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Perspectives on Missouri v. Jenkins: Abandoning the Unfinished Business of Public School Desegregation 'With All Deliberate Speed'

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PERSPECTIVES ON *MISSOURI v. JENKINS*: ABANDONING THE UNFINISHED BUSINESS OF PUBLIC SCHOOL DESEGREGATION "WITH ALL DELIBERATE SPEED"

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JOSE FELIPE ANDERSON*

[T]he problem seems to me to be one of really scrutinizing the goals of American education.

. . . .

Education is all a matter of building bridges, it seems to me. Environment is bouncing everything off everybody in this country.

- Ralph Ellison[1]

Integration and education are not synonymous, though Americans appear to think so.

- James Baldwin[2]

* Assistant Professor of Law, University of Baltimore School of Law; J.D. 1984, University of Maryland School of Law; B.A. 1981, University of Maryland, Baltimore County. I would like to thank Betsy Levin, Distinguished Visiting Professor of Law at the University of Baltimore, 1995-1996, for her input and insight on this effort. Her expertise and direction, acquired from years of scholarship, teaching, and public service, including her service as counsel to the United States Department of Education, encouraged me to offer my thoughts on this important issue. Any merit is due to her influence and inspiration; any shortcomings are mine alone. I would also like to thank my wife, Dreama Clarke Anderson, my mother Aquilla Alaba Rice, and my aunt, Dorothy C. Thomas, all educators who provided me a realistic perspective on the changes that have occurred in public education since I attended grade school.

I dedicate this essay to the memory of my grandmother, Dorothy Wynn Alaba, whose lifelong commitment to public education inspired four generations; and to my great uncle, William I. Gosnell, who, as co-counsel with Charles Hamilton Houston and Thurgood Marshall, represented Donald Gaines Murray in the early 1930s and desegregated the University of Maryland School of Law.

1. RALPH ELLISON, GOING TO THE TERRITORY 66 (1986) (address given at a seminar on "Education for Culturally Different Youth" in Dedham, Massachusetts, 1963).

2. JAMES BALDWIN, NO NAME IN THE STREET 59 (1972).

I. INTRODUCTION

This essay examines the continuing struggle that centers around whether this country will allow public elementary and secondary school officials to use race-conscious, and sometimes aggressive, tools to eliminate the continuing presence of predominantly single race schools in most of our urban centers. Despite the promise of *Brown v. Board of Education*,[3] the efforts to desegregate schools in some areas of America appear to have eliminated only the legal barriers to truly integrated schools. Many school systems have simply resegregated through demographic shifts prompted by urban decay and "white flight."[4] In *Missouri v. Jenkins*,[5] the Supreme Court struck down certain district court-ordered remedies designed to attract non-minority students to the Kansas City, Missouri School District ("KCMSD"). In this decision, a sharply divided Court once again confronted the problem of what local school districts can be compelled to do to eliminate the problem of past discrimination.[6] By weakening the power of the federal courts to order aggressive remedies, the Supreme Court has clearly indicated that it intends to abandon its commitment to desegregating public schools, seemingly joining the political opposition to

3. Brown v. Board of Educ., 347 U.S. 483 (1954) [hereinafter *Brown I*]. In *Brown*, the Supreme Court concluded that "separate but equal" had no place in the field of public education because separate schools "with the sanction of law . . . ha[ve] a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Id.* at 494-95.

4. *See generally* Wright v. Council of the City of Emporia, 407 U.S. 451, 466 (1972) (prohibiting city from withdrawing from an existing county school district when the entire school system was under federal order to desegregate. The Court held that the potential for white flight from the county school system "would actually impede the process of dismantling the existing dual system").

The problem of "white flight" has made exceedingly difficult local efforts to achieve schools with a more balanced racial makeup. Professor Stephen L. Carter has cogently explained the phenomenon in this way:

> Imagine a spectrum of white students, each with a slightly different tolerance for integration. As the first black students arrive in a formerly segregated school, the white students with the smallest tolerance for integration leave the school. This increases the proportion of black students, which means that the white students with the next smallest tolerance for integration leave. . . . This goes on until the only white students left are those who either cannot leave or possess an infinite tolerance for integration—not likely a substantial number.

STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 234 (1991).

5. Missouri v. Jenkins, 115 S. Ct. 2038 (1995) [hereinafter *Jenkins III*].

6. Comparable educational funding for blacks is not a new problem. Historically, state government could not even be trusted to distribute federal educational funds fairly. Experience with some state distribution of funds has shown that when such funds were distributed to black schools during legally mandated segregation, "frequently either the funds for Negro schools were diverted in part to white schools or the local support of Negro schools [was] reduced." *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1271 n.21 (1944).

busing, magnet school programs, and other educational reforms that have already compromised the promise that schools should be desegregated with "all deliberate speed."[7] The real tragedy of the Supreme Court's decision in *Jenkins* is that it is likely to have a chilling effect on school officials trying to achieve desegregation, and federal judges and litigants attempting to draft plans that are designed to facilitate that goal.

The struggles encountered in achieving legal recognition of the impropriety of de jure segregation suggest that the high cost that has already been paid by so many should encourage our nation to continue to push aggressively toward the goal of integration. My view is that we must pursue integration even while acknowledging recent failures that have led some to call for the abandonment of techniques designed to integrate public schools.[8] It is my hope that those decision makers who are attempting to continue efforts to desegregate will not be discouraged by the Supreme Court's most recent reduction of the power of the federal courts to advance efforts to achieve desegregated education. This nation should press forward with good faith efforts to integrate the public schools despite the challenges that might lead some educational policy makers to abandon that goal. Failure to do so will result in the erosion of public education for all. Such a consequence we can hardly afford.

Before I offer my thoughts on integration and the Supreme Court's decision in *Jenkins*, it seems appropriate that I should disclose something of my background and experience. I am of African-American and Filipino heritage and am the product of the integrated schools of a majority white public school district. I would characterize my public educational experience as good, but certainly not perfect. My elementary and secondary education occurred while the schools I attended were trying to adjust to the challenges of desegregation. I en-

7. Brown v. Board of Educ., 349 U.S. 294, 301 (1955) [hereinafter *Brown II*].

8. One critic of *Brown* observed that "[i]n basing the *Brown* doctrine in a sweeping decision purely within the purpose and function of public school education, the courts committed a beneficial act analogous to freeing long-term convicts from prison without adequate resources to survive in the free world." HAROLD CRUSE, PLURAL BUT EQUAL 67-68 (1987). Another skeptic of *Brown* commented that he was troubled by any suggestion that the problem of addressing "the damaging effects of segregation . . . can be corrected by the simple expedient of appropriately mixing Black and White bodies." Michael A. Middleton, Brown v. Board: *Revisited*, 20 S. ILL. U. L.J. 19, 21 (1995). Professor Middleton further remarked that the pursuit of integration with "myopic zeal, may hamper the development of potentially effective remedies for the lingering effects of segregation." *Id.* The observations of Middleton and Cruse are valid to a point; however, I maintain that any failure of integration is more attributable to the blatant resistance to its implementation than to any structural failure of the *Brown* opinion.

countered some parents, teachers, and students who were uncomfortable with the mixed-race classroom, but there were also many people of good faith who worked toward making an unfamiliar setting comfortable for all. Consequently, my integrated education was more beneficial than it was harmful. My experience cannot, of course, stand alone as reason to endorse aggressive plans to integrate public school systems; but my experience does tell me that to abandon all such efforts would be premature. It is with such a view and, if you will, with such a bias that I approach the concept of integration and challenge the Supreme Court's opinion in *Jenkins*.

II. INTEGRATING PUBLIC SCHOOLS: HISTORICAL ORIGINS AND PRACTICAL LIMITATIONS

The current, poor state of public education for minorities generally in this country cannot be divorced from our nation's shameful history of providing unequal educational opportunity to African Americans after the Civil War and up to the early 1950s.[9] We certainly can begin with the tragedy of the institution of slavery and its painful legacy in our country. The decision to enact slave codes declaring reading and writing to be illegal for blacks affected the generations that followed.[10] More than almost any other institution, education is built on tradition. If one's tradition of education begins with the fear that learning may provoke physical harm and severe punishment, one's motivation for establishing a tradition of learning would, of course, be seriously impaired.[11] Some African Americans—

9. After the Civil War, the Freedman's Bureau was established to "compensate" for years of legally enforced ignorance at a rate of about $1.25 per person. The Bureau did manage to operate about 4,000 small schools across the South, serving approximately 250,000 people of all ages who were attempting to acquire some education after generations of bitter bondage. By 1870, however, the Bureau was dismantled and its efforts to aid freed slaves were mostly abandoned. *See* RICHARD KLUGER, SIMPLE JUSTICE 50 (1976).

