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Gwendolyn S. Andrey
Gwendolyn.Andrey@chicagounbound.edu

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The Missing Half of Missouri v Jenkins: Determining the Scope of a Judicial Desegregation Remedy

Gwendolyn S. Andrey†

In Missouri v Jenkins,¹ the United States Supreme Court ruled five to four that a federal court may impose a local property tax increase to finance school desegregation remedies. Justice White, writing for the majority, held that a federal court could compel such tax increases only by enjoining obstructive state statutes or ordering local authorities to exercise their own taxing authority rather than by directly imposing the tax, which would interfere with principles of federalism. The Court addressed only the issue of funding the desegregation remedy, having declined to grant certiorari on the issue of the scope of the remedy itself.²

The case involved a court-ordered desegregation plan for the Kansas City, Missouri, School District ("KCMSD") stemming from an action brought under 42 USC § 1983.³ The plan provided detailed remedies for desegregation, including a method of financing. The district court had allocated 75 percent of the cost of the plan to the state and 25 percent to KCMSD, with joint and several liability.⁴ However, a provision of the Missouri state constitution prevented KCMSD from raising its tax levy above a certain level, which effectively made KCMSD unable to pay its share.⁵ The district court refused to let the state absorb the full cost of the plan, so it "found itself with no choice" but to order the tax levy increased through fiscal year 1991-92.⁶

The Court of Appeals for the Eighth Circuit upheld the district court's decision, but noted that, in the future, the district court must not set the tax rate itself but instead should authorize

† B.A. 1989, Northwestern University; J.D. Candidate 1992, University of Chicago.
¹ 110 S Ct 1651 (1990).
² Id at 1664.
³ Id at 1655. Allegations that a district is operating a segregated school system arise under 42 USC § 1983 (1988).
⁴ Jenkins, 110 S Ct at 1657.
⁵ Id at 1656.
⁶ Id at 1658.
KCMSD to submit a levy to the state tax collection authority\(^7\) and enjoin the state law preventing KCMSD from adequately funding the remedy.\(^8\) The Supreme Court upheld the distinction created by the Court of Appeals, holding that authorizing and directing local institutions to devise and implement remedies, such as a tax levy, is constitutional.\(^9\) This power to enjoin obstructive state provisions greatly enhances federal courts' equitable powers in the area of desegregation.\(^{10}\)

The ruling is remarkable because it upholds civil rights by allowing judicial intervention in the area of taxation, traditionally the sole province of local governmental bodies.\(^{11}\) The Court declined to examine the scope of the desegregation remedy, however, accepting the appellate court's conclusion that the remedy was proper.\(^{12}\) The Court's ruling thus expands the powers of federal courts to implement desegregation remedies while at the same time consciously neglects to discuss the practical aspects involved in designing and implementing an effective court-ordered remedy.\(^{13}\)

*Missouri v. Jenkins* provides a good starting point for examining the role of the judiciary in sculpting, implementing, and monitoring a remedial plan for desegregation. The case raises two important issues: constitutional federalism concerns of the sort dealt with in the Court's opinion, and broader questions about the practical effects of judicial school management through desegregation remedies. The latter is the focus of this Comment. Part I gives a brief history of desegregation decisions, part II argues for judicial intervention to accomplish effective desegregation, and part III gives concrete examples of desegregation techniques and the situations where they are most effective.

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\(^7\) *Id* at 1658-59.

\(^8\) *Jenkins*, 110 S Ct at 1658-59.

\(^9\) *Id* at 1664-67. The Supreme Court rejected other constitutional challenges, based on the Tenth Amendment and Article III, to the order issued by the Court of Appeals.

\(^{10}\) *Id* at 1663.

\(^{11}\) *Id*.

\(^{12}\) *Jenkins*, 110 S Ct at 1663.

