinations "with particular rigor when [the] district court and court of appeals are in agreement as to what conclusion the record requires.

According to the dissent, the majority had breached a well established rule of self-restraint and ventured beyond its institutional competence in ignoring the two court rule. "The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise." In addition, the Supreme Court previously has given special weight to the factual determinations of district courts in school desegregation cases. Consider, for instance, the dispute between the majority and the dissent in *Columbus Board of Education v. Penick*. The district court had found that the public schools in Columbus, Ohio, were unlawfully

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258. See id. at 1576–78 (Scalia, J., dissenting).
259. Id. at 1576.
260. See id. at 1576–77.
261. Id. at 1577.
262. See id.
263. Id.
segregated prior to 1954, and that the school board had not fulfilled its constitutional obligation to disestablish the dual system.\footnote{265} The Supreme Court affirmed the district court’s judgment, but two dissenting justices would have rejected the district court’s conclusion that existing segregation in Columbus schools was traceable to intentional discrimination.\footnote{266} In rejoinder, the Court emphasized the importance of deferring to district courts on such issues: “[O]n the issue of whether there was a dual system in Columbus, Ohio, in 1954, on the record before us we are much more impressed by the views of the judges who have lived with the case over the years.”\footnote{267} The Court stated that the dissent’s “suggestion that this Court should play a special oversight role in reviewing the factual determinations of the lower courts in school segregation cases asserts an omnipotence and omniscience that we do not have and should not claim.”\footnote{268} Moreover, in \textit{Dayton Board of Education v. Brinkman} (\textit{Dayton II}),\footnote{269} decided the same day as \textit{Columbus}, the Court similarly recognized that, in the context of desegregation cases, “there is great value in appellate courts showing deference to the fact-finding of local trial judges.”\footnote{270}

Justice Stewart’s separate opinions in \textit{Columbus} and \textit{Dayton II}, frequently cited by lower federal courts,\footnote{271} express the same idea more forcefully. Justice Stewart wrote that “[t]he development of the law concerning school segregation has not reduced the need for sound factfinding by the district courts, nor lessened the appropriateness of
deference to their findings of fact."272 Appellate review of district court judgments in desegregation cases calls for "undiminished deference to the factual adjudications of the federal trial judges ... uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit."273 Determinations concerning intricate causal relationships, such as those between school segregation and demographic changes, are challenging enough for a trial court, which has the benefit of hearing live testimony. "The coldness and impersonality of a printed record, containing the only evidence available to an appellate court in any case, can hardly make the answers any clearer."274 Justice Stewart therefore concluded that in desegregation cases, "appellate courts should accept even more readily than in most cases the factual findings of the courts of first instance."275 Circuit courts subsequently have taken these pronouncements as establishing a rule of special deference to factual findings in school desegregation cases.276

2. The Court's Questionable Reasoning

Thus, as Jenkins came to the Supreme Court, there were at least three distinct reasons for the Court to afford extreme deference to the district court's conclusion that intradistrict segregation within the KCMSD had
caused white students to leave the district—Rule 52(a), the two court rule, and the tradition of special deference to factual findings in desegregation cases. Under these circumstances, one would have expected the Court to provide substantial justification for its decision to overrule the district court’s factual determination. But the Court’s opinion in *Jenkins* contained no serious weighing of the record. Instead, it rejected the district court’s finding because of its counterintuitiveness and its supposed inconsistency with the district court’s earlier finding that none of the suburban school districts had unlawfully discriminated: “The lower courts’ ‘findings’ as to ‘white flight’ are both inconsistent internally, and inconsistent with the typical supposition, bolstered here by the record evidence, that ‘white flight’ may result from desegregation, not *de jure* segregation.” 277 The Court made no effort in its opinion to discern what had led the district court to its conclusion. Indeed, *Jenkins* contains no discussion of what actually happened in KCMSD—what the demographic makeup of the district was in 1954, how and when it changed, or why the district court’s conclusion was implausible.

Particularly noteworthy was the Court’s failure at any point in the opinion to articulate the appropriate standard of review. *Jenkins* contains no reference to Rule 52(a); the phrases “clear error” and “clearly erroneous” do not appear in the opinion. Thus, the Court never attempted to explain why the district court’s white flight finding was implausible or impermissible in light of the record viewed as a whole. Nor did the Court ever mention the two court rule or its traditional deference to trial court’s factual findings in school desegregation cases. Consequently, the Court made no attempt to explain what “extraordinary reason” justified

277. Missouri v. Jenkins, 115 S. Ct. 2038, 2052 (1995) (footnote omitted). According to the Court, the finding was internally inconsistent because the district court, when dismissing the suburban school districts, had held that “this case involved no interdistrict constitutional violation that would support interdistrict relief.” *Id.* at 2050. But the district court had made this finding as part of its holding that a mandatory interdistrict remedy akin to that condemned in *Milliken I* was inappropriate. See *Jenkins v. Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984). The district court specifically had found that “Plaintiffs simply failed to show that those defendants had acted in a racially discriminatory manner that substantially caused racial segregation in another district.” *Id.* at 1488. Thus, read in context, the district court’s finding most likely meant that there were not sufficient interdistrict segregative effects—or discriminatory acts by suburban districts—to justify a mandatory interdistrict transfer plan. Moreover, to the extent that the district court’s statement about interdistrict effects referred to by the Court was unclear, its subsequent (and more specific) white flight finding resolved this ambiguity. By stating that *de jure* segregation in the KCMSD had caused nonminority students to leave the school district, the district court was necessarily saying that there had been *some* interdistrict effects. Reading the two rulings together, the first statement is properly understood as concluding that there were not sufficient interdistrict effects to justify a mandatory multi-district remedy.
revisiting this factual issue or what in *Jenkins* convinced the Court that there was "a very obvious and exceptional showing of error."

Nor did the majority make any attempt to explain why the arguments posed by the dissent in *Kyles* did not apply with equal force in *Jenkins*. As in *Kyles*, the district court and the court of appeals in *Jenkins* had both correctly stated the substantive law, namely that an interdistrict remedy was inappropriate in a case involving only intradistrict segregation.278 And both lower courts had correctly stated that the scope of the constitutional violation determines the scope of the remedy, so that all remedial orders must be tailored to address only the lingering effects of unlawful segregation.279 The sole contested issue about the salary relief order was whether the district court and the court of appeals had correctly applied these legal principles to the facts of the case. And this, in turn, depended entirely on whether segregation within the KCMSD had caused interdistrict segregative effects, a purely factual determination.

Also significant is the Court's statement in *Jenkins* that the "typical supposition"—"that 'white flight' may result from desegregation, not de jure segregation"—was "bolstered here by record evidence."280 This statement reveals a twofold misunderstanding of the proper question for review. First, the issue was not whether the desegregation of the KCMSD caused nonminority students to leave the district, but whether de jure segregation had had this effect; conceivably both contributed to white flight from the school district. Second, when an appellate court reviews any factual finding, the question is never whether the record supports a different conclusion. Rather, the issue is whether the record fails to support the finding under review. Thus, the appropriate question in *Jenkins* was whether the record lacked support for the district court's

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278. *Jenkins* v. Missouri, 807 F.2d 657, 662 (8th Cir. 1986) (en banc) ("Without an interdistrict violation and interdistrict effect, there is no constitutional wrong requiring an interdistrict remedy."); *cert. denied*, 484 U.S. 816 (1987); *Jenkins* v. Missouri, 593 F. Supp. 1485, 1488 (W.D. Mo. 1984) (citing *Milliken I* and stating that plaintiffs could not obtain interdistrict relief because they failed to show that suburban school districts "had acted in a racially discriminatory manner that substantially caused racial segregation in another district").


conclusion that de jure segregation had caused white flight. That the record "bolstered" a conclusion that desegregation caused white flight was immaterial.

More fundamentally, the Court premised its analysis on a tenuous dichotomy between the effects of segregation and desegregation. Arguably, any consequence of the desegregation process, such as white flight, is also causally related to the de jure violation, for there would never have been desegregation of the school district had there not first been segregation.281 The effects of the former are largely indistinguishable from the effects of the latter. At the same time, a regime of state-imposed segregation likely influences conditions and attitudes that directly lead to whites leaving the school system when the de jure system is dismantled. "Whites who flee are often seeking to avoid conditions that the government’s de jure segregation helped to create, and to replicate racial patterns to which the government’s own de jure segregation has accustomed them."282 Thus, even if the Court was correct that nonminority students left the KCMSD in response to the process of desegregation, this hardly diminishes the correctness of the district court's conclusion that white flight was a result of de jure segregation within the KCMSD.

Moreover, even accepting the Court’s logic on its own terms, its statement about "the typical supposition" may itself be empirically suspect.283 Admittedly, substantial social science research supports the thesis that court-enforced desegregation, especially when accomplished through mandatory busing or student reassignment, leads to a decline in white enrollment in the desegregated school district.284 But the

281. Id. at 2085 (Souter, J., dissenting) (explaining that "there is in fact no break in the chain of causation linking the effects of desegregation with those of segregation. There would be no desegregation orders and no remedial plans without prior unconstitutional segregation as the occasion for issuing and adopting them, and an adverse reaction to a desegregation order is traceable in fact to the segregation that is subject to the remedy.")); Gewirtz, Remedies and Resistance, supra note 212, at 640 ("White flight itself is an effect of the original de jure segregation, and therefore segregated attendance patterns resulting from flight are an effect of the original violation.").