10. For example, Georgia's slave code, enacted in 1860 during the South's secession, provided that any free person could be punished for "supplying books to a slave." DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 30-31 (1978).

11. *Id.* Noted historian Lawrence Friedman writes:

> During the high noon of slavery, the slave codes were important documents. They varied in their details, from Florida to Arkansas to Texas; but the general outlines were, depressingly, much the same . . . . [T]he law codified and expressed the basic theorem of slave law[,] . . . the right [of the slave master] to administer summary punishment or "correction." In plain blunt English, it was the power to beat, to hit, to flog, to whip, to inflict quick dry dirty punishment, on the spot and to the point.

LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 85 (1993).

for example, the incomparable Frederick Douglass[12]—have overcome legal prohibitions against education. But education as a foundation for an entire culture requires great effort from all parts of the community. It would be unfair to the average person emerging from slavery to equate the experience of the exceptional Mr. Douglass with his own access to opportunity to self educate. Indeed, for newly freed slaves, obtaining education was a daunting task, considering the many other challenges they faced simply to survive.[13]

Although there were some provisions made for educating free blacks in post-Civil War America, those efforts could only be described as meager at best.[14] After the Civil War, Reconstruction attempted to remedy many of the ills of slavery.[15] The success of those efforts was dubious to be sure, but for the newly freed slaves, any state or federally funded effort to educate a people lacking—and, indeed, barred from—resources to do it themselves was, no doubt, welcome. After Reconstruction the inspirational life stories of Booker T. Washington,[16] W.E.B. Dubois[17] and George Washington Carver[18] served as

12. WILLIAM S. MCFEELY, FREDERICK DOUGLASS 26-39 (1991). McFeely recounts Frederick Douglass's experience educating himself as a young slave living in Fells Point, Baltimore, Maryland, and particularly his purchase of his own copy of *The Columbian Orator*. McFeely writes that "[s]eldom has a single book more profoundly shaped the life of a writer and orator." *Id.* at 34.

13. The mobilization of the black community after the Civil War was remarkable considering the "wave of violence that raged almost unchecked in large parts of the postwar South." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 119 (1988). One official of the Freedman's Bureau said that blacks were "frequently beaten unmercifully, and shot down like wild beasts, without any provocation." *Id.*

14. Before emancipation debate raged over the public education of free blacks in Northern schools, most efforts to integrate schools in Northern states and the new Western territories met with stern resistance. For an excellent review of the efforts to educate free blacks prior to the Civil War, and the issues that complicated those efforts, see LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790-1860, at 113-52 (1961). After the Civil War, efforts to provide education in the South were affected by national attitudes and resistance against providing education to blacks and the political actions those attitudes stimulated. When the North abandoned reconstruction reforms, the South's "educational system . . . was crippled by insufficient appropriations." MCFEELY, *supra* note 12, at 299 (citation omitted).

15. "Perhaps the most striking illustration of the freedmen's quest for self-improvement was their seemingly unquenchable thirst for education." *See* FONER, *supra* note 13, at 96; *see also id.* at 98 (detailing blacks' extensive efforts after the Civil War, despite continuing impoverishment, to establish public education).

16. *See* BOOKER T. WASHINGTON, UP FROM SLAVERY: AN AUTOBIOGRAPHY (1907) (describing the self-education of Washington's youth until his founding of Tuskegee Institute). In his noted autobiography, Washington wrote, "I determined, when I was a small child, that, if I accomplished nothing else in life, I would in some way get enough education to enable me to read common books and newspapers." *Id.* at 27. After moving to a West Virginia cabin, his mother obtained a copy of a Webster "blue-back" spelling book that was to become his first tool of learning. *Id.* In recalling his early educational experience, he wrote, "At the time there was not a single member of my race anywhere near us who could read, and I was too timid to ap-

an inspiration to many of their race, and at a minimum dispelled the myth of black inferiority[19] or any notion that blacks were either unwilling or unable to learn.

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proach any of the white people. In some way within a few weeks, I mastered the greater portion of the alphabet." *Id.* at 27-28.

17. *See* DAVID L. LEWIS, W.E.B. DUBOIS, BIOGRAPHY OF A RACE 1868-1919 (1993) (describing the educational backgrounds and experiences, during Reconstruction through the early twentieth century, of the renowned civil rights leader and first African American to win a Doctorate from Harvard University). Dubois was born during the peak of Reconstruction in 1868. At that time, the educational resources for the newly freed slaves were limited. Dr. Lewis described the Fisk Free Colored School that opened in early 1866 on the site of a Union Army hospital near Nashville, Tennessee as "narrow, windowless frame buildings jammed into a small rectangle near Chattanooga depot." *Id.* at 56. Illustrating the demand for education, Dr. Lewis wrote "Two hundred ex-slaves, men, women, and children, came to learn to read, write, and count on the first day. By February, six hundred clamored for instruction. A year later, a thousand a day were being spelled . . . ." *Id.* at 56-57. Examples such as these leave little doubt that African Americans anxiously embraced educational opportunity as soon as legal barriers to those opportunities were removed.

18. *See* RACKHAM HOLT, GEORGE WASHINGTON CARVER: AN AMERICAN BIOGRAPHY (1943) (examining the life and education of the modest and diligent scientist). The Holt biography describes Carver's Reconstruction days in Missouri and the small one-room schoolhouse established by the Freedman's Bureau where he received his first training. Holt describes the challenge for the school's first Negro teacher:

> In the one room of the Lincoln School, a tumbledown cabin fourteen feet by sixteen, he did the best he could with his own limited education for the seventy-five children massed on the high, hard benches before him.
>
> Into this throng George [Washington Carver] was promptly inserted. . . . He was an absorptive sponge whose thirst for more knowledge was increased with the salt of fervor.

Id. at 26.

19. At the turn of the twentieth century, the myth of black inferiority was not only supported by demeaning stereotypes but also by questionable research. For example, one biologist, Charles B. Davenport, claimed that heredity, not environment, accounted for the superiority of whites over blacks; and Yale's William Graham Sumner argued that changing the law would not change the circumstance of a man "born of an inferior race." *See* HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 5-6 (1978). Such notions even lingered into post-*Brown* era litigation. *See* Brunson v. Board of Trustees, 429 F.2d 820, 824 (4th Cir. 1970) (criticizing the dissent's endorsement of the educational theory that seeks to establish schools with a predominantly middle class student body—where "middle class" is synonymous with "white" and the subordinate "lower class" is synonymous with "black"—as a pretext for achieving majority white schools). The central proposition of expert testimony heard in *Brunson* was the curious notion that "'there does seem to be some optimum level for the achievement of both white and black children that drops after 35 or 40 (percent of black students in the school is surpassed).'" *Id.* at 821 (quoting expert testimony). In rejecting this thesis, Judge Sobeloff, in his concurring opinion, recognized that "at bottom [such theories] rest[ ] on the generalization that educationally speaking, white pupils are better and somehow more desirable than black pupils. This premise leads to the next proposition, that association with white pupils helps the blacks so long as whites predominate . . . . But once the number of whites approaches minority, then association with inferior black children hurts the whites and, because there are not enough good whites to go around, does not appreciably help the blacks." *Id.* at 826. Judge Sobeloff cogently observed that "this theory grossly misapprehends the philosophical basis for desegregation." *Id.*

Predictably, the great changes in the country after the Civil War and Reconstruction led to *Plessy v. Ferguson*[20] and several decades of legally mandated segregation. Although *Plessy* dealt with public accommodations on railroads, one of the most conspicuous casualties of *Plessy*'s separate-but-equal doctrine was educational resources for children.[21] For several decades the nightmare of inequality in a "separate but equal" world became all too apparent. African Americans had neither the political ability nor the financial resources to change their circumstances.[22]

New hope came in the form of a band of lawyers intent on using the courts to help their people out of the quandary of separate but equal. In the early 1930s, Charles Hamilton Houston, Thurgood Marshall, Houston's star pupil, and others joined in the fight for equality. They selected from many worthy cases only a few that demonstrated the greatest promise to advance the goal of desegregating public education.[23] One early case, widely recognized as Marshall's earliest civil rights victory, was *Pearson v. Murray*,[24] which successfully desegregated the University of Maryland's law school in Baltimore, Marshall's hometown.[25] Other major victories in desegregating graduate