\(^{13}\) See the concurring opinion of Justice Kennedy, who agreed that the Court had jurisdiction and that the District Court exceeded its authority, but who would have reversed the Court of Appeals decision to order a tax levy. Justice Kennedy noted the extensive provisions of the remedial plan were "without parallel." *Id* at 1668.
I. A Brief History of Desegregation Decisions

Court-ordered desegregation efforts essentially began in 1954 with Brown v Board of Educ. ("Brown I"), which ended the regime of "separate but equal" school systems permitted in 1896 by Plessy v Ferguson. One year later, in Brown II, the Supreme Court ordered that desegregation proceed "with all deliberate speed." The Court did not place any fixed limitations on the scope of courts' equitable powers, characterizing equity as having "practical flexibility." For the most part, early desegregation plans in the South consisted of freedom of choice remedies. Green v Board of Educ., the first Supreme Court case to address the substantive requirements of a desegregation remedy, ended the freedom of choice practice. The Court noted that freedom of choice initiatives had virtually no impact on the degree of segregation, and ordered that states use alternative remedies.

A short debate ensued over what alternative methods should be used, after which the Supreme Court decided Swann v Charlotte-Mecklenburg Bd. of Educ. In Swann, the Court stated that vestiges of state-imposed segregation must cease to exist and sanctioned the use of district-wide busing. The Court placed two limitations on courts' remedial powers. First, judicial intervention may occur only after local school authorities have failed in their affirmative obligations to end discrimination. Second, the scope of the remedy must be determined by the scope of the federal constitutional violation. The Court acknowledged that strict race neutrality in a desegregation plan might not accommodate the goal of remedying past de jure segregation. Thus, children could be assigned and bused to school under a race-conscious assignment system. The first major desegregation decision outside the South was

15 163 US 537 (1896).
16 Brown v Board of Educ., 349 US 294, 301 (1955) ("Brown II").
17 Id at 300.
18 Freedom of choice remedies allowed students to attend the neighborhood school of their choice. See Finis Welch and Audrey Light, New Evidence on School Desegregation 24 (US Commission on Civil Rights Clearinghouse Publication 92, 1987).
21 Id.
22 Id at 15.
23 Id at 16.
24 Swann, 402 US at 28. De jure segregation is state-imposed, whereas de facto segregation occurs by default.
Keyes v School Dist. No. 1, in which the Court stated that official action leading to de facto segregation was equivalent to de jure segregation. The next significant decision was Milliken v Bradley, in which the Court considered an interdistrict busing remedy that included both primarily black, inner-city districts and primarily white, suburban districts in the desegregation plan. The Court held that the interdistrict plan was invalid because inclusion of a suburban district in a plan required proof that it had engaged in segregative practices that had an interdistrict effect. The Supreme Court then attempted to articulate a definitive standard for setting limits on the equitable powers of the federal courts in constructing a desegregation plan. The Court set forth a three-part test. First, the “nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. . . . Second, the decree must indeed be remedial in nature. . . . [Third, the remedy] must take into account the interests of state and local authorities in managing their own affairs.” The test sets forth criteria, but does not define with much more precision than earlier desegregation cases what the federal courts can and cannot do.

The Milliken approach reflects a corrective, or remedial, stance toward racial justice, as opposed to a prohibitory or distributive stance. A prohibitory approach simply prohibits the undesirable behavior, without any further steps to address the wrongs it created. A distributive approach actively attempts to chart future behavior through shaping mechanisms such as hiring quotas. The corrective model, however, focuses on three elements: (1) an intentional discrimination or violation, (2) a direct link between the violation and the remedy, and (3) wider principles of limitation than

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26 Id. Keyes also extended desegregation remedies to Hispanics.
28 Id.
29 Id at 280-81.
32 Id at 730.
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the link, such as political or constitutional limitations.33 These three elements are evident in the three-step Miliken test.34

As Professor Gerwitz notes, "[t]he defendant's violation is not simply a trigger for judicially mandated action, unleashing a free-wheeling judicial policy-making power. Rather, the remedy must be linked to the violation as a corrective, a measure that seeks to eliminate the violation's harmful effects."