282. Gewirtz, Remedies and Resistance, supra note 212, at 640.

283. Cf. Gewirtz, Choice in the Transition, supra note 47, at 767 ("Courts cannot simply assume that [white] flight will be a significant and irreversible problem [for desegregation] in every school system; the likelihood and extent of flight depends upon the racial composition of the system, the particular design of the desegregation plan, and a range of setting-specific variables.").

284. See, e.g., Armor, supra note 80, at 180 ("The consensus at this point is that school desegregation contributes to white flight and that the flight can be quite large for some school systems, especially those systems that are larger, have higher minority concentrations, and have suburban or private school systems that can serve as alternatives for those who flee a desegregation plan or for new residents who want to avoid one."); James S. Coleman et al., Trends in School
KCMSD's desegregation plan did not include mandatory student reassignment or busing. And a significant body of research has demonstrated that desegregation remedies have not, in fact, lead to greater white flight than would have otherwise occurred, and in some cities they have actually stabilized demographic shifts. For instance,

Segregation, 1968–1973 (1975) (concluding that court-ordered school desegregation was substantial cause of declining white enrollment in those school districts); Gewirtz, Remedies and Resistance, supra note 212, at 629 ("While some research has questioned the extent to which flight occurs because of school desegregation... it is now widely agreed that school desegregation typically does accelerate white departures from the public school system above the 'normal' loss."); Mandatory student reassignment and busing are the factors most associated with white flight. See Armor, supra note 80, at 176–78; Gewirtz, Remedies and Resistance, supra note 212, at 629 n.114; Christine H. 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, 624–27 (1995).


286. Gary Orfield, Must We Bus? Segregated Schools and National Policy 100 (1978) (reviewing relevant research and concluding that "[d]esegregation... neither creates flight where there was none nor has a long-term impact on the rate of declining white enrollment"); Finis Welch & Audry Light, New Evidence on School Desegregation 66–67 (1987) (stating that researchers have discredited theory that "desegregation efforts might trigger such a large exodus of white students that racial isolation actually increases"); Philip A. Cusik, The Effects of School Desegregation and Other Factors on "White Flight" from an Urban Area, 15 Educ. Adm. Q. 35, 48 (1979) (studying desegregation in Pontiac, Michigan and concluding that whites' attitudes about busing "[d]id not even indirectly contribute to 'white flight'"); Thomas F. Pettigrew & Robert L. Green, School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis, 46 Harv. Educ. Rev. 1, 49–53 (1976); Christine H. Rossell, School Desegregation and White Flight, 90 Pol. Sci. Q. 675, 688 (1976) (finding that "school desegregation causes little or no significant white flight, even when it is court ordered and implemented in large cities.").

287. Willis D. Hawley et al., Strategies for Effective Desegregation: Lessons from Research 63 (1983) (reviewing several studies on relationship between school desegregation and white flight and concluding that "[t]he right kind of school desegregation plan can slow the process of racial change and encourage residential desegregation"). Likewise, Liebman states that:

[After the second year of desegregation,] white loss normally drops off almost to pre-desegregation levels and in the case of certain kinds of plans appears to fall below pre-desegregation levels. Although the data are fragmentary, they create the possibility that, over the course of a decade or so, certain kinds of desegregation plans actually produce a net gain in the number of white children attending school in desegregated districts.

Liebman, supra note 19, at 1622; see also George K. Cunningham et al., The Impact of Court-Ordered Desegregation on Student Enrollment and Residential Patterns (White Flight), 160 J. Educ., May 1978, at 36, 44 (discussing study of Jefferson County, Kentucky, finding that "[b]ecause of the stabilizing effect on schools over a wide area, a metropolitan desegregation plan can have a positive effect by keeping neighborhoods from undergoing rapid changes in ethnic makeup"); Gary Orfield, Metropolitan School Desegregation: Impacts on Metropolitan Society, 80 Minn. L. Rev. 825, 831 (1996) (noting that "the most extensive desegregation plans, covering entire urbanized counties, have shown by far the highest levels of desegregation and have produced the nation's most stable districts in their percentage of white enrollment"); Christine H. Rossell, The Effect of School Integration on Community Integration, 160 J. Educ., May 1978, at 46, 59–60 (finding that school integration can lead to long term reductions in residential segregation).
studies show that metropolitan-wide desegregation has induced demographic stabilization in several communities, including Charlotte\textsuperscript{288} and Raleigh,\textsuperscript{289} North Carolina, and St. Louis, Missouri\textsuperscript{290} causing more white students to stay in the district than would have absent desegregation. It is quite possible that the "typical supposition" was an inappropriate assumption for Kansas City.

There are certainly plausible explanations for how de jure segregation within the KCMSD could have caused white flight. For instance, the de jure system may have attracted more African-American families to move to Kansas City so that their children could attend the all-black schools. Black parents might have felt more comfortable sending their children to these all-black schools, perhaps because they were a refuge from overt discrimination or because they promoted a sense of black community in their students. And as more black families moved into the KCMSD, more whites may have left Kansas City for less diverse school districts. Prejudiced whites might have feared a drop in their property values due to the increasing concentration of African-Americans, or they might have felt that the quality of education in the district was declining simply due to the increasing presence of blacks, albeit in separate schools. Or biased whites might simply have not wanted to associate with blacks in any way, and therefore left the KCMSD because it included significant numbers of African-Americans. Whatever the reason, research has corroborated that the rate of white flight from school districts accelerates as the proportion of black enrollment increases, even where the district's schools remain largely segregated.\textsuperscript{291}

\textsuperscript{288.} See Frye Gaillard, \textit{The Dream Long Deferred} 155–59 (1988) (describing stabilization of demographic shifts in Charlotte after metropolitan-wide school desegregation); Orfield, \textit{supra} note 287; Brief Amici Curiae of the NAACP et al., at 7A, Freeman v. Pitts, 503 U.S. 467 (1992) (No. 89-1290) (including statement signed by 52 scientists summarizing research concerning effects of school desegregation); cf. Denis J. Lord & John C. Catu, \textit{School Desegregation Policy and Intra-School District Migration}, 57 Soc. Sci. Q. 784, 794 (1977) (studying residential movement in Charlotte in two years immediately after implementation of desegregation remed es and finding that, although impact of desegregation could not be completely denied, "the temptation to view this as a cause and effect relationship should be tempered with caution because the stronger suburbanization trend may actually be indicative of a more active period of intra-urban residential mobility during the 1970s as well as of other factors not associated with school desegregation").


\textsuperscript{291.} Orfield, \textit{supra} note 287, at 71.
Obviously, judgments about the causes of existing conditions in a formerly segregated school district, and the roles played by de jure segregation and desegregation, are largely speculative. But because the Court has made the elimination of all vestiges of the de jure system the test of constitutional compliance, causation is necessarily the touchstone for determining whether existing conditions require further remedy. And the level of complexity and uncertainty in these inquiries, if anything, weighs in favor of granting greater deference to the trial court’s conclusions. If making such determinations is difficult for a district court, which has supervised the case directly and heard days (or even months) of live testimony, it will present a substantially greater challenge to appellate courts.

D. The Implicit Message of Jenkins

In sum, the reasons offered by the Court for rejecting the district court’s salary relief order were unconvincing. The Court construed the term “interdistrict remedy” far too broadly and in a manner inconsistent with its holdings in Milliken I and Gautreaux; it ignored a less controversial justification for salary assistance that appeared to be clearly within the district court’s remedial authority; and it failed to justify its rejection of the district court’s white flight finding, providing no explanation as to why the district court’s reading of the record was implausible. These flaws in the Court’s analysis make clear that the outcome in Jenkins was a result of the Court’s extrinsic goals. Namely, the Court sought reasons to end the prolonged and expensive desegregation remedies ordered by the district court for the KCMSD.

Jenkins reveals an important, albeit unsurprising, change in the Court’s approach to desegregation cases. The Court’s implicit analytical baseline has shifted. No longer does the Court presume that, where desegregation remedies have been less than totally effective, school districts must take further measures to ensure the eradication of all vestiges of the de jure system. Rather, the Court starts from the implicit premise that, where a school district has implemented its desegregation plan in good faith, the district court should return control over the school district to local officials as soon as practicable, even if current conditions in the school district indicate that vestiges of past discrimination may

293. See supra note 73 and accompanying text.
The Court no longer vigorously insists, as it once did, that school systems must eliminate de jure segregation "root and branch." Instead, the Court now emphasizes what it has termed the "ultimate objective" in desegregation cases: "return[ing] school districts to the control of local authorities."

Moreover, Jenkins shows that the Court intends to accomplish this shift without stating so explicitly. The Rehnquist Court, at least to this point, has been unwilling to alter the doctrinal principles responsible for the results it now finds disquieting. Instead, as Jenkins illustrates, it prefers narrow, case-specific reasons for issuing decisions that curtail desegregation remedies and expedite the end of judicial supervision over formerly segregated school districts. In short, Jenkins reveals an important, implicit change in the Court's approach to school segregation cases—a quiet revolution in desegregation law.