20. Plessy v. Ferguson, 163 U.S. 537 (1896). In *Plessy*, the Supreme Court considered an 1890 Louisiana law that required rail passengers of different races to ride in separate rail cars. Plessy sat in a rail car reserved for whites. He was asked to leave and was arrested after he refused to do so. *Id.* at 538. Plessy argued that he "was seven-eighths Caucasian, one-eighth African blood . . . and that he was entitled to every right [of] the white race." *Id.* Under *Plessy*, "Congress and the states could not prohibit racial segregation, but the states could compel it." LEONARD W. LEVY, JUDICIAL REVIEW AND THE SUPREME COURT 34 (1967). Thus, *Plessy* and the statutes and cases it spawned "most certainly dammed up and discouraged the democratic values of American life, stunted the political and moral capacity of people, and released and energized the most unworthy, even bigoted forces." *Id.*

21. "In 1915, South Carolina spent $23.76 on the average white child in public school, [but only] $2.91 on the average Negro child. As late as 1931 six southeastern states (Alabama, Arkansas, Florida, Georgia, North and South Carolina) spent less than a third as much per Negro public school pupil as per white child." ANTHONY LEWIS, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION 20 (1964). "[T]he annual salary for the Negro public school teacher in the 17 states with compulsory segregation laws was $601 in 1940. The corresponding figure for white teachers was $1,046." ARNOLD ROSE, THE NEGRO IN AMERICA 117 (1948).

22. *See* ROSE, *supra* note 21, at 117-18 (describing Southern white-controlled school authorities' strategies for underfunding black schools and black teachers' colleges to maintain white dominance).

23. For an outstanding survey of the litigation that led up to *Brown v. Board of Education*, see RICHARD KLUGER, SIMPLE JUSTICE (1976).

24. Pearson v. Murray, 182 A. 590 (Md. 1936).

25. *Id.* at 593-94. Charles Houston was cautious about becoming involved in the desegregation of the University of Maryland law school, wanting to ensure that the case would fit into his plan to attack the *as applied* constitutionality of the separate-but-equal doctrine. *See* KLUGER, *supra* note 23, at 186. A Baltimore attorney, Bedford V. Lawson, Jr., who was planning to bring suit against the entire University of Maryland system, and another Baltimore attorney, William Gosnell, brought Donald Gaines Murray to the attention of Marshall and Houston as a possible

and professional education followed.[26] During that period, segregation in many other areas was challenged, but, ultimately, the true goal crystallized—to achieve equal educational opportunity.[27] Making education a priority reflected the reality that only through education could the entire African-American culture make significant strides to become a vital part of America.[28] The strategy of Houston, Marshall, and the other lawyers at the NAACP Legal Defense Fund[29]

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plaintiff. *Id.* at 186-87. Murray was a well-qualified graduate of Amherst College and a member of a prominent Baltimore family affiliated with the African Methodist Episcopal Church. With a suitable plaintiff available, Houston pursued the case against the law school, believing it unwise to challenge the entire University. *Id.* at 187. Marshall, legal counsel to the Baltimore branch of the National Association for the Advancement of Colored People ("NAACP"), was particularly anxious to obtain a victory against the University and to put the branch on the map as a civil rights force in the black community. *Id.* at 184-86.

Before Marshall and Houston became Murray's attorneys, Gosnell had advised Murray to write to Raymond A. Pearson, the president of the University, to inquire about admission to law school. When Murray informed Pearson he was a Negro, the president recommended that the Amherst graduate attend either Morgan College or Princess Anne Academy—a demeaning suggestion, considering that neither institution had a law school. *Id.* at 188. Led by Houston, the team of lawyers was successful at both the trial and appellate court levels, and the State of Maryland did not seek review of the case by the United States Supreme Court. *Id.* at 192-94.

26. *See, e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (holding that the refusal to admit a black student to the all-white University of Missouri law school, when no other equal facility for blacks existed in the state, violated equal protection). That Missouri was willing to pay for Gaines to attend an out-of-state school was inadequate to cure the constitutional violation. *Id.* at 349-50.

27. The NAACP became involved in many legal disputes regarding equal treatment. One of its more noteworthy activities was its effort to desegregate the military. For an interesting account of that endeavor, see MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 120-32 (1992).

Discrimination in the armed forces was a matter of grave concern during World War II. "By 1940, there were less than 5,000 Blacks in the American army composed of 230,000 enlisted men and officers. At the beginning of the war emergency, there were less than a dozen Black officers in the regular army." ACKLYN LYNCH, NIGHTMARE OVERHANGING DARKLY 58 (1992) (footnote omitted). When blacks enlisted, they were sent to mostly segregated units and assigned almost exclusively to jobs as servants and laborers. "Thurgood Marshall dispatched a letter . . . to Secretary of War Henry L. Stimson, listing the services that excluded Blacks. He warned that when conscription was enacted, Blacks who were refused the right to serve in all branches of the service would prefer to go to jail." *Id.* (footnote omitted).

28. A. Leon Higginbotham, Jr., has commented that "*Brown* changed the moral tone of America; by eliminating the legitimization of state imposed racism it implicitly questioned racism wherever it was used." A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague,* 140 U. PA. L. REV. 1005, 1017-18 (1992).

29. *See generally* JACK GREENBERG, CRUSADERS IN THE COURT: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 85-191 (1994) (describing the events, beginning with the decision to attack the constitutionality of Jim Crow, leading to the *Brown* decision). The struggle to desegregate sometimes brought about violence. Greenberg, an NAACP Legal Defense and Educational Fund lawyer, recounts that in 1958, "John Kasper, a notorious segregationist, led riots to attack first-grade desegregation. A bomb destroyed a synagogue. Hattie Cotton School, where one black child was enrolled, was bombed." *Id.* at 254. Local resistence to desegregation was often violent.

culminated in the original *Brown* decision, intended to implement desegregation in public elementary and secondary schools.[30]

The question of implementing *Brown* was to be settled in *Brown II*.[31] The Supreme Court, in discussing the remedial power of the lower courts to enforce the Court's desegregation mandate, instructed that

> [T]he courts will be guided by equitable principles. . . . Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.[32]

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30. The problem of judicial remedy has plagued the implementation of *Brown* from the beginning. In the oral argument of the cases intended to fashion a remedy for the violations identified by the Supreme Court in the first *Brown* decision, Justice Reed queried that "[i]f there were more time [for states to desegregate] . . . there would be opportunity for the enactment of state law that would put into a central body authority to carry forward desegregation?" Transcript of Proceedings, Harry Briggs, Jr. v. W. Elliot, at 134 (transcript of Justice Marshall's argument before the Supreme Court in *Brown II*, 349 U.S. 294 (1955)) (on file with Howard University School of Law Library). Thurgood Marshall, arguing the case on behalf of the black school children, was worried about the prospect of allowing further delay because of the enforcement problems. He argued:

> The effect [of delay] would be to say to all the district courts of the states, [that] the several states could decide in their own minds as to how much time was necessary—then the Negro in this country would be in a horrible shape. . . . He, as a matter of fact, would be as bad, if not worse off than under separate but equal doctrine for this reason. When they produce reasons for delay, they are up in the air, they are pretty hard to pin down.
>
> And, as a lawyer, it is difficult to meet that type of presentation. In separate but equal, we could count the number of books, the number of bricks, the number of teachers and find out whether the school was physically equal or not. But now, enforcement of this will be left to the judgment of the District Court with practically no safeguards.

Id. at 140.

31. *Brown II*, 349 U.S. at 294. It has been said that "*Brown v. Board of Education* [was] one of the most daring assertions of court authority in judicial history." ROBERT G. MCCLOSKEY, THE MODERN SUPREME COURT 333 (1973).

Some critics have argued that while "*Brown* was a great and correct decision . . . it must be said in all candor that the decision was supported by a very weak opinion." ROBERT H. BORK, THE TEMPTING OF AMERICA 75 (1990). The legal basis of the opinion, which relied on social science information, called the opinion into question soon after it was issued. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35 (1959) (suggesting that *Brown* did not rest on any neutral principle of constitutional adjudication).

32. *Brown II*, 349 U.S. at 300. One chronicle of the *Brown* decision observed that "[t]he Supreme Court's refusal to set deadlines for desegregation invited Southern officials to invent foot dragging tactics. . . . [T]he court's faint-hearted approach was matched by the other branches of the federal government." PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 110 (1988). The Court's approach presented special problems for those families attempting to integrate schools in the newly desegregated Southern states.