Gerwitz further argues, however, that the linkage principle espoused by the Court in Miliken becomes a powerful engine of transformation, enabling federal courts to devise extremely broad remedies over long periods of time.36 Evidence of this assertion can be found in the ongoing debate over how and when a court should relinquish control over a school district upon a finding of unitariness.37

The first interdistrict remedy was approved in Newburg Area Council, Inc. v Board of Educ.,38 where the Sixth Circuit found that the strict interdistrict test in Miliken had been met. The first case sanctioning the use of magnet schools39 as a desegregation technique was Morgan v Kerrigan,40 and the first all-magnet school plan was implemented in Milwaukee.41

Thus, courts have great leeway in determining the scope of a desegregation remedy, even after Miliken, but not much guidance from the long line of decisions since Brown I. The unique, all-encompassing remedy in Missouri v Jenkins explicitly illustrates the lack of constraints on the judiciary's equitable powers. Justice Kennedy in his concurrence quotes from the Eighth Circuit's dissent:

The remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order—the large number of magnet schools and the quantity of capital renovations and new construction—are

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33 Id.
34 See text accompanying note 28.
35 Gerwitz, 86 Colum L Rev at 732.
36 Id at 733.
38 521 F2d 578 (6th Cir 1975).
39 Magnet schools draw students from all over a district into special programs. See text accompanying note 78.
41 Welch & Light, New Evidence at 29 (cited in note 18).
concededly without parallel in any other school district in the country.\textsuperscript{42}

The programs included construction of a new performing arts school, a technical magnet school, a 25-acre petting farm, a 25-acre wildland area, fifteen microcomputers for every classroom, a two thousand square foot planetarium, an alarm system, greenhouses, vivariums, a Model United Nations wired for language translation, broadcast radio and TV, a temperature-controlled art gallery, and an 1,875 square foot animal room for elementary school students.\textsuperscript{43} Justice Kennedy pointed out that “these items are a part of legitimate political debate over educational policy and spending priorities, not the Constitution’s command of racial equality.”\textsuperscript{44}

By not examining the scope and propriety of this extraordinary remedy, the Court failed to address the important practical issues involved with judicial management of a school system. Concerns of judicial economy, expertise, and efficacy all suggest that the role of the federal court in desegregation cases is more delicate and political than the Supreme Court decisions, culminating with Jenkins, imply.

II. THE NEED FOR A HIGH LEVEL OF JUDICIAL INTERVENTION

Before addressing the need for a high level of judicial intervention to ensure the effective implementation of desegregation plans, it is useful to examine the effects and desirability of desegregation. Desegregation’s positive effects and desirability as public policy outweigh the negative effects. Mandatory, court-ordered remedies prove the most effective at implementing desegregation.

A. Effects of Desegregation

In several studies, researchers have found that black students’ achievement level has increased after desegregation. In the late 1960s, blacks on average scored three grade levels below whites, but by the late 1970s, when desegregation plans had been meaningfully implemented, blacks scored only two grade levels below whites.\textsuperscript{45} Professor Crain found that white students’ achievement

\begin{itemize}
  \item \textit{Missouri v Jenkins}, 110 S Ct 1651, 1668 (1990).
  \item Id at 1676-77.
  \item Id at 1677.
\end{itemize}
did not decrease in a desegregated environment because individual students were only indirectly affected by their classmates. While noting that psychological factors were harder to quantify, Crain found that black students in a desegregated environment felt they had a greater sense of control over their environment, increased opportunities, higher and more realizable job aspirations, increased opportunity for contacts and "networking," a greater likelihood of completing high school and/or college, and an ability to work cooperatively with white students. On the other hand, blacks also experienced a general loss of self-esteem, based on a perceived notion of failure when compared to white students.

The exact cause and effect relationship between desegregation and black achievement is open to interpretation. Many complex factors enter into the statistics, such as long-term housing patterns and parental involvement. For example, Crain cited the fact that black students did better in schools with more black teachers. The reason is unclear: Is this because white teachers discriminate against black students? Or because black teachers discriminate in favor of black students? Or is it because black students work harder in the presence of black role models? Whatever the reason, Crain argues, schools should endeavor to hire more black teachers. The effects of desegregation do not end with graduation, but continue into the job market and the community. Also, schools as institutions influence other institutions throughout the country, and desegregated institutions should be the rule, not the exception.