V. PLACING JENKINS IN CONTEXT

The implicit message of Jenkins is more apparent if one views the decision as the third in a trilogy of important desegregation cases decided by the Rehnquist Court. In all three cases—Jenkins, Board of Education v. Dowell and Freeman v. Pitts—the Court substantially undermined the continuation of desegregation remedies, and expedited the end of judicial supervision, in the respective school districts. The outcomes were consistent, even if the Court's analysis was not. Moreover, while the Court did not explicitly question its desegregation remedies jurisprudence, the rhetoric of the three decisions provided tacit support for the abandonment of court-ordered desegregation. Each opinion contained language useful to lower courts for justifying decisions that end desegregation remedies and return control over formerly de jure school systems to local officials. Thus, placing Jenkins in the context of

294. Compare Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) ("The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."); with Freeman v. Pitts, 503 U.S. 467, 498 (1992) ("A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new de jure violation, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future.").

295. Green, 391 U.S. at 437–38 (holding that formerly segregated school districts are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

296. Freeman, 503 U.S. at 489.


the Court's other recent desegregation decisions further clarifies the Court's agenda, namely the de facto abandonment of court-enforced desegregation.

The question in Dowell concerned the obligation of a school district, after having been declared unitary but not fully released from judicial supervision, to comply with the requirements of the district court's desegregation decree. Oklahoma City had used mandatory busing to desegregate its public school system since 1972. Having achieved unitary status, the school board in 1985 adopted a student reassignment plan (SRP) that eliminated mandatory busing for students in kindergarten through grade four, instead assigning them based on neighborhood attendance zones. The plaintiffs sought to reopen the case and prevent the implementation of the SRP because it would have resulted in the substantial resegregation of Oklahoma City's elementary schools. Under the SRP, eleven of the city's sixty-four elementary schools would have been more than ninety percent African-American, and twenty-two would have been more than ninety percent white.

The Supreme Court held that the school district was entitled to implement the SRP, even if it would result in significant resegregation. It reasoned that requiring a school district that has achieved unitary status to continue to comply with the district court's desegregation decree would subject the district to judicial supervision "for the indefinite future." According to the Court, "neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result." It therefore concluded that a unitary school district "no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like." On remand, the district court returned control to local authorities, the school district implemented the SRP, and Oklahoma City's elementary schools became resegregated.

300. Id. at 242.
301. Id.
302. Id.
303. Id. at 250.
304. Id. at 249.
305. Id.
306. Id. at 250.
307. See Dowell v. Board of Educ., 8 F.3d 1501 (10th Cir. 1993).
At issue in *Freeman* was whether a district court could release a formerly segregated school district from judicial supervision incrementally prior to the district’s full compliance with the Constitution.\(^{308}\) The DeKalb County School System (DCSS) had been under federal court supervision since 1969, when the district court found that the school system was operating in violation of *Brown*.\(^{309}\) At that time, the school district was only 5.6 percent African-American.\(^{310}\) In response to the district court’s finding of liability, the DCSS adopted a neighborhood attendance zone policy that “effectively desegregated the district for a period of time” with respect to student assignments.\(^{311}\) Seventeen years later, however, the demographics of DeKalb County had changed dramatically; 47 percent of DCSS students were black, and, due to a combination of de facto residential segregation and the district’s neighborhood attendance policy, many schools in the system were predominantly one-race.\(^{312}\)

In 1986, the DCSS moved for a declaration of unitary status and final dismissal of the case.\(^{313}\) The district court found that the DCSS had eliminated the vestiges of the de jure system in four *Green* factor areas—student assignment, transportation, physical facilities, and extracurricular activities—but that it remained unconstitutionally segregated with respect to teacher and principal assignments and quality of education.\(^{315}\) The district court accordingly returned control over the four unitary areas to the DCSS while retaining supervision over the three areas that remained unconstitutionally segregated.\(^{316}\) On appeal, the Eleventh Circuit reversed, holding that a district court could not

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309. Id. at 472–73.
310. Id. at 475.
311. Id. at 477.
312. Id. at 476; see also Joondeph, supra note 73, at 151–52.
314. The “*Green* factors” (or “Green-type areas”) are the primary facets of a school district’s operations that the Supreme Court has directed lower courts to use in evaluating whether school systems have successfully desegregated and achieved unitary status. See Joondeph, supra note 73, at 152. The six traditional *Green* factors are student assignments, faculty assignments, staff assignments, transportation, extracurricular activities, and physical facilities. See *Freeman*, 503 U.S. at 486. They were born of the Court’s opinion in *Green v. County School Board*, 391 U.S. 430 (1968), where the Court stated that the segregation of the school district “was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.” Id. at 435.
315. Freeman, 503 U.S. at 474.
316. Id. at 484.
relinquish control over any part of a formerly segregated school system until the school district had fully complied with the Constitution. The court of appeals further ruled that the DCSS was constitutionally required to mitigate the effects of resegregation caused by demographic shifts until it had achieved such full compliance. It therefore ordered the school district to consider several aggressive desegregation remedies to achieve greater racial balance in student assignments, including the pairing and clustering of schools, drastic gerrymandering of school zones, grade reorganization, and busing.

The Supreme Court reversed the Eleventh Circuit and upheld the district court’s “incremental or partial withdrawal” of supervision over the DCSS. The Court reasoned that “[t]he concept of unitariness has been a helpful one in defining the scope of the district courts’ authority,” but that it does not restrict district courts’ “inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action.” Moreover, in the exercise of this discretion, district courts are obligated to “provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance.” The Court accordingly concluded that incremental withdrawal of judicial supervision was an “appropriate means” for the district court to fulfill its “duty to return the operations and control of schools to local authorities.”

In accordance with the Court’s decision, the district court returned control over the four unitary Green-type areas to the DCSS. Local authorities were then free to implement policies in those areas as if the school district had never been found liable for de jure segregation. That is, so long as its actions were not intentionally discriminatory, the DCSS could take actions in the unitary facets of its operations that

317. *Pitts*, 887 F.2d at 1446–47.
318. *Id.* at 1448–49.
319. *Id.* at 1450.
320. *Freeman*, 503 U.S. at 489.
321. *Id.* at 486.
322. *Id.* at 487.
323. *Id.* at 490.
324. *Id.*
325. *Id.* at 489.
326. *See* *Pitts* v. *Freeman*, 979 F.2d 1472, 1473 (11th Cir. 1992).
actually aggravated existing racial imbalances, even though the school district remained in violation of the Constitution. The DCSS was under no obligation to ensure that each of the school district’s Green-type areas was effectively desegregated at the same time. This meant that, depending on when each area becomes unitary, a formerly de jure school district could go through the entire desegregation process and be released from judicial supervision without fully eliminating its schools’ racial identifiability.

_Dowell_ and _Freeman_ show that the result in _Jenkins_ was by no means aberrational. All three of the Rehnquist Court’s primary school desegregation decisions have produced outcomes detrimental to extensive desegregation remedies and beneficial to returning control over public school systems to local officials. This has been true even though the Court has employed different, indeed contradictory, logic between cases. Consider _Freeman_ and _Jenkins_. Instrumental to the Court’s decision in _Freeman_ was the breadth of a supervising district court’s discretion in school desegregation cases. The Court emphasized that “[t]he term ‘unitary’ does not confine the discretion and authority of the District Court in a way that departs from traditional equitable principles, and that district courts must be afforded flexibility in the imposition of desegregation remedies “if [the] underlying principles [of desegregation] are to be enforced with fairness and precision.” But in _Jenkins_, the Court was anything but deferential to the district court’s supposedly “broad remedial authority.” The Court carefully scrutinized the district court’s decision to order salary assistance, overturning the district court’s nine-year-old factual finding regarding white flight. Moreover, it did so on the weak grounds that the finding was “both inconsistent internally, and inconsistent with the typical supposition” that white flight results from desegregation instead of segregation. It is difficult to explain the Court’s fluctuating attitude toward the breadth of district courts’ discretion in _Freeman_ and _Jenkins_ in terms other than outcome.

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328. _Id._
329. _Id._ at 166–67.
330. _Freeman_ v. _Pitts_, 503 U.S. 467, 487 (1992); _see also id._ (“That the term ‘unitary’ does not have fixed meaning or content is not inconsistent with the principles that control the exercise of equitable power.”).
331. _Id._
333. _See supra_ text accompanying note 277.
334. _Jenkins_, 115 S. Ct. at 2052.
Also significant has been the Court's rhetoric in the three opinions. While none of the decisions challenged or altered the principles of *Green*, each contained language that tacitly supported lower courts' abandonment of court-enforced desegregation. In *Dowell*, for instance, the Court stated that, from its inception, "federal supervision of local school systems was intended as a temporary measure."\(^{335}\) It explained that "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."\(^{336}\) Thus, returning control to local authorities "properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'"\(^{337}\)

The Court's opinion in *Freeman* contained similar language.\(^{338}\) The Court began its analysis by reiterating that "'local autonomy of school districts is a vital national tradition,'"\(^{339}\) and that judicial supervision of formerly segregated school districts "was intended as a 'temporary measure.'"\(^{340}\) The Court underscored that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."\(^{341}\) When state and local authorities are responsible for administering public schools "in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course."\(^{342}\) Perhaps most telling, the Court identified the "ultimate objective" in desegregation litigation not as the complete