> Those few southern blacks who dared seek their newly affirmed rights faced the threat of harsh reprisal. Black parents who petitioned their local school board to comply with the *Brown* ruling often discovered their name listed prominently in local newspapers—to be read by white employers and landlords upon whom they were dependent.

Following *Brown II*, a twenty-year struggle to implement desegregation ensued, primarily in the South, involving instances of "admitted state-imposed segregation."[33]

This resistance to *Brown* in many states, and the still-perplexing question of remedy, dimmed the hope that both the letter and the spirit of *Brown* would be realized. Litigation over various state efforts to avoid segregation followed *Brown II*, including plans that permitted students to transfer to a school where they would be in the majority.[34] For example, Prince Edward County, Virginia, suspended public funding of any school attended by both blacks and whites and paid tuition grants to white students who chose to attend non-sectarian private schools, creating a situation where African Americans were effectively denied education from 1959-1963.[35] In another case, the Supreme Court invalidated plans that sought to desegregate schools at a pace of "one year, one grade" for being too slow.[36] In 1968, in *Green v. New Kent County School Board*,[37] the Supreme Court invalidated a freedom-of-choice plan that allowed pupils to choose which public schools

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SETH CAGIN & PHILIP DRAY, WE ARE NOT AFRAID 54 (1988).

33. For an excellent, detailed discussion of the litigation that occurred between *Brown II* and Milliken v. Bradley, 418 U.S. 717 (1974) [hereinafter *Milliken I*], see Betsy Levin & Philip Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW AND CONTEMP. PROBS. 50, 57-114 (1975).

34. Goss v. Board of Educ., 373 U.S. 683 (1963). In *Goss*, the Supreme Court struck down a transfer plan because of its unilateral effect on the composition of the schools. As the court explained, "[T]he right to transfer, which operates solely on the basis of racial classification is a one-way ticket leading to but one destination, i.e., the majority race of the transferee and continued segregation." *Id.* at 687.

35. In Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964), the Supreme Court invalidated this practice.

Virginia was not alone in its resistance to desegregation by attempting to destroy the local public school system. Another example was Macon County, Alabama, where in 1963, Governor George Wallace solicited state employees for financial assistance to begin a private school called the "Macon Academy." The Governor "encouraged white residents to boycott the public schools in Macon County and send their children to the newly formed, private, all-white" academy. FRED GREY, BUS RIDE TO JUSTICE 212 (1995).

Some blacks faced the special challenge of being in the first generation of students to attend integrated schools after *Brown*. In his best-selling memoir, Nathan McCall recounts his experience in Virginia in 1966 at a predominantly white junior high school, which he attended instead of attending the school in his mostly black community. He writes, "The U.S. Supreme Court had long before ruled against the notion of separate but equal schools; still, Virginia, one of the states that had resisted desegregation, was slow in putting together a busing plan. . . . [L]ike many blacks then, my parents figured I could get a better education at the white school across town." NATHAN MCCALL, MAKES ME WANNA HOLLER 18 (1994). Difficulty adjusting to the majority white school and white students' refusal to accept McCall led to his suspension from that school, and to his parents' eventual decision to transfer him to his neighborhood school. *Id.* at 18-20.

36. *See* Rogers v. Paul, 382 U.S. 198 (1965).

37. Green v. New Kent County Sch. Bd., 391 U.S. 430 (1968).

they would attend.[38] During that period, the Court had, in several cases, compelled immediate desegregation without further delay,[39] announced that desegregation would be eliminated "root and branch,"[40] and approved busing under certain circumstances.[41]

Although the Court noted that there is no constitutional right to racial balance in and of itself,[42] mathematical ratios demonstrating racial imbalance could serve as a starting point.[43] By the early 1970s, the Supreme Court had made it clear that remedies fashioned by the district court "may be administratively awkward, inconvenient, and even bizarre in some situations."[44] But by 1974, the Supreme Court had announced its decision in *Milliken v. Bradley*,[45] where it held that federal remedial powers stop at the school district line, unless the nearby district or the state had contributed to the constitutional violation. The decision effectively brought to an end two decades of successful desegregation litigation in the court.[46] In *Milliken*, Chief Justice Burger held that the district court exceeded its authority when

38. *Id.* at 439-42.

39. *See* Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969).

40. *Green*, 391 U.S. at 437-38. In a unanimous opinion, the Court struck down a Kent County, Virginia plan because it was not effective in desegregating the public schools. The so-called "freedom of choice" plan resulted in substantial continued segregation. Justice Brennan wrote that

> *Brown II* was a call for the dismantling of well-entrenched dual [school] systems . . . . School boards . . . then operating state-compelled dual systems were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Id. The district was ordered to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Id.* at 442.

41. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30-31 (1971). At the time of *Swann*, the Nixon Administration was faced with the challenges of implementing desegregation. One member of President Nixon's staff, Patrick Buchanan, wrote a memo in January 1970 "suggesting that [President Nixon] was being unfair to the South by desegregating the schools there and not in the North." NICHOLAS LEMANN, THE PROMISED LAND 210 (1991). President Nixon wrote in the margin of that memo, "[W]hy should we continue to kick the South and hypocritically ignore the same problem in the North?," *id.*, and reportedly remarked that "integration hasn't worked." *Id.* It is clear, however, that integration was a problem, not only for the South, but for the North as well.

42. *See Swann*, 402 U.S. at 24 (holding that the constitutional mandate to desegregate does not mean that the racial composition of every school must reflect that of the entire school system):

43. *Id.* at 25.

44. *Id.* at 28. Among the more controversial remedies was busing. One commentator explains that "busing is seen [by the Supreme Court] as the best way to properly desegregate racially divided schools, albeit with some limitations. Not surprisingly, an intense debate has arisen among the public as to whether busing is, in fact, a proper method of integrating students." Joel B. Teitelbaum, Comment, *Issues in School Desegregation: The Dissolution of a Well-Intentioned Mandate*. 79 MARQ. L. REV. 347, 364 (1995) (footnotes omitted).

45. *Milliken I*, 418 U.S. 717 (1974).

46. *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 569 (3d ed. 1992).

it ordered fifty-three suburban school districts to participate in the desegregation plan intended to desegregate the mostly black Detroit school system.[47] Chief Justice Burger wrote that "[i]t is obvious from the scope of the interdistrict remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts, the District Court will become . . . a de facto legislative authority . . . and the school superintendent for the entire area."[48] The *Milliken* decision foreshadowed a period of uncertainty and confusion for the remedial power of the federal courts and called into question the continued validity of *Brown* and its progeny. By 1986, Justice Marshall would remark that he was aware in 1955 that the "all deliberate speed" remedial formula would signal "problems ahead . . . but I sure as hell never imagined we'd get to this sad state of affairs."[49]

III. *MISSOURI v. JENKINS III*, DESEGREGATION AND THE AMERICAN DILEMMA AT THE CROSSROADS

The first court order in this long-running litigation was issued in June 1985.[50] At that time, the court identified twenty-five schools within the KCMSD that had enrollments of ninety percent or more black students[51] and ordered aggressive remedies[52] in an effort to cor-

47. *Milliken I*, 418 U.S. at 742-44.

48. *Id.* at 743-44.

49. *See* CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS 250 (1993). Former Chief Justice Earl Warren also voiced considerable surprise at the amount of resistance that the *Brown* decision encountered. "The Court expected some resistance from the South. But I doubt if any of us expected as much as we got." CHIEF JUSTICE EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 290 (1977).

50. Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985). For a review of the litigation involving the KCMSD from 1977 to 1993, see Deborah E. Beck, Note, Missouri v. Jenkins: *School Choice As a Method for Desegregating an Inner City School District*, 81 CAL. L. REV. 1029, 1032-35 (1993).

51. *Id.* at 36.

52. *See Jenkins III*, 115 S. Ct. 2038, 2042-43 (1995) (citing Jenkins, 639 F. Supp. at 26-33). The district court ordered the State of Missouri, which had been held jointly and severally liable for the continuing segregation in the KCMSD, to offset the cost of providing KCMSD with

> high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; . . . green houses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities.