The National Education Association ("NEA") Report of 1984 noted eight benefits of desegregation:

1. It prepares students for diversity in the world after school.
2. It increases public support for community needs because of perceived "larger stakes" in the community.
3. It produces a positive climate, because only a school could integrate people this closely every day.

Id at 41.
Id at 41-43.
Id at 41.
Id at 41.
Id.
(4) Parental involvement increases, which monitors and enhances school progress.
(5) It produces progress in housing desegregation.
(6) Achievement scores improve (for all children).
(7) Educational improvement of norms and attitudes (for all children).
(8) It produces deliberate attempts to eliminate inequities in building facilities and educational resources.

The NEA Report also noted several remaining problems:

(1) A disproportionately high suspension and expulsion rate for blacks.
(2) Higher black dropout rates.
(3) Segregated classrooms through "tracking" curricula.
(4) A still-present achievement test gap.
(5) Some extracurricular activities have only white participants.

Another negative effect of desegregation is the much-studied phenomenon of "white flight" from the soon-to-be-integrated urban district to the suburbs. White flight occurs when the perceived costs of remaining in the district outweigh the perceived benefits of desegregation. White parents' perceived costs, according to Professor Rossell, are:

1. The quality of education will decline.
2. Their child will be emotionally or physically harassed.
3. Their child will be exposed to bad academic, social, and sexual attitudes and behavior.
4. They will lose influence over their child's education.
5. Their property values will decline.

Nevertheless, the positive effects of desegregation still outweigh the bad.

B. The Need for Judicial Intervention

Given the positive effects of desegregation and its desirability as public policy, not to mention its constitutional imperative, how

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83 Id.
84 Id.
86 Id at 74-75. Characteristics of white flight in relation to specific desegregation plans are discussed in section III.B. See text accompanying notes 95-101.
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can desegregation best be achieved? The options are through court-initiated or school board-initiated plans, and these plans can include mandatory or voluntary reassignment of students. Court-ordered desegregation plans with mandatory reassignment of students achieve better results than other types of plans, thus necessitating a high level of judicial intervention in desegregation cases.

Empirically, court-ordered, mandatory desegregation plans are more successful.\(^\text{57}\) Courts have broader remedial powers at their disposal than school boards do, thus producing greater compliance. Positive incentives for voluntary desegregation, such as promised funding through the now-repealed Emergency School Assistance Act, have had little effect. Negative incentives, such as withholding funding under the Act, produced less response than court-imposed fines or jail sentences.\(^\text{58}\) The equitable powers of a federal court, along with its ability to absorb responsibility for unpopular policies, make mandatory court-ordered remedies more successful than those designed by elected school boards.

Another option within the category of court-ordered plans is to desegregate voluntarily through the settlement process.\(^\text{59}\) Again, however, the court and the threat of judicial intervention have already made their presence felt. Furthermore, school boards usually do not settle for other than voluntary, magnet school programs that do not make the boards accountable for unpopular reassignment programs or costly building improvements.\(^\text{60}\)

One problem with court-ordered plans is that the desire to foist accountability for implementing desegregation onto the courts often produces collusion problems between the parties. The school boards, along with the plaintiffs, would like to see expensive new improvements to their school buildings, higher-paid teachers, and better programs, all under the name of a desegregation remedy. Because *Milliken* allowed broad remedies and because courts cannot reallocate financial resources between districts,\(^\text{61}\) desegregation remedies are used to cure deficits in minority education. The remedial approach adopted in *Milliken* allows schools to accomplish much more than just physical desegregation. School boards view

\(^{57}\) Id at 71. For further statistics, see, generally, Welch & Light, *New Evidence* at 58-65 (cited in note 18).