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336. Id. at 248.
337. Id. (quoting Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)).
338. Joondeph, supra note 73, at 158 ("The Freeman Court chose...to emphasize the importance of returning control to local authorities at the earliest practicable date."); The Supreme Court, 1991 Term, supra note 276, at 257 ("The Freeman Court's deference to the findings, conclusions, and actions of the district court is unmistakable. Justice Kennedy's opinion relied heavily on the role of a district court's equitable discretion in formulating a desegregation remedy.").
339. Freeman v. Pitts, 503 U.S. 467, 490 (1992) (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) (Dayton I)); see also id. at 506 (Scalia, J., concurring) ("We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition...that public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents.").
340. Id. at 490 (quoting Board of Educ. v. Dowell, 498 U.S. 237, 247 (1991)).
341. Id.
342. Id.
desegregation of formerly de jure systems, but as "return[ing] school
districts to the control of local authorities." 343

Finally, the rhetoric of Jenkins also tacitly endorsed an end to court-
ordered desegregation. In addition to again reiterating that "federal
supervision of local school systems was intended as a temporary
measure," 344 and that "local autonomy of school districts is a vital
national tradition," 345 the Court stated that "district court[s] must strive to
restore state and local authorities to the control of a school system
operating in compliance with the Constitution." 346 Moreover, the Court
reminded lower federal courts that, in the imposition of desegregation
remedies, they "must take into account the interests of state and local
authorities in managing their own affairs." 347

Together, the outcomes and rhetoric of the Rehnquist Court's three
school desegregation decisions show how the Court's approach to
desegregation cases has changed. Not only have each of the decisions
ended or significantly curtailed desegregation remedies, but they have
also contained language indicative of the Court's discomfort with
prolonged judicial supervision of formerly segregated school districts.
Instead of demanding all-out desegregation, the Court has extolled the
virtues of local control over public education. No longer does the Court
see district courts' encroachment on the control of local officials as a
necessary means to ensuring that the victims of segregation are made
whole and the vestiges of discrimination fully eradicated. Rather, the

343. Id. at 489.
345. Id. at 2054.
346. Id.
347. Id. at 2049 (quoting Milliken v. Bradley, 433 U.S. 267, 281 (1977) (Milliken II)). In her
concurrency, Justice O'Connor added:

[I]n the school desegregation context, federal courts are specifically admonished to take into
account the interests of state and local authorities in managing their own affairs, in light of the
intrusion into the area of education where States historically have been sovereign, and to which
States lay claim by right of history and expertise.

Id. at 2061 (O'Connor, J., concurring) (citations and quotation marks omitted).

Experience indicates that lower courts have taken the message of these three decisions seriously.
As of mid 1996, at least six district courts had cited one of the aforementioned passages from
Dowell, Freeman, or Jenkins in finding that a formerly segregated school district had achieved
partial or total unitary status. See, e.g., Reed v. Rhodes, No. 1:73 CV 1300, 1996 WL 376873, at *14
Congress of Hispanic Educators, 902 F. Supp. 1274, 1281–82 (D. Colo. 1993); Coalition to Save
Tex. 1994).
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Court views judicial supervision as an impediment to political accountability and local autonomy in the governance and administration of public education. The Court accordingly starts from the implicit premise that, unless school districts have acted in bad faith in the implementation of their desegregation plans, district courts should return control to state and local authorities. *Jenkins,* coming after *Dowell* and *Freeman,* cements this shift in the Court’s approach; it fully reveals the Court’s de facto abandonment of court-enforced desegregation.

VI. SCALIA, THOMAS, AND THE FAILURE TO JUSTIFY THE COURT’S RETREAT

Although the change in the Court’s approach to desegregation cases is apparent, the underlying rationale for this shift is unclear. The Rehnquist Court thus far has avoided altering or rejecting the doctrinal foundations of court-ordered desegregation remedies, instead deciding its three elementary and secondary school segregation cases on relatively narrow, case-specific grounds. *Jenkins* exemplifies this tack. The decision effectively ended court-ordered remedies in Kansas City, but primarily on the limited ground that the district court erred in concluding that segregation had caused white flight from the KCMSD.

In two recent opinions, however, Justice Scalia and Justice Thomas explicitly have challenged the two basic principles adopted by the Court in *Green.* In a concurring opinion in *Freeman,* Justice Scalia contended that, because *Green’s* presumption of causation is based on empirical assumptions that have grown obsolete, presuming that current conditions are traceable to past discrimination no longer makes sense. And in his concurrence in *Jenkins,* Justice Thomas argued that the Court should abandon *Green’s* corrective approach to remedies. According to Justice Thomas, the corrective approach not only contradicts the original meaning of *Brown,* but it encroaches on the important constitutional principles of federalism and separation of powers, and it is implicitly based on the belief that predominantly black schools are inherently inferior.

Given the tension between the practical implications of the Court’s desegregation remedies jurisprudence and the Rehnquist Court’s core values—its exaltation of the principles of race-neutrality, federalism, and judicial restraint—348—it is possible that a majority of the Court has implicitly endorsed either Justice Scalia’s or Justice Thomas’s argument.

348. See supra notes 82–92 and accompanying text.
Rejecting one or both of Green’s two basic principles would dramatically curtail the availability and extensiveness of desegregation remedies, a goal that the Court appears to have embraced. But the Court may be unwilling to overrule part or all of Green because of school desegregation’s symbolic importance. Not only has the issue been an important bellwether for the country’s direction on civil rights, but school desegregation, due to Brown’s singular enormity, occupies a unique place in the Court’s history.

Moreover, the Rehnquist Court may be especially reticent to reexamine Green in light of the backlash it suffered in response to its so-called civil rights “rollback” decisions a few terms ago. In 1989, the Court issued four rulings considered highly detrimental to civil rights causes. For example, in Wards Cove Packing Co. v. Atonio, the Court significantly heightened the requirements for recovery in disparate impact cases under Title VII of the Civil Rights Act of 1964, making those claims essentially unwinnable for plaintiffs. And in City of Richmond v. J.A. Croson Co., the Court substantially restricted the circumstances under which local and state governments could adopt affirmative action programs. The Court received resounding criticism for the decisions, not just from the civil rights community, but from many mainstream observers and commentators as well. Within two years,

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349. Those decisions were, in chronological order, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that supposedly benign racial classifications in state and local governments’ affirmative action programs are subject to strict scrutiny, and that to show compelling interest, these governments must demonstrate particularized findings of past discrimination in relevant community and industry), Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding that statistical disparities do not establish prima facie showing of disparate impact in Title VII claims, and that once plaintiffs do make prima facie showing, burden that shifts to defendants is one of production, not persuasion), Martin v. Wilks, 490 U.S. 755 (1989) (holding that white employees not party to consent decree have standing to attack affirmative action provisions in decree), and Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that 42 U.S.C. § 1981 prohibits discrimination in formation and enforcement of contracts, but provides no relief for racially discriminatory working conditions).


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Congress overruled most aspects of the decisions as they affected Title VII.\(^{353}\)

Nonetheless, even if the Court’s recent desegregation decisions were based implicitly on one of the rationales suggested by Justice Scalia or Justice Thomas, the Rehnquist Court’s course of action would still be unjustified. These arguments provide a more analytically defensible justification for curtailing the availability and breadth of desegregation remedies, but neither countenances a rejection of either of Green’s two basic principles. The Green presumption properly recognizes that it remains preferable to allocate the burden of proof regarding the cause of current conditions to formerly de jure school districts rather than to the victims of discrimination. And Green’s corrective approach to remedies appropriately reflects an understanding that the harms caused by de jure segregation do not immediately cease once a school district abandons intentional discrimination. Instead, the ongoing effects of discrimination continue to influence the operations of school systems in a manner that disadvantages African-Americans. To provide equal protection, school districts must eliminate these remnants of discrimination. Consequently, while the arguments offered by Justice Scalia and Justice Thomas are more candid and intellectually coherent than the Court’s case-by-case approach, they fail to justify the Court’s abandonment of court-enforced desegregation.

A. Discarding the Green Presumption of Causation

The Supreme Court never has justified explicitly the evidentiary presumption that existing conditions in a nonunitary school district are

\(^{353}\) The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, overruled Patterson by permitting the recovery of compensatory and punitive damages for discrimination in the terms and conditions of employment. Id. § 102(a) (codified at 42 U.S.C. § 1981a (1994)). And the Act overruled most of Wards Cove by restoring the burden on employers after a plaintiff’s prima facie showing to one of persuasion, id. § 105(a) (codified at 42 U.S.C. § 2000e-2(k)(1)(A)), and by returning the rules concerning alternative business practices to “be in accordance with the law as it existed on June 4, 1994”—the day before Wards Cove was decided, id. (codified at 42 U.S.C. § 2000e-2(k)(1)(C)). Indeed, Congress specifically stated in the preamble to the Act that “the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections,” and that “legislation is necessary to provide additional protections against unlawful discrimination in employment.” Pub. L. No. 102-166, 105 Stat. 1071 § 2.
causally related to that district’s prior de jure segregation. There are generally two reasons for creating an evidentiary presumption. First, allocating the burden of proof to one party on a particular issue may be more likely to produce a factually correct result. That is, the presumption may be more likely to produce trial outcomes that, over time, better approximate the truth. Second, a presumption may reflect a judgment about which side is better able to bear the costs of error. Given that there will be great empirical uncertainty in a large percentage of the cases, trials will often produce factually inaccurate outcomes simply because the litigants are incapable of proving or disproving the proposition. A presumption is justified where systematically erring in favor of one party on the issue will further the interests of fairness and justice.