Jenkins v. Missouri, 495 U.S. 33, 77 (1990) (Kennedy, J., concurring in part and concurring in judgment). In fact, the educational plan then ordered by the court exceeded the local school district's budget; it was held to exceed the federal court's taxing authority. *See id.* at 37.

rect the racial disparity.[53] In ordering a reduction in class size, the district court concluded, "Reducing class size will serve to remedy the vestiges of past segregation by increasing individual attention and instruction, as well as increasing the potential for desegregative educational experiences for KCMSD students by maintaining and attracting non-minority enrollment."[54] In November 1986, the district court approved a plan to create magnet schools in KCMSD, as well as a capital improvement program, both intended to attract students from outside the district and from private schools.[55] Under the plan, every high school, middle school, and one-half of the elementary schools were converted into magnet schools.[56] The district court concluded that "[t]he long-term benefit of all KCMSD students of a greater educational opportunity in an integrated environment is worthy of such an investment"[57] and, according to the Supreme Court, "candidly . . . acknowledged that it . . . 'allowed the District planners to dream' and 'provided the mechanism for those dreams to be realized.'"[58]

By a slim 5-4 majority, the Supreme Court reversed the Court of Appeals for the Eighth Circuit,[59] affirming the desegregation plan of United States District Court for the Western District of Missouri.[60] The State of Missouri had challenged the district court's order, primarily for awarding salary increases to "virtually all instructional and noninstructional staff within the . . . [KCMSD] and . . . requiring the State to fund remedial 'quality education' programs because student achievement levels were still 'at or below national norms at many grade levels.'"[61]

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53. One commentator has described the kind of taxing power used by the federal court to control schools as "the greatest usurpation of legislative power and is contrary to federalism and state-federal comity." David G. Richardson, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case*, 26 URB. L. 215 (1994).

54. *Jenkins III*, 115 S. Ct. at 2043 (quoting Jenkins v. Missouri, 639 F. Supp. 19, 29 (W.D. Mo. 1985)).

55. *Id.*

56. *Id.*

57. *Id.* (citing district court order).

58. *Id.* (citations omitted). The Supreme Court has generally recognized that in school desegregation cases great deference is given the factual findings of the district court, and such findings should be reversed only if they are clearly erroneous. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). The findings of fact should thus be upheld unless the record demonstrates a "definite and firm conviction that a mistake has been committed." *Id.* at 573.

59. *Jenkins III*, 115 S. Ct. at 2042.

60. *Id.* at 2045. The Court noted that the same district court judge had supervised the school districts desegregation plan since 1977. *Id.* at 2042.

61. *Id.* The circuit court had affirmed the district court's findings that the programs and funding were needed, finding that

The State of Missouri argued that the court-ordered salary increases did not directly address the state's constitutional violations. The Eighth Circuit rejected this argument, stating that "in addition to compensating the victims, the remedy . . . was also designed to reverse white flight by offering superior educational opportunities."[62] The State of Missouri appealed the Eighth Circuit decision. Before addressing the merits of Missouri's specific arguments against the propriety of both the salary increases and the quality education programs, the Court addressed the procedural question of whether the Court could review the scope of the remedy ordered by the district court.[63] The Court had denied certiorari on that question in prior litigation between the parties.[64]

Chief Justice Rehnquist, writing for the majority, presumed that it was proper to address the question of the remedy's propriety because the earlier denial of certiorari imparted no expression of opinion on the merits of that issue.[65] In a dissenting opinion, Justice Souter sternly criticized the majority for what he believed was an improper procedural approach, and that was both unfair and imprudent, because it "lulled [respondents] into addressing the case without sufficient attention to the foundational issue."[66]

The Court, relying heavily on the scope-of-remedy analysis in *Milliken v. Bradley*,[67] reversed the Eighth Circuit's affirmance of the remedy of salary increases and other relief ordered by the district court to be provided by KCMSD.[68] Focusing on the district court's efforts to create "desegregative attractiveness"[69] to non-minority, suburban students, Chief Justice Rehnquist explained that a court exceeds its authority when it fashions interdistrict relief where the

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> [Q]uality education programs and magnet schools were a part of the remedy for the vestiges of segregation causing a system wide reduction in student achievement in the KCMSD schools. . . . [W]e pointed to the district court's findings that the failure to remove the vestiges of the dual school system precipitated an atmosphere which prevented KCMSD from raising necessary funds, specifically those to maintain required salary levels.

Jenkins v. Missouri, 13 F.3d 1170, 1172 (8th Cir. 1993).

62. Missouri v. Jenkins, 11 F.3d 755, 767 (8th Cir. 1993).
63. *Jenkins III*, 115 S. Ct. at 2046-47.
64. *See id.* (citing Missouri v. Jenkins, 495 U.S. 33, 53 (1990)).
65. *Id.* at 2047 (citing United States v. Carver, 260 U.S. 482 (1923)).
66. *Id.* at 2074 (Souter, J., dissenting).
67. *Milliken I*, 418 U.S. 717 (1974).
68. *Jenkins III*, 115 S. Ct. at 2061.
69. The majority opinion criticized the district court for attempting to advance the goal of "desegregative attractiveness" because of its view that such a goal "results in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools . . . that . . . it is beyond the admittedly broad discretion of the District Court." *Id.* at 2055.

surrounding school districts had not themselves been guilty of any constitutional violation.[70] The Court went on to "reject[ ] '[t]he suggestion . . . that schools which have a majority of Negro students are not 'desegregated,' whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered.'"[71] The Supreme Court criticized the district court for creating a magnet district to serve the "interdistrict" goal of attracting non-minority students from the surrounding state school districts and redistributing them within the KCMSD.[72] It thus concluded such a broad remedy was beyond the scope of the district court's remedial authority.[73] The Court found that the district court's order, designed to create "desegregative attractiveness," and its "[i]nsistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the KCMSD will be able to operate on its own."[74]

In her concurring opinion, Justice O'Connor commented that federalism concerns would limit the remedial power of the federal court in addressing school desegregation.[75] Justice O'Connor emphasized that the courts are constrained by "necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution."[76]

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70. *Id.* at 2047. Justice Rehnquist has displayed a long-standing inclination to strike down segregation plans that attempt to remedy shifts in population and housing patterns. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (holding that order requiring annual readjustment of attendance zones so that no school would have a majority-minority racial makeup exceeded court's authority; and finding that a "quite normal pattern of human migration [that] resulted in some changes in the demographies of . . . residential patterns . . . [and] in the racial make up of some schools . . . [was] not attributed to . . . segregative actions.").

71. *Jenkins III*, 115 S. Ct. at 2048 (quoting *Milliken I*, 418 U.S. at 747 n.22).

72. *Id.* at 2051.

73. *Id.* Not all scholars have agreed that the right to attend desegregated schools is limited in remedial scope to only those remedies that take effect within the school district. *See* Norman Amaker, Milliken v. Bradley: *The Meaning of the Constitution in School Desegregation Cases*, 2 HASTINGS CONST. L.Q. 349, 352-59 (1975); *see also id.* at 359 (noting that the dissenters' argument in *Milliken* reasonably recognized that, under the Fourteenth Amendment, "school district boundaries may give way . . . if that is required to prevent state denial of equal educational opportunity to black children").

74. *Jenkins III*, 115 S. Ct. at 2056.

75. *Id.* at 2061 (O'Connor, J., concurring) ("[F]ederal courts are specifically admonished to 'take into account the interests of state and local authorities in managing their own affairs.'" (quoting Milliken v. Bradley, 433 U.S. 267, 281 (1977))).

76. *Id.* At the heart of the controversy over the extent of the power of federal courts to control local school districts is the debate over the scope of the remedy and the consideration over local autonomy. As one writer has recognized, "*Missouri v. Jenkins* raises the fundamental questions about the extent of the power of the federal courts to remedy constitutional violations. On the other hand, a concern for federalism counsels against giving federal judges unlimited power over the affairs of state and local government." Martin A. Schwartz, *The School Taxation Decision*, N.Y. L.J., May 16, 1990, at col. 1.

She further reasoned that "[t]he unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation."[77]

Justice Thomas, in a separate concurring opinion, criticized the district court for what Thomas characterized as an "experiment with the education of . . . black youth."[78] Justice Thomas, on one hand, indicates that harm has been "done to those black school children injured by segregation,"[79] but later in his concurrence criticizes "the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development."[80] Justice Thomas recommended that the Court "should demand that remedial decrees be more precisely designed to benefit only those who have been victims of segregation."[81] He asserted that "the remedy for *de jure* segregation ordinarily should not include educational programs for students who were not in school (or were even alive) during the period of segregation."[82]

In a lengthy dissent, Justice Souter criticized the majority's review of the district court's order granting equitable relief, in part because the Court "did not accept for review[,] . . . need not reach . . . , and . . . specifically refused to consider" the issue of remedial orders of the district court when granting certiorari in the case.[83] He also criticized as "flatly contrary to established precedent"[84] the majority's assertion that the "rule against interdistrict remedies for intradistrict violations applies to this case, solely because the remedy here is meant to produce effects outside the district in which the violation occurred."[85]

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77. *Jenkins III*, 115 S. Ct. at 2061.