\(^{58}\) Rossell, 12 J Legal Stud at 71-73.


the desegregation process as a convenient means to upgrade programs and raise tax levies without suffering the normal accountability of elected officials; the boards can shift the blame to the courts.62

Another problem with settlement is the lack of public information available afterward. This is true for any kind of settlement agreement, but given the political nature of desegregation, public affirmation of the right to equal schools sends a distinct message to the community. As Judge Nathaniel Jones of the Sixth Circuit notes, "within the black community there is a strong degree of skepticism and suspicion about having anyone but a federal judge dispose of school desegregation cases."63 Thus, mandatory, court-ordered remedies provide the only practical public resolution available.

School board-initiated, voluntary plans are an alternative to court-ordered plans. One argument for this type of desegregation is that a voluntary plan possessing community support would result in less white flight and greater black-white contact. Los Angeles is the only city showing support for this assertion.64 The fact that desegregation cases are still being decided testifies to the reluctance of communities to desegregate voluntarily. Thus, court-ordered plans, or the threat of court-ordered plans, tend to produce better results. As Julius Chambers, plaintiff's counsel in Swann, noted,

Voluntarily, no one will come up with a plan that will ensure equal educational opportunities. . . . In the implementation of the plans somehow black schools still end up underfunded. But more importantly, students will not get the kind of exposure that is needed to make America great, for education affects the total person and the total community.65

Thus, if left on their own, school boards will not design desegregation plans that result in mandatory reassignment of students, leav-

63 Jones, Impact of Desegregation, in Miller, ed, Brown Plus Thirty at 53.
65 Cole, NAACP Perspective, in Miller, ed, Brown Plus Thirty at 23 (cited in note 52).
ing court-ordered plans as the best method of implementing desegregation.

C. How Judges Should Intervene

Given the need for a high level of judicial intervention in school desegregation, how should judges pursue this task? Judges need to communicate closely with educational planners, who can more efficiently work out the details of a specific plan. Judges also need to lay out more specific legal criteria to help educational planners design remedies.

When judges construct a remedial order to implement desegregation, they combine the legislative functions of political savvy and social policy with legal precedent and judicial negotiation. John Letson, superintendent of schools in Atlanta, states that the remedy is not a legal matter so much as one of social engineering: "The remedy oftentimes does not, and should not, require the narrow point-of-law approach. A legal precedent doggedly pursued without regard to local social or educational consequences may lead to the defeat of the very end which the remedy seeks." Thus, the trial judge, the attorneys, and the educational planners must all communicate and cooperate to ensure that an effective remedy will be designed and successfully implemented.

Educators stress the need for communication between the parties. Educational planners need accurate data on which to develop potential plans. A partial list of necessary data includes:

- Student population identified by domicile, race, and socioeconomic characteristics;
- Racial composition of student populations of each school;
- Socioeconomic and educational characteristics of the total district population by residence;
- Total population and enrollment projections;
- Number, capacity, condition, and location of educational facilities;
- Organization of system by grade level;
- Staffing patterns, assignments, and racial composition;
- Transportation available and projected needs;

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47 Id.
Financial needs, with budgeting practices and procedures;
Description and location of special programs, alternative schools, and kindergartens;
Applicable state laws, rules, and regulations governing the schools;
Accrediting agency requirements;
Public information needs and public involvement;
Resources outside the schools, such as private schools, higher education, businesses, and associations;
Curricular and instructional methods, materials, and needs;
Multicultural needs;
Staff, parents, and student human-relations training requirements;
Options for hardship cases and students with special needs;
Time limitations and deadlines for implementation.\footnote{Id at 635.}

This partial list demonstrates the complexity involved in designing a remedy. In the interest of efficiency,\footnote{Id at 630-31.} educational planners, not judges, should consider these details. Ultimately, however, judges must approve any plan.

Communication and acquisition of the needed data are essential, despite the problem of information costs. For example, simply defining the student population by domicile, race, and socioeconomic characteristics would require analyzing a great deal of data and using a great deal of