In 1968, Green’s presumption of causation made sense on both grounds. As an empirical matter, it seemed clear that existing conditions in formerly segregated school districts were directly traceable to the de jure era. In school systems that had adopted “freedom of choice” plans, it was evident that many African-Americans’ choices were shaped by the forces of past discrimination. As many commentators have noted, several factors linked to de jure segregation likely tainted the decisions of students in previously segregated school districts, systematically steering them away from desegregated schools. Moreover, the recency of de

357. For the most thorough discussion this idea, see Gewirtz, Choice in the Transition, supra note 47, at 741–49. See also 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, 1128 (1990) (explaining that black families’ choices in Green “had been conditioned by established patterns of behavior and beliefs that were rooted in the invidious value”); Shane, supra note 13, at 1052 (noting likelihood that “social circumstances partly resulting from past segregation prevented blacks under freedom-of-choice plans from freely choosing to attend the schools they most preferred”); Cass R. Sunstein, Lochner’s Legacy, 87 Colum. L. Rev. 873. 901 (1987) (stating that “[t]he Court’s hostility to [free choice] plans depends at least in part on a conclusion that the preferences of whites and blacks are distorted by the history of discrimination”).
jure discrimination meant that there was hardly opportunity for intervening forces or influences to undo the effects of years of segregation. It was natural to presume a causal connection.\textsuperscript{358}

The \textit{Green} presumption also made sense as a preferred allocation of error costs. School districts in the South had been de jure segregators for nearly one hundred years and had only abandoned intentionally discriminatory policies within the last five years; New Kent County, for instance, had been a de jure segregator until 1965. To the extent that there were empirical uncertainties as to the cause of current conditions, it was hardly fair to force the victims of segregation to bear the burden of this uncertainty. Thus, once plaintiffs successfully established that the school district was a de jure segregator, it was sensible as a matter of justice and fairness to make the school districts bear the burden of persuasion on the issue of causation.

Justice Scalia has contended, however, that the justifications for the presumption are no longer nearly so compelling.\textsuperscript{359} In his concurring opinion in \textit{Freeman}, he acknowledged that, in 1968, the causal presumption adopted in \textit{Green} was "extraordinary in law but not unreasonable in fact."\textsuperscript{360} Specifically, "[t]he extent and recency of the

\begin{itemize}
\item School districts' past discrimination likely tainted students' school choices in four discernible ways. First, the ongoing effects of the de jure system, particularly the racial identifiability of the schools, necessarily restricted students' options in exercising choice. \textit{See Gewirtz, Choice in the Transition, supra note 47, at 742-44}. Thus, in the immediate wake of de jure segregation, children in New Kent County could not choose an integrated school; they could choose only between an all-black school and a nearly all-white school. Second, the threat of retaliation or duress from whites who opposed desegregation almost certainly influenced the decisions of some African-Americans. Because free choice plans forced blacks to be the instigators of desegregation, the fear of predictable discrimination and hostility from whites likely steered more African-Americans toward predominantly black schools. \textit{See Derrick Bell, Race, Racism and American Law § 7.4.1 (3d ed. 1994)}; Sunstein, \textit{supra}, at 901. Third, the long period of state-imposed segregation that had just ended likely distorted some African-Americans' preferences, causing them to undervalue the benefits of desegregation. \textit{See Gewirtz, Choice in the Transition, supra note 47, at 745}. In other words, individuals who had lived for many years under Jim Crow were unable to form their preferences entirely independent of a value system still tainted by the effects of past discrimination. \textit{See Sunstein, supra, at 901}. Finally, given the lack of interaction between whites and blacks during the de jure era, there likely were significant informational barriers that prevented individuals from knowing what to expect at an integrated school. In light of the natural tendency to prefer the known to the unknown, this lack of information caused more students to select schools in which they were in the racial majority. \textit{See Gewirtz, Choice in the Transition, supra note 47, at 748}.
\item Paul Brest, \textit{The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle}, 90 Harv. L. Rev. 1, 33 (1976) ("In \textit{Green} the causal connection between past discrimination and the current racial composition of the schools was as clear as such matters ever can be.").
\item \textit{Id.} at 505.
\end{itemize}
prior discrimination, and the improbability that young children (or their parents) would use ‘freedom of choice’ plans to disrupt existing patterns” justified presuming that predominantly one-race schools were the result of the prior dual system. But Justice Scalia argued that, due to the passage of time, circumstances have changed materially; “the rational basis for the extraordinary presumption of causation simply must dissipate as the de jure system and the school boards who produced it recede further into the past.” So many intervening demographic changes have influenced the racial composition of neighborhoods and schools that de jure segregation “cannot realistically be assumed” a significant cause of current conditions. “At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools.”

Clearly, the empirical bases for the presumption are much weaker today than they were in 1968. As a school system’s de jure violation becomes more remote in time, the likelihood that current conditions in the district are causally related to that violation diminishes significantly. In school districts that use some form of school choice to assign students, the risk that African-Americans’ decisions are tainted by the regime of de jure segregation has dissipated considerably. Moreover, intervening demographic forces, such as normal migration, population growth, and white flight from cities to suburbs, have substantially influenced the operations and racial compositions of public schools. When a school district’s de jure violation is many years old, these intervening factors may be a greater cause of current racial compositions or levels of student achievement than past discrimination. Where the violation ended forty years ago, such as in Jenkins, the probability of a causal connection may be quite slim.

But this argument only addresses one of the two reasons for the Green presumption—that it is more likely to produce an outcome that is

361. Id.
362. Id. at 506.
363. Id.
364. Id.
365. See id. at 491 (“With the passage of time the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish.”).
366. See id. at 496 (“As the de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system.”).
The Green presumption remains a sound principle because, in the face of this empirical uncertainty, it allocates the costs of error preferably. Under the Green presumption, if current conditions are actually unrelated to past discrimination but the school district is unable to prove this, desegregation remedies and judicial supervision continue when they actually should end. This error does have costs, as the Court has taken pains to point out. It encroaches on state and local autonomy and diminishes political accountability in the governance and administration of public schools. In essence, it impinges on the constitutional principle of federalism. But without the Green presumption, the costs of error would be that equal protection violations would go unremedied. If current conditions were traceable to de jure segregation but the plaintiffs were unable to prove this causal link, desegregation remedies would end prematurely. Judicial supervision would cease even though vestiges of discrimination remained in the school district, so that the victims of the ongoing effects of de jure segregation would never be made whole.

While federalism clearly remains a vital constitutional principle, the Fourteenth Amendment dictates that, within reason, equal protection must take precedence. Inherent in the Equal Protection Clause’s command that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws” is an invitation for federal encroachment on state sovereignty. As the Court recognized this past term in *Seminole Tribe v. Florida,* "the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, . . . fundamentally altered the balance of state and federal power struck by the Constitution." Indeed, the whole idea behind the Reconstruction amendments (and the Civil War, for that matter) was that prohibiting

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367. Justice Scalia stated that “[p]resumptions normally arise when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.” *Id.* at 505 (citations and quotation marks omitted) (alterations in original). He then took “sensible” to mean only sensible as a matter of factual accuracy, not as an appropriate allocation of error costs.

368. U.S. Const. amend. XIV, § 1.


370. *Id.* at 1125; see also *Mitchum v. Foster,* 407 U.S. 225, 238–39 (1972) (“As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.”). *But see* Richard A. Posner, *Overcoming Law* 220 (1995) (“The Reconstruction amendments do not on their face appear to revolutionize the relation between the national government and the states; their principal thrust is to abolish the racial caste system of the southern states.”).
official discrimination on the basis of race was more constitutionally significant than preserving state autonomy from federal power.\textsuperscript{371} The \textit{Green} presumption thus appropriately reflects the constitutional judgment that the costs of denying equal protection are more significant than the costs of federal intrusion on state legislative or executive discretion. In the face of empirical uncertainty, it is preferable to err in favor of remedying the effects of state-imposed segregation than to preserve state prerogatives against federal intrusion.\textsuperscript{372}

Moreover, forcing formerly de jure school districts to bear the risks of empirical uncertainty still properly reflects the relative culpability of the

\begin{quote}
\textsuperscript{371} The Supreme Court acknowledged this basic purpose of the Reconstruction amendments in its first attempt to construe them, the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). While taking a narrow view of the amendments' impact on the distribution of power between the federal and state governments, a view that it has subsequently repudiated, the \textit{Slaughter-House} Court at least recognized that the Reconstruction amendments fundamentally altered the principle of federalism with respect to protecting African-Americans from state-imposed discrimination:

\begin{quotation}
[O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.
\end{quotation}

\textit{id.} at 71. In dissent, Justice Field noted that the Fourteenth Amendment "was adopted . . . to place the common rights of American citizens under the protection of the \textit{National government}." \textit{id.} at 93 (Field, J., dissenting) (emphasis added). Justice Bradley, also dissenting, expressed the implications of the Reconstruction amendments on federalism in even clearer terms:

\begin{quotation}
The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative . . . .
\end{quotation}

\textit{id.} at 112, 114 (Bradley, J., dissenting).

Finally, Justice Swayne wrote in his dissent that these amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members . . . . The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application.