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

79. *Id.* at 2061 (Thomas, J., concurring).

80. *Id.* at 2062. Although Justice Thomas suggests that he is not convinced that segregation harms black students in their educational development, some scholars have reached the conclusion that its ill effects are significant. Derrick Bell writes:

> Despite their promises for the future, history offers important warnings regarding the prospects of single-race schools. All-black public schools before *Brown* were notorious for the scandalously inferior quality of their education. Today, separate remains unequal. Over thirty-five years after *Brown*, evidence shows that predominantly black schools have higher student-faculty ratios, less experienced and lower paid teachers, inferior facilities, and lower quality course offerings and extracurricular programs than white schools. Given the continuity in the economic and political powerlessness of blacks in this country, it is naive to suppose that things would be any different today.

BELL, *supra* note 46, at 611 (footnotes omitted).

81. *Jenkins III*, 115 S. Ct. at 2073 (Thomas, J., concurring).

82. *Id.*

83. *Id.* at 2073 (Souter, J., dissenting).

84. *Id.* at 2083.

85. *Id.*

Justice Souter suggested that the effect of the majority opinion "amounts to a redefinition of the terms of *Milliken* and consequently to a substantial expansion of its limitation on the permissible remedies for prior segregation."[86]

Justice Souter also accused the majority of implicitly overruling the effect of a prior unanimous Supreme Court opinion,[87] *Hills v. Gautreaux*,[88] where the Court had approved interdistrict relief in the absence of interdistrict violations. Souter, fearing that the majority's opinion would become "an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct,"[89] reminded the majority that "there [is] no '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."[90]

In a separate dissent, Justice Ginsburg noted that "[g]iven the deep, inglorious history of segregation, in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon."[91] Justice Ginsburg's dissent not only embraced Justice Souter's reasoning, but also emphasized that Missouri's history of segregation warranted extreme caution before the state should be released from close federal oversight.[92]

The Supreme Court's recent opinion in *Jenkins* represents the Court's continuing shift toward federalism and the consideration of states' rights in its jurisprudence.[93] There can be few items of greater local interest than issues related to elementary and secondary schools—public education represents the largest expenditure for local

86. *Id.* at 2088.

87. *Id.* at 2089-90.

88. Hills v. Gautreaux, 425 U.S. 284 (1976). In *Hills* the district court found that the Chicago housing authority and the federal Department of Housing had racially segregated the city's housing projects. The Court, Justice Stewart writing, held that a federal court could undertake efforts that went beyond the municipal boundaries of the city. *Id.* at 306.

89. *Jenkins III*, 115 S. Ct. at 2090-91 (Souter, J., dissenting).

90. *Id.* at 2089 (quoting *Hills*, 425 U.S. at 298) (footnotes omitted).

91. *Id.* at 2091 (Ginsburg, J., dissenting). Justice Ginsburg noted that Missouri's pre-Civil War Black Codes "prohibited the creation or maintenance of schools for educating blacks: 'No person shall keep or teach any school for the instruction of negroes mulattoes, in reading or writing, in this State.'" *Id.* (citation omitted). She also noted that immediately after the Civil War, Missouri passed a series of laws requiring segregated schools. *Id.*

92. *Id.*

93. *Id.* at 2061.

government.[94] The intervention of a federal judge into the local community—to direct an extensive plan for spending local funds to desegregate schools—caused the order to be viewed with great hostility. A plan so detailed as that ordered for KCMSD may not have been entirely appropriate, at least in a prudential sense, to remedy the vestiges of discrimination in that district.

On the other hand, the Supreme Court painted with too broad a brush in wholly invalidating interdistrict remedies. *Jenkins* may have a profound detrimental effect on how local school districts handle desegregation in the future. The Supreme Court's opinion serves as a disincentive for district judges considering new or unproven desegregation strategies that may, in any way, affect adjoining school districts. School districts will examine pending litigation involving its neighbors much more closely and will be less willing to accommodate those plans if they can intervene in the litigation and avoid cooperation.

The awkward procedural mechanism employed in this case that permitted the original equitable order to be essentially "reopened"[95] will encourage those states already under court order to be less vigorous in complying with those orders. Those jurisdictions will recognize that there is now a possibility that appellate courts or the Supreme Court may limit the jurisdiction of a district judge to order equitable relief in a subsequent appeal. *Jenkins* may also encourage resistance to federal court orders already in place if local lawyers advise school districts that a current plan arguably contains inappropriate "interdistrict" remedies.

The legacy of avoiding compliance with the federal courts is nothing new in school desegregation.[96] Much of that resistance was intentional and required the firm intervention of the courts.[97] Without the broad remedial power of the federal courts, very little would have been accomplished to compel some school districts to comply.

The unavailability of interdistrict remedies reduces the already limited options of local governments to redress racial discrimination in education that may have occurred over several decades. In short, the

94. In 1992, America spent nearly $419 billion on education, of which $235 billion went to public elementary and secondary schools. Kevin P. McJessy, *Contract Law: The Proper Framework For Litigating Educational Liability Claims*, 89 NW. U. L. REV. 1768, 1787 n.76 (1995).

95. *Jenkins III*, 115 S. Ct. at 2043-46.

96. *See, e.g.*, Alexander v. Holmes County Bd. Educ., 396 U.S. 19 (1969).

97. Court-ordered desegregation in many states was met with blatant resistance, judicial hostility, and legislative evasion. *See* Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 203-12 (1964).

Supreme Court in *Jenkins* has planted the seeds of apathy in the area of public school desegregation. This may cause the erosion of meaningful school desegregation orders because the court has, "with all deliberate speed,"[98] relaxed its potential coercive grip on local school officials who may already be reluctant to remedy past discrimination.[99] Respect for desegregation orders may unravel, and diligent efforts to achieve any racial balance will cease because there will be no fear of court intervention. While it is not always necessary to use the full force of judicial equitable power to bring about compliance with a court's order, the presence of broad power to grant relief encourages agreements and voluntary compliance at the local level.[100]

Also troubling is the tone of the *Jenkins* opinion, which suggests a dominant role for federalism in desegregation orders in general. It was the resistance to the federal constitution by state officials, under the banner of federalism, that led to the need for coercive intervention to enforce school desegregation in the first instance.[101] A better approach for the Supreme Court to have taken would have been more carefully to review the factual basis upon which the district judge in *Jenkins* relied, rather than to eliminate the traditionally broad range of potential equitable relief. In this way, the Supreme Court could have avoided the impression that *Jenkins* is simply its way of abandoning the unfinished business of public school desegregation. Yet the Court's leanings toward abandonment of school desegregation

98. *Cf. Brown II*, 349 U.S. 294, 301 (1955).

99. *See Jenkins III*, 115 S. Ct. at 2091 (Ginsburg, J., dissenting). The power to order aggressive, tax-related remedies against local governments may assist in encouraging their voluntary cooperation with constitutional mandates. One insightful commentator reasons that:

> [L]egitimating judicial power to enforce judgments by ordering tax levies is not . . . to encourage courts to exercise this power. Indeed, the circumstances in which such orders are warranted are quite limited. The purpose of making judicial power to order tax levies a "credible threat" is to encourage state and local governments to devise political solutions . . . .

D. Bruce La Pierre, *Enforcement of Judgments Against States and Local Governments: Judicial Control Over the Power to Tax*, 61 GEO. WASH. L. REV. 299, 307 (1993). La Pierre provides a comprehensive justification for federal courts' ordering state officials to pay for purpose of providing a remedy for constitutional violations.

100. Often some school districts refuse to meet their constitutional duty to desegregate until the district court orders them to do so. It is for that reason that the Supreme Court has recognized that the courts' equitable powers to remedy past discrimination are inherently broad and flexible. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

101. One need only reflect on the resistance of state officials in Little Rock, Arkansas, after the original *Brown* decision to be alert to the potential risks of too much federalism in the implementation of unpopular constitutional rights. Because of political pressure and opposition to the Supreme Court mandate in *Brown*, Governor Orval Faubus resisted integration, and federal troops were required to enforce desegregation of Central High School in Little Rock. *See* DAVIS & CLARK, *supra* note 27, at 185-97.

was foreshadowed in *Freeman v. Pitts*,[102] decided three terms ago by the Court.