\textit{id.} at 128 (Swayne, J., dissenting); see also 1 Bruce Ackerman, \textit{We the People: Foundations} 95 (1991) (explaining that the \textit{Slaughter-House} Court "recognized that the amendments revolutionized traditional principles of federalism so far as blacks were concerned").

\textsuperscript{372} Cf. Ronald Dworkin, \textit{Law's Empire} 391–92 (1986) (stating that federal courts' intrusion "deep into the normal jurisdiction of school superintendents and other local officials" through school desegregation orders was largely unprecedented in American history, but that it was consistent with "a perfectly traditional view of the judicial office" and was "largely a credit to law").
parties. School districts may be less blameworthy than they were in 1968; the school board members and administrators who enacted and implemented de jure policies have long since departed. And African-American students in nonunitary districts may be less the victims of discrimination than those black students who attended formerly de jure schools in the immediate wake of state-imposed segregation; although current students may encounter ongoing discriminatory effects of the prior de jure regime, they are unlikely to face explicit discrimination similar to that endured by black children in 1968. But formerly de jure school districts clearly remain the wrongdoers relative to the plaintiffs; the school districts are the proven constitutional violators, and the students are (to the extent vestiges of discrimination remain) the victims of intentional discrimination. Thus, the dictates of justice and fairness still favor forcing school districts to bear the risk of empirical uncertainties.373

In short, while Justice Scalia’s argument for discarding the Green presumption rightly points out that the presumption’s empirical bases are weaker than they were in 1968, the presumption remains sound because it dictates a preferable allocation of the costs of error. The unwarranted continuation of judicial supervision over formerly segregated school districts is a lesser evil than letting the vestiges of state-imposed segregation go unremedied, and school districts, as proven constitutional violators, remain blameworthy relative to desegregation plaintiffs. Thus, although the case for the Green presumption may not be as strong today as it was in 1968, it remains a sound basis for ordering the continuation of extensive desegregation remedies aimed at rooting out the vestiges of discrimination.

B. Rejecting Green’s Corrective Approach to Desegregation Remedies

A second, more drastic means to reforming the Court’s desegregation doctrine, suggested by Justice Thomas in his concurrence in Jenkins, would be to reject Green’s other basic principle—the corrective approach to desegregation remedies. According to this rationale, Brown dictated that remedies for school segregation be purely prohibitory; the Court endorsed a corrective approach in Green merely as a temporary measure to overcome difficulties in enforcement. In addition, federal

373. Cf. Gewirtz, Remedies and Resistance, supra note 212, at 640 n.143 (contending that, where white flight follows implementation of desegregation remedy, “to the extent that causation remains a matter of empirical speculation, it seems appropriate to presume (rebuttably) that the government, already a proven segregator, is responsible”).

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courts' experience in implementing the corrective approach has exposed its variance with established constitutional norms. Prolonged judicial supervision of public school districts encroaches on the important principles of federalism and the separation of powers, and the corrective approach's mandate to eliminate all vestiges of discrimination implicitly assumes that predominantly black schools are inherently inferior. For each of these reasons, Justice Thomas has contended, the Court should return to Brown's original, prohibitory meaning.

When the Court decided Green, its previous desegregation decisions suggested a prohibitory approach to remedies. By speaking predominantly in terms of eliminating the harm inherent in the message of state-imposed segregation, they implied that the de jure policies themselves were the only harms warranting remedial action. None of these cases suggested that the Constitution required school districts to eliminate the ongoing effects of the dual system. Rather, they indicated that the Constitution forbids school systems from assigning any student to a particular school on the basis of that student to a particular school on the basis of that student's race.  

But even if the Court had believed Brown dictated this more limited scope of remedies, it faced a practical dilemma. Allowing district courts to do no more than prohibit future discrimination would have drastically hindered efforts to force school districts to desegregate. Indeed, such a holding likely would have permitted many school districts to evade compliance with Brown completely. School boards would have had no incentive to desegregate their schools until judicially ordered to do so. Given the intense political pressure to resist desegregation, it was clear that few southern school districts would have desegregated voluntarily. Moreover, to gain compliance in recalcitrant school districts, plaintiffs would have had to bear the onus of repeatedly filing actions to force a cessation of de jure segregation.

374. See supra notes 52–64 and accompanying text.

375. Cf. Ralph Cavanagh & Austin Sarat, Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence, 14 L. & Soc'y Rev. 371, 408 (1980) (contending that often traditional, prohibitory approach to remedies "provide[s] little more than symbolic victories," and that "meaningful redress" is possible only "through 'intrusive' intervention").

376. Gewirtz, Choice in the Transition, supra note 47, at 739; Liebman, supra note 19, at 1529.

377. As James Liebman has explained:

[A] prohibitory approach ... provides virtually no incentive for [a formerly segregated school district] to refrain from choosing segregative school-assignment patterns: If the district does discriminate a second time, it may well escape being sued; if it is sued, it probably will escape liability; if it is found liable, it assuredly will face but a second injunction forbidding discrimination but allowing it yet again to formulate a new, perhaps only marginally different,
At the same time, it was apparent (if not provable in court) that school boards like New Kent County's, which had enacted racially neutral policies that maintained de facto segregation, were actually acting with discriminatory intent. For instance, it would have been much simpler and more cost efficient for New Kent County to divide its school district into two attendance zones and assign students to the school closer to their homes. But such a plan would have resulted in actual desegregation. So the County instead offered "free choice," maintaining its duplicative, criss-crossing bus routes, knowing full well that it would maintain de facto segregation.

If the Court had endorsed the prohibitory approach, plaintiffs would have had great difficulty obtaining relief for such discrimination (technically de jure segregation) because of the challenges inherent in

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assignment policy—which policy is even less likely to prompt a suit, which suit is even less likely to succeed, and so on.

Liebman, supra note 19, at 1529.

378. See Armor, supra note 80, at 24 ("Although at first glance, freedom of choice appears to be a race-neutral policy of student assignment, it was more often used to preserve racially separate schools than to promote integration."); Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice 111 (1987) (calling freedom of choice plans "devices school boards and their lawyers worked out to convey a sense of compliance with Brown, while in fact the schools remained segregated"); Mark G. Yudof, Nondiscrimination and Beyond: The Search for Principle in Supreme Court Desegregation Decisions, in School Desegregation: Past, Present, and Future 97, 99 (Water G. Stephan & Joe R. Feagin eds., 1980) (explaining that "state and local bodies were ingenious in the extreme in devising superficially neutral plans (pupil placement laws, ability grouping, freedom of choice) which were subterfuges for keeping the races separate in the public schools"). But see Graglia, supra note 46, at 1157 (contending that by late 1960s “no one was any longer being barred from any school—or, indeed, from any public facility”).

379. In a concurring opinion to the Fourth Circuit’s decision in Green, Judge Sobeloff explained:

In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a ‘unitary, non-racial system’ could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School.

Bowman v. County Sch. Bd., 382 F.2d 326, 332 (4th Cir. 1967) (en banc) (Sobeloff, J., concurring), rev’d, 391 U.S. 430 (1968); see also Green v. County Sch. Bd., 391 U.S. 430, 442 n.6 (1968) (quoting same); cf. Lino A. Graglia, Disaster by Decree. The Supreme Court Decisions on Race and the Schools 78 (1976) ("Freedom of choice in school selection was a method very rarely employed except in districts required to end segregation. In operation it is cumbersome and expensive—often to the point of unworkability.").

380. Bowman, 382 F.2d at 332 (Sobeloff, J., concurring) ("[I]t is evident that here the Board, by separately busing Negro children across the entire county to the ‘Negro’ school, and the white children to the ‘white’ school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning."); see also Green, 391 U.S. at 442 n.6 (quoting the same); Yudof, supra note 378, at 105 (stating that “[o]nly a fool would need to search the official records for evidence of racial prejudice under [the] circumstances” of Green).
proving invidious intent in the adoption of facially neutral policies. Conceivably, courts might have inferred discriminatory intent in cases like Green, where the availability of less burdensome and more effective desegregation remedies was abundantly clear. But in the majority of cases, where the school board’s continued intentional discrimination was less obvious, requiring proof of invidious intent would have imposed a substantial burden on plaintiffs who already faced other significant obstacles in obtaining desegregation.381

According to this understanding of Green, the Court adopted the corrective approach to desegregation remedies not as a faithful interpretation of Brown but as a transitional regime necessary for the implementation of any version of desegregation. In Justice Thomas’s words, it was a “temporary” solution to be “used only to overcome the widespread resistance to the dictates of the Constitution.”382 Because school districts continued to resist desegregation, their motives in adopting race-neutral plans that preserved de facto segregation were highly suspect. Unless school boards’ policies actually produced integration, there simply was not sufficient cause to believe that their decisions were uncorrupted by discrimination. Mandating actual integration was necessary as a prophylactic measure for courts to verify that school districts had abandoned de jure segregation.383 Under this

381. See Bell, supra note 378, at 111.
383. Among commentators on the subject, only Ronald Dworkin has endorsed a reading of Green similar to this. See Ronald Dworkin, Social Sciences and Constitutional Rights—the Consequences of Uncertainty, 6 J. L. & Educ. 3, 11–12 (1977). Dworkin has contended that constitutional “rights are based on antecedent probabilities,” so that “the equal protection clause . . . provides that no decisions with a high antecedent probability of corruption though [sic] prejudice should be left to the normal political process.” Id. at 10–11. In a community that has recently shown prejudice toward African-Americans through state-imposed segregation, there is a strong antecedent probability that the political decisions determining the assignment of students to public schools will be corrupted. Id. at 11. Unless the background of prejudice has truly dissipated, the only way to ensure that the school district’s student assignment plan was not tainted by prejudice in the political process would be to require the plan to be “of a sort itself to negate the charge of corruption.” Id. at 2. Green’s mandate to integrate therefore works as an order to school boards that implicitly says the following:

If you refuse yourself to produce an outcome that negates the antecedent probability of corruption, then we must impose on you such an outcome. The only decision that we can impose, given the nature of the problem, is a decision that requires integration: on some formula that is evidentially not corrupt even if it is just as evidently arbitrary.