In *Freeman*, the Court ruled that a school system could be relieved of some of its obligations under a district court order if it was found to be in compliance in some areas but not others.[103] In that case, DeKalb County, Georgia, was under the supervision of the United States District Court for the Northern District of Georgia since it had been ordered to dismantle its dual school system in 1969.[104] After the mandate in *Brown*, the county took no steps to desegregate until the 1966-1967 school year when it adopted a freedom-of-choice transfer plan.[105] Under that plan, several black students attended formerly all-white schools, but there was virtually no effect on the formerly de jure black schools.[106] In 1968, several black school children and their parents brought suit, and a desegregation plan began under a consent decree.[107] By 1986, however, dramatic demographic changes to the county population had occurred. In 1969, 56% of the county's students were black, but by 1986 that figure had risen to 47%.[108] During the same period the white population shifted to counties surrounding DeKalb.[109] The Court held that the county had no obligation to remedy racial imbalance caused by demographic

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

103. *Id.* The Supreme Court, in an opinion by Justice Kennedy, held that the district court has the authority to relinquish control over some aspects of its previously ordered desegregation plan, while retaining its control over others. The court explained,

> [U]pon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control of the school systems in those areas where compliance has been achieved . . . . In particular, the district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations.
>
> . . . .
>
> Among the factors which must inform the sound discretion of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for the judicial intervention in the first instance.

Id. at 491.

104. *Id.* at 471.

105. *Id.* at 472.

106. *Id.*

107. *Id.* Under the consent decree, all formerly de jure black schools were closed and the students were assigned to the remaining schools in the neighborhood. *Id.*

108. *Id.* at 475.

109. *Id.*

factors.[110] That decision, combined with *Jenkins* and other ruminations from the Court, such as Justice Thomas's suggestion that integration itself is not a valued goal in American education,[111] clearly signal a retreat from the Supreme Court's strong commitment to participation of the federal courts in desegregation. It is as if the difficulty of the problem has caused the Supreme Court to grow bored with the job of supervising its solutions. The problem did not occur overnight, however, and cannot be solved overnight.

The vestige of unequal educational opportunity in this country is one of the most perplexing problems our nation has ever confronted, and, indeed, continues to confront. *Jenkins*, however, signals a new tolerance for local officials who may simply want to stop trying to achieve any racial balance whatsoever, and the current state of the law will paralyze our ability to solve the problem. *Freeman* teaches us that we cannot chase the children through the state to contain white students in a school district,[112] and *Jenkins* teaches that we cannot, generally, create a school district to make the children chase the school.[113] *Jenkins* further instructs that there are limits on how federal courts

110. *Id.* at 483. Lawyers from the NAACP Legal Defense and Educational Fund, Inc. asserted, "Throughout the country as many as 400 school districts still are wrangling with legal issues stemming from desegregation lawsuits first filed in the mid-'50s to late '60s . . . ." Linda Gibson, *Exhibit A: Case Closing, 37 Years of School Case is Enough But Original Plaintiffs and Allies Fear Backsliding in Long-Running Florida Dispute,* NAT'L L.J., Jan. 8, 1996, at A10.

111. *Jenkins III*, 115 S. Ct. 2038, 2064 (1995) (Thomas, J., concurring). Justice Thomas felt compelled, in a footnote, to criticize research that might suggest that integration has educational value. He wrote, "[T]here is simply no conclusive evidence that desegregation either has sparked a permanent jump in the achievement scores of black children, or has remedied any psychological feelings of inferiority black school children might have." *Id.* It seems clear that Justice Thomas has personally rejected one of the premises of the *Brown* decision.

112. In relieving a state from the responsibility to desegregate where residential demographics has caused resegregation, the Court said:

> In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a de jure violation. And the law need not proceed on that premise.

Freeman v. Pitts, 503 U.S. 467, 496 (1992). By requiring a causal connection between the changing demographics of a community and the racial discrimination that led to segregated schools, the Court has made the use of interdistrict remedies by a district court nearly impossible.

113. *Jenkins III*, 115 S. Ct. at 2061. The majority opinion went out of its way in dicta to warn the lower court not to engage in any remedies that relied on "desegregative attractiveness":

> The Court today discusses desegregative attractiveness only insofar as it supports the salary increase order under review and properly refrains from addressing the propriety of all the remedies that the District Court has ordered, revised, and extended in the 18-year history of this case. These remedies may also be improper to the extent that they

may control expenditures for the primary "raw materials" to provide equal education: teacher salaries and funds for creative programming.[114] With the Supreme Court's restrictive approach to the available remedies to halt the increase of "one race" schools, it is likely that many desegregation plans will simply rot on the judicial vine.

IV. CONCLUSION

Having invested so much into integration as a tool for achieving "one" America, we should demand clear proof that desegregation cannot work before we abandon it as our primary tool of ensuring equal education.[115] Although there have been many problems with efforts to integrate, we have enjoyed many successes that would never have occurred without courageous and often controversial efforts to compel people of different racial backgrounds to learn together.[116]

> serve the same goals of desegregative attractiveness and suburban comparability that we hold today to be impermissible . . . .

Id. at 2061. Implicit in the Court's comments is a rejection of the goal of achieving racial balance through a district court order that takes into account rapidly shifting demographics. When combined with *Freeman v. Pitts*, the two cases make clear that a district judge must stay within district boundaries in ordering relief. If the district itself has become predominantly "one race" through demographic shifts, the lower courts are virtually forbidden to remedy that situation in its desegregation plan.

114. *See supra* note 107. The rationale for ordering teacher salary increases in *Jenkins III* was not simply the whim of the district court, rather, the factual record supported the need for the increases. The record revealed that without salary increases, salaries would "revert to a level which will result in intolerable consequences for the desegregation plan. Such a rollback would place the KCMSD teacher salary schedule thousands of dollars behind any comparable school district and would devastate the District's ability to attract and retain teachers." Jenkins v. Missouri, No. 77-0420-CV-W-4, 1992 WL 551568, at *2 (W.D. Mo. June 25, 1992).

115. It may be that a racially and economically diverse classroom has value as an educational tool. Some research has demonstrated that black children in a desegregated school are more likely to graduate from high school and college and to escape much of the social pathology associated with poverty. *See* William L. Taylor, Brown, *Isolation and Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1710-11 & n.40 (1986). This conclusion is in conflict with the views expressed by Justice Thomas. *See supra* note 111. Professor Laurence Tribe has cautioned that such a conclusion as has been reached by Taylor's research may be a double-edged sword for those who seek to advance racial equality. He comments:

> Whatever its empirical merits, this line of reasoning contains a distasteful echo of the argument pressed by the plaintiff in *Plessy*, that he had a right to sit amongst whites . . . because the 'reputation of belonging to the dominant race, in this instance the white race,' was a property right that could not be deprived.

LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1476 (2d ed. 1988). Professor Tribe further notes that, in his view, "neither that rationale nor its modern incarnations will do." *Id.*

116. It has been observed that a mixed race classroom may enhance the education for minority students if most of those students are from lower socio-economic backgrounds. Professor Marilyn Yarbrough writes:

> Even if we were to determine that racial mixing is not itself an important goal, there is growing evidence that socio-economic class rather than race causes the difference in educational achievement. If class does matter and students from lower socio-economic backgrounds suffer more educational disadvantage than their middle class and upper class peers, to the extent that so many more minority students than non-minority stu-

Our society is becoming increasingly multi-cultural.[117] We will soon no longer be able to avoid that reality by running further from our urban centers, leaving them as a place to work but where the educational systems rot from inattention and lack of funds.[118] If it is crime in schools that makes many fear integration, let us together attack crime.[119] If it is the schools' inability to attract and retain good teachers, then let us make our teaching staff a priority. If it is the economic and social challenges presented by urban decay, drug abuse, teenage pregnancy, and a decaying industrial base, let us address those matters

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dents are poor, minority students suffer disproportionately. Therefore, mixing socio-economic classes invariably means mixing races, a potential catalyst for better education for poor students and, therefore, better education for minority students.

Marilyn V. Yarbrough, *Still Separate and Still Unequal*, 36 WM. & MARY L. REV. 685, 693 (1995).

117. It has been noted that "[s]ince the 1960s . . . three important demographic trends have changed the face of America and its race relations: first, the increasing percentage of persons of color; second, the increasing percentage of persons of color who are not black; and third, the increasing number of persons who consider themselves multiracial." Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 959 (1995) (collecting various demographic statistics and studies).

Another commentator has observed that "the demographics of the United States are undergoing a sea change. Early in the next millennium, the United States will cease being a predominantly caucasian nation with a European heritage." Robert Justin Lipkin, *Liberalism and the Possibility of Multicultural Constitutionalism: The Distinction Between Deliberative and Dedicated Cultures*, 29 U. RICH. L. REV. 1263, 1266 (1995).