Id. Thus, “[u]ntil the background changes,” such that we are no longer presumptively convinced that the political process is corrupted by discrimination, “integration is required as the only thing that can sustain the burden of proof rising from the antecedent probability of corruption.” Id.; see also Liebman, supra note 19, at 1532–39 (discussing Dworkin’s “prophylaxis” explanation for the Supreme Court’s desegregation remedies decisions).
rationale, the corrective approach is not a fixed principle of constitutional law. Rather, its continuing vitality is necessarily contingent on the existence of the practical circumstances justifying its creation.\footnote{384} When those circumstances no longer exist—that is, when courts are confident that school systems will implement desegregation remedies in good faith—the transitional regime is no longer necessary.

If this were the sole justification for the corrective approach to desegregation remedies, it would probably be time to adopt a different approach. First, because public attitudes toward state-imposed segregation and discrimination have changed dramatically since 1968, there is less reason to be suspicious of the motives of school authorities in formerly de jure school districts. Explicit racial discrimination has not only lost the political appeal it enjoyed in 1968, but it has actually become affirmatively distasteful to most voters, an embarrassment to communities when uncovered. Second, African-Americans now play a more prominent role in the political process, mitigating the fear that local authorities will be unresponsive to blacks' desires in the governance and administration of public schools.\footnote{385} For these reasons, outright resistance to desegregation has become much less likely, alleviating the concern that school systems' race-neutral policies are implicitly motivated by intentional discrimination. Opponents of the corrective approach accordingly contend that mandating the elimination of all effects of past discrimination is no longer necessary to implement Brown's true command: that public school districts cease intentionally discriminating on the basis of race.

Opponents further argue that the corrective approach's variance with the Constitution has become more apparent through experience in its implementation. According to Justice Thomas, federal courts' imposition

\footnote{For critiques of Dworkin's argument, see Gewirtz, Choice in the Transition, supra note 47, at 739 n.33 (contending that Dworkin's prophylactic explanation for mandate to integrate is "curious" because it rests on general predicate—i.e., one assumed to be applicable to all formerly segregated school districts—rather than one based on specific recalcitrance of particular defendant), and Yudof, supra note 378, at 105–07 (arguing that Dworkin's theory fails to justify remedy—mandatory integration—when harm is not denial of integrated education but infection of political process by prejudice).}

\footnote{384. Dworkin, supra note 383, at 12 (stating that when "the background changes in one of two ways, [when] our sense of prejudice abates or blacks have the political power to make decision in question," mandate to desegregate would no longer be necessary).}

\footnote{385. See Klarman, supra note 26, at 11 (noting that "southern blacks have advanced from nearly universal exclusion from the political community to participation rates roughly comparable to those of southern whites of similar economic class, with concomitant increases in the responsiveness of public officials to the interests of the black community").}
of corrective desegregation remedies "has trampled upon principles of federalism and the separation of powers." The corrective approach has led to federal judicial supervision over hundreds of public school districts, lasting for as long as thirty years in many communities. It has thrust federal courts into the role of public school administrators, involving them in school systems' day-to-day decisions regarding attendance zones, financing, transportation, capital improvements, and curricula. Such intrusion by the federal government into the administration of public education, Justice Thomas argues, has "strip[ped] state and local governments of one of their most important governmental responsibilities, . . . thus deny[ing] their existence as independent governmental entities." Moreover, the corrective approach has required supervising district courts to perform largely executive and legislative functions. Not only do courts lack the expertise to exercise these powers, but this disregard for the appropriate separation of powers "detracts[s] from the independence and dignity of the federal courts." Thus, the corrective approach has allowed federal courts to exercise discretion far in excess of that authorized by the Constitution.

Finally, some opponents have contended that the corrective approach rests on a morally unjustifiable premise—that predominantly black schools are inherently inferior. Under Green's framework, racially imbalanced (or "racially identifiable") schools in a nonunitary school district are presumptively vestiges of past discrimination. The corrective approach therefore requires school districts to affirmatively integrate these schools, even if they are identical to all other schools in the system in every respect other than racial composition. But what exactly is the harm that justifies remedial measures under these circumstances? Justice Thomas has contended that, if a school district has abandoned de jure segregation and its schools receive equal resources, requiring the integration presumes that African-Americans suffer an injury purely by attending a predominantly black school. This reasoning, he has argued,

386. Jenkins, 115 S. Ct. at 2062 (Thomas, J., concurring).
387. See supra notes 79–81 and accompanying text.
388. Jenkins, 115 S. Ct. at 2070 (Thomas, J., concurring).
389. Id.
390. Id. at 2071.
391. See id. at 2061; Kevin Brown, Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?, 78 Cornell L. Rev. 1, 6 (1992) (contending that Supreme Court's "remedies for de jure segregation are based upon an assumption of African-American inferiority—the same assumption that pervaded the constitutional violation of de jure segregation").
"assume[s] that anything that is predominantly black must be inferior." 393 That is, "segregation injures blacks because blacks, when left on their own, cannot achieve." 394 As such, the corrective approach has produced "a jurisprudence based upon a theory of black inferiority." 395

The argument for rejecting the corrective approach to desegregation remedies offers an intriguing explanation for why the Court may have endorsed this principle in Green. As an historical matter, it seems quite possible that practical circumstances concerning the enforcement of Brown led some of the justices to concur in requiring school districts to eliminate the ongoing effects of past discrimination rather than just to abandon de jure segregation. But even if this were the case, the corrective approach may still be a sound principle of constitutional law. Its validity turns not on the implicit reasons for the Court's original adoption of it, but on whether it represents the best possible understanding of the Equal Protection Clause. If the corrective approach is the best means to assuring that the victims of school segregation are afforded equal protection, then the unarticulated motivations of the Court in Green are irrelevant.

The foundation of Justice Thomas's argument is that the only harm of segregation is the violation itself—the "classification of students based on their race." 396 Once the school district has ceased intentionally discriminating on the basis of race, any constitutional harms from segregation cease to exist. Current conditions in the school district, such as de facto segregation or reduced achievement by African-American students, have no constitutional significance, even if they are directly traceable to the de jure system. In Green, for instance, had the Court been able to determine that the school board had acted in complete good faith, the county's freedom of choice plan would have satisfied its constitutional obligations, and any further remedies would have been unwarranted.

393. Id. at 2061; see also Graglia, supra note 46, at 1171 (contending that district court's remedial order in Swann, which effectuated Green's corrective approach by mandating integration through busing, "was based on the erroneous theory that predominantly black schools are unconstitutional because inherently inferior"); cf. Shane, supra note 13, at 1059-60 (recognizing that there are "philosophical objections to the proposition that all-black schools are inherently harmful," largely because it "erroneously implies that black political autonomy has no positive value").
394. Jenkins, 115 S. Ct. at 2065 (Thomas, J., concurring).
395. Id. at 2066.
396. Id. at 2065.
But as many commentators have noted, such a view conceives of segregation's harm far too narrowly. The harm is not just the discriminatory policy itself, the formal inequality of treatment inherent in official classifications based on race. School segregation also inflicts tangible injuries on the disfavored group by producing disadvantages that continue well after the abandonment of state-imposed discrimination. Indeed, segregation infects the civic institution of public education with racism. It causes pervasive and systemic harms that, until fully uprooted, continue to influence the operation of public school systems in a racially discriminatory manner.

The corrective approach properly recognizes that the vestiges of the de jure system continue to unconstitutionally disadvantage African-Americans after the school district has abandoned its intentionally discriminatory policies. Consider racial imbalances that persist following de jure segregation. These imbalances influence the myriad decisions throughout the community that affect the school system's operations. For instance, students may wish to attend an integrated school, but if the system's schools remain predominantly one-race, their only choice will be between predominantly white and predominantly black schools. In these circumstances, students and families are likely to prefer schools in which they are a racial majority, even if their first choice would be an integrated school. Offering such restricted choices would be especially unjust to the victims of segregation, who may be effectively forced to choose predominantly African-American schools, regardless of their personal preferences, due to the predictable hostility and duress that they would suffer as a small minority at predominantly white schools.

State-imposed segregation also distorts a community's perceptions in a way that cannot be undone simply through the abandonment of de jure policies. De jure segregation contains a clear social message: that whites are superior to African-Americans, and that interaction with blacks is undesirable. School segregation in particular unmistakably signals that white schools provide a better education than black schools. If schools remain identifiably white and black in the wake of de jure segregation,
individuals in the community will continue to make decisions based on these perceptions—perceptions shaped by the government’s de jure policies. People are apt to continue to use the schools’ racial composition as a proxy for their quality.401 This, in turn, will affect where the most qualified teachers decide to accept jobs, where families decide to buy homes, and which schools the highest achieving students wish to attend. So long as these perceptions persist, de facto segregation will steer educational resources (in the form of highly qualified teachers, the best students, and even the affluence of students’ families) disproportionately toward the predominantly white schools. Thus, de facto segregation that perpetuates these perceptions systematically undermines the quality of education in predominantly African-American schools.

If these many private decisions affecting a school district’s operations were based on factors unrelated to de jure segregation, they would be of no constitutional significance. The Fourteenth Amendment only reaches intentionally discriminatory state action,402 and these decisions are private acts, even when motivated by intentional discrimination. But if those decisions are directly influenced by perceptions in the community and conditions in the school district created by the district’s prior de jure policies, the decisions are themselves products of unconstitutional discrimination. And where those decisions produce outcomes that disadvantage African-Americans, those outcomes represent constitutional violations;403 they are ongoing cognizable harms “ultimately . . . trace[able] to a racially discriminatory purpose.”404

The point is clearer in cases like Jenkins, where the harm caused by de jure segregation is a reduction in the level of student achievement. If low student achievement is a vestige of the de jure system, then current educational outcomes in the district are below what they would have


403. See Schnapper, supra note 400, at 858 (“When governmental discrimination creates continuing social or physical conditions, each injury caused by those conditions is a fresh constitutional violation.”).

404. Davis, 426 U.S. at 240. Eric Schnapper has similarly noted that the persistence of a predominantly black school’s racial identifiability in the wake of de jure segregation represents “a constitutionally impermissible badge of inferiority. That label, having been placed on the school and its black students by systematic de jure segregation, can be removed only by altering the composition of the student body.” Schnapper, supra note 400, at 857.
been had there never been state-imposed segregation. That is, student achievement remains artificially low precisely because of past intentional discrimination by the school system. The school system’s educational process therefore represents an ongoing constitutional violation. Only after the school district has eliminated this effect of its past discrimination has it truly remedied the constitutional violation. Until then, harms wrought by the school district’s de jure segregation will persist.

Once one accepts that the Constitution ordains a corrective approach to desegregation remedies, the responses to the remainder of Justice Thomas’s contentions are straightforward. Prolonged federal judicial supervision of formerly de jure school districts does impinge on the principles of federalism and the separation of powers, but it does so to ensure the vindication of another constitutional principle—that the victims of intentional discrimination be afforded equal protection of the laws. To say that the Court should abandon the corrective approach because it violates the norms of federalism and the separation of powers is to value those principles over equal protection.

This argument fails for the same reasons that Justice Scalia’s rejection of the Green presumption founders. The text of the Fourteenth Amendment mandates that, within certain limits, affording African-Americans equal protection must be valued over federalism. The Equal Protection Clause memorialized the collective judgment that federal encroachment on state prerogatives, when necessary to remedy identified acts of racial discrimination, is not only legitimate but actually promotes the values of the Constitution. 405 Thus, there simply is no room for arguing that when the principles of federalism and equal protection collide, federalism should prevail. More specifically, prolonged judicial supervision over formerly segregated school districts cannot be illegitimate simply because it tramples on states’ legislative and executive authority. Rather, if extensive desegregation remedies are necessary to ensure that all citizens are afforded equal protection of the laws, then state autonomy must yield.

With respect to the principle of separation of powers, federal encroachment on state autonomy to enforce the Equal Protection Clause is constitutionally legitimate whether accomplished by Congress, the executive, or the courts. While section 5 of the Fourteenth Amendment expressly grants Congress the power to enact “appropriate legislation” to

405. See supra note 371 and accompanying text; see also Ackerman, supra note 371, at 44–47.
enforce the Amendment's provisions, the Amendment otherwise makes no distinction between legislative, executive, and judicial powers. For reasons of institutional competence, Congress may be best equipped to devise effective solutions to problems created by pervasive racial discrimination. But nothing in either the Fourteenth Amendment or Article III prohibits the federal judiciary from enforcing the commands of equal protection. The license to infringe on state legislative and executive discretion granted to the federal government by the Fourteenth Amendment applies as much to the courts as it does to Congress or the President, especially when the elective branches have generally eschewed a leading role in enforcement. Thus, while judicial remedies to school segregation may be less efficient than congressional or executive action, they are perfectly legitimate under the Constitution.

Moreover, it is important to keep in mind what precipitated federal judicial intrusion in the first place. Federal courts assumed control of formerly de jure school districts precisely because the legislative and executive branches of state and local governments were invidiously discriminating against African-Americans. The democratic process had completely broken down, systematically disadvantaging and oppressing blacks. Segregation, coupled with terrorism that was at least tacitly condoned by local governmental officials, had disenfranchised African-Americans, preventing them from protecting themselves through the political process. Insulating segregated school systems from majoritarian control was therefore necessary to remedy the harms of segregation. Suspending democratic governance for some period was essential to ensuring that school boards abandoned their de jure policies and implemented plans designed to eliminate the effects of discrimination. Thus, to criticize the corrective approach for undermining political accountability in the governance of public schools is, at a basic level, merely to condemn it for having achieved its objectives.

It is conceivable that, at some point, the vestiges of discrimination in a school district will be so remote or intractable that the costs of removing them, in terms of infringing on the principles of federalism and the separation of powers, will outweigh the value in adhering to the strict commands of equal protection. Given courts' limited institutional competence, some lingering effects of the de jure system may ultimately

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407. Moreover, where state-imposed segregation existed for nearly one hundred years, as it did in most southern and border states, federal judicial intrusion for twenty to thirty years hardly seems disproportionate.
be unremediable through court-enforced desegregation. But recognizing such limits hardly means that courts should jettison the corrective approach entirely. Rather, it merely counsels courts to make certain that the vestiges for which they order remedies have a "real and substantial relation to a de jure violation," and can be practicably removed from the school system through court-ordered remedies. Nothing in the corrective approach necessarily restricts district courts' discretion to withdraw judicial supervision once court-ordered remedies are incapable of removing those vestiges of discrimination that might remain.

Finally, the contention that the corrective approach implicitly assumes that predominantly black schools are inherently inferior misunderstands the reasons for requiring actual desegregation. The corrective approach does not demand desegregation because predominantly black schools necessarily provide a lower quality of education, or because African-Americans will have more difficulty achieving when they are racially isolated. Rather, it requires effective desegregation because de facto segregation traceable to the de jure system tends to distort decisionmaking in a manner that produces outcomes disadvantageous to blacks. Until schools are actually desegregated, so that the causal link between the racial composition of the district's schools and de jure segregation is broken, we cannot be confident that racially imbalanced schools are a product of students' and families' free choices. Clearly, there is nothing inherently inferior in predominantly black schools. But if those schools' racial isolation is directly traceable to the prior de jure system, a period of complete desegregation is necessary to ensure that decisions affecting the school district's operations are no longer influenced by past discrimination, and that racial imbalances are the product of families' choosing predominantly one-race schools free from the taint of unconstitutional segregation.

In sum, none of the reasons offered by Justice Thomas justify rejecting the corrective approach to desegregation remedies. Replacing the corrective approach with a purely future-oriented, prohibitory approach would ignore how the ongoing effects of past discrimination continue to discriminate against African-Americans in formerly de jure school districts. Even if the Court's decision in Green was indeed the product of pragmatic concerns pertaining to enforcement, Green's two basic principles remain sound constitutional law. While the remedial framework mandated by those principles impinges to some extent on the norms of federalism and the separation of powers, it properly recognizes

that failing to fully remedy state-imposed segregation would be a greater evil. Hence, while the arguments posited by Justice Scalia and Justice Thomas provide more analytically defensible rationales for curtailing desegregation remedies, they scarcely vindicate the Supreme Court's quiet revolution.

VII. CONCLUSION

It remains possible that Jenkins will prove rather insignificant, the resolution of two discrete and relatively straightforward issues in desegregation law. But the flaws in the Court's reasoning suggest otherwise. Jenkins, together with Dowell and Freeman, reveals that the Court's approach to school desegregation cases has changed. No longer does the Court focus on the effectiveness of the desegregation remedies in eliminating the vestiges of de jure discrimination "root and branch."\(^{409}\) Instead, it emphasizes that court-enforced desegregation was intended to be a "temporary measure,"\(^{410}\) and that local control of elementary and secondary education is "a vital national tradition."\(^{411}\) The Court's primary concern appears to be what it has termed the "ultimate objective" in desegregation cases: "to return school districts to the control of local authorities."\(^{412}\)

Ten years ago, Paul Gewirtz wrote about school desegregation that "at some point—perhaps in words that could connote either triumph or despair—the [C]ourt will come to say: it is finished."\(^{413}\) That point has arrived, but the Supreme Court has failed to deliver any accompanying words of triumph or despair. Instead of confronting the precepts of its desegregation jurisprudence directly and explaining its hostility to extensive court-ordered remedies, the Court is ending this important chapter in our constitutional history subtly and without words. The long and celebrated era of court-ordered desegregation will soon fade quietly, remembered as an enormous, contentious, and largely unsuccessful effort to remedy persisting racial inequalities in public education.


\(^{412}\) Freeman, 503 U.S. at 489.

\(^{413}\) Gewirtz, Choice in the Transition, supra note 47, at 798.