118. *Jenkins III*, 115 S. Ct. 2038, 2075 (1995). Clearly, all problems will not be solved by throwing money at them; however, lack of financial resources remains a problem for providing equal education. As one observer has noted, although we may not always get what we pay for, "[w]hat seems equally clear . . . is that we surely cannot get that which we adamantly will not pay for. . . . Children have become the disputed but uncared-for objects of contentious politics over federalism . . . ." Jane Maslow Cohen, *Competitive and Cooperative Dependencies: The Case for Children*, 81 VA. L. REV. 2217, 2235 (1995).

119. Professor Robert R. Wright of the University of Arkansas School of Law suggests that a by-product of the desegregation plan in Little Rock, Arkansas, which has required the closing of schools in black neighborhoods that cannot be integrated, "has been . . . the rise in crime and the organization of gangs in cities throughout the U.S." Robert R. Wright, *On Its Anniversary: A Look Back at* Brown v. Board of Education, 28 ARK. L. 51 (1994). He reasons that "[w]hen schools are closed in black neighborhoods, one of the major anchors for the black community has been eliminated." *Id.* Although it is difficult to quarrel with the notion that a school can anchor a community, a school alone cannot provide the healthy balance required for a thriving community. Economic stability, decent housing, and a sense of hopefulness also contribute. Indeed, efforts to desegregate should not be unfairly blamed for problems in a community that were caused by other factors, including the flight of many middle class citizens from the urban centers, leaving fewer businesses and a reduced tax base and, in general, a less desirable community for those who simply cannot afford to leave. "Black neighborhoods seem impoverished today not so much because they are segregated, as because most blacks with jobs have moved out." LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY 57 (1992) (footnote omitted).

directly.[120] But we should not abandon integration simply because other problems have frustrated us.[121]

"When I was eight years old, Martin Luther King Jr.[122] and Robert F. Kennedy[123] were assassinated within two months of each other. My grandmother, a junior high school English teacher, took my brother and me to see the train that was carrying Robert Kennedy's body. I remember asking her that day about "integration," because I had heard the word on television and it seemed to be important. She told me that "integration is making sure that kids of all races and backgrounds are in class together." She told me integration was good, not because one group of people was smarter than another or because some lifestyles and cultures were better than others, but rather, she said, "So long as we are all in the same room, teachers cannot share information with some students without sharing it with all." She added that "because people are different does not mean that they cannot learn from each other."

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120. The complex problems faced by the urban and rural poor still are at the heart of our deteriorating public education system. It has also become apparent to some "that poverty is closely intertwined with issues of discrimination on the basis of race and other minority status, and gender." Peter B. Edelman, *Toward a Comprehensive Anti-Poverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1698 (1993) (footnotes omitted); *see generally id. passim* (reviewing current poverty statistics and discussing the continuing plight of the poor, including circumstances of unemployment, violence, drug abuse, crime, and teen pregnancy).

121. Many social ills contribute to the challenge of providing adequate education. The Black community suffers in a way objectively more severe than the white community. Professor Kenneth Tolbert has observed that:

> Virtually every social indicator for measuring the well being of individuals or groups in society is negative or shows gross gaps between Blacks and Whites. Such gaps may be found in wealth income and employment; health . . .; housing; criminal law enforcement or involvement; electoral and political representation; and last, but not least, indeed, the most important indicator, education.

Kenneth S. Tolbert, Sr., *The Case For Black Higher Education & Affirmative Action*, N.B.A.J., Jan.-Feb. 1996, at 13 (footnotes omitted).

122. Dr. King was assassinated on April 4, 1968 in Memphis, Tennessee. During 1963, he had occasion to comment on school desegregation and the *Brown* decision:

> The Negro had been deeply disappointed over the slow pace of school desegregation. He knew that in 1954 the highest court in the land had handed down a decree calling for desegregation of schools "with all deliberate speed." He knew that this edict from the Supreme Court had been headed with all deliberate delay. At the beginning of 1963, nine years after this historic decision, approximately 9 percent of southern Negro students were attending negro schools. If this pace were maintained, it would be the year 2054 before integration in southern schools would be a reality.

A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 520 (James M. Washington ed., 1986).

123. Robert Kennedy, former Senator from New York and then Attorney General of the United States, was assassinated on June 5, 1968. He was a key proponent of America's desegregation effort before his death. As Attorney General, he pledged to press forward to desegregate the public schools. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 414 (1988).

At the time I thought her statements simply meant that she believed integration was a good thing. It was not until years later that the true significance of her statements became apparent to me: equality in education does not mean any group of people is inferior or superior to any other group of people.[124] And it is critical that all students have an opportunity to dine at the same table. Sometimes equal education requires that we learn with and about each other even if we do not like the extra effort required to make that possible. A failure to require our children to test their views and perspectives with each other will guarantee a future where we will have unequal substance in education. Our children will lack the skills to avoid conflict with those who are different. In a society growing in diversity,[125] we can ill afford to deny our children an educational experience that will arm them with the tools to seek common ground.[126]

My fear is that the political controversy that arises from desegregation and the challenges presented by rapidly changing demographics will chill local school officials and politicians from engaging in creative ways to ensure an integrated education in elementary and secondary schools. Although the challenges to resolve these problems are difficult, we should not be deterred by the same shortsighted, but sometimes persuasive, skepticism that prevented us for so long from freeing all Americans from the shackles of "separate but equal" and the embarrassing legacy of Jim Crow.[127] Today Jim Crow

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124. *See supra* note 16.

125. According to Census Bureau statistics, the United States population is currently "73.6 percent white, 12 percent black, 10.2 percent Latino, 3.3 percent Asian and 0.7 percent American Indian. . . . [I]n 2050, the United States will be 52.8 percent white, 24.5 percent Latino, 13.6 percent black, 8.2 percent Asian and 0.9 percent American Indian." *Latino, Asians Are Expected to Fuel U.S. Population Growth; Census Bureau Predicts Rise in Retirees As Well*, BALTIMORE SUN, Mar. 14, 1996, at 3A.

126. The importance of strong public education cannot be overstated in a democratic society. "It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown I*, 347 U.S. 483, 492-93 (1954). Near the turn of the century, the New Hampshire Supreme Court observed that public education is a "means of protecting the state from the consequences of ignorant and incompetent citizenship." Fogg v. Board of Educ., 82 A. 173, 174-75 (N.H. 1912).

127. "The public symbols and constant reminders of [the Negro's] inferior position were the segregation statutes, or 'Jim Crow' laws. They constituted the most elaborate and formal expression of sovereign white opinion upon the subject." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (3d ed. 1974) (footnote omitted).

According to one account,

> Jim Crow was first heard by the American public in 1832 when Thomas 'Daddy' Rice, one of the first whites to perform comic representations of blacks, danced across the stage of New York's Bowery Theater and sang the lyrics of the song that would become America's first international hit:

may be legally dead, but the gap in education and wealth persists along racial lines. This gap should serve as a constant reminder of legal segregation's stubborn stain. Many simply blame efforts to achieve school desegregation for these problems. But among those critics are, no doubt, many who never gave integration even a fighting chance to work.

We can no longer avoid the crossroads that we now approach. Education is the gateway to our collective future, and we must all pass through. Although it may be difficult to achieve desegregation in the face of rapidly changing demographics, it should be remembered that many of these demographic forces were the result of the same past discrimination that caused resistance to integration during the days of "separate but equal." If the promise of integrated public education becomes a casualty of our fear of each other and our inability to agree on what we intend to do about it, we will virtually guarantee a society that will be unable to deal effectively with our future—a future that promises even more rapid cultural and social change than we have thus far experienced.[128]

Weel a-bout and turn a-bout
And do just so.
Every time I weel a-bout
I jump Jim Crow.

JUAN WILLIAMS, EYES ON THE PRIZE 12 (1988).

> By the early 1990s, Jim Crow described a far reaching, institutional segregation that affected every aspect of American life. Schools, restaurants, trains and all forms of transportation, theaters, drinking fountains—virtually all public and many private facilities practiced total separation of the races. . . . [I]n South Carolina black and white cotton-mill workers were prohibited from looking out the same window.

Id. at 12-13.

128. James Baldwin, commenting on integration in the early 1960s, wrote, "[I]f the word *integration* means anything, this is what it means: that we, with love, shall force our brothers to see themselves as they are, to cease fleeing from reality and begin to change it . . . and we can make America what America must become." JAMES BALDWIN, THE FIRE NEXT TIME 9-10 (First Vintage 1993) (1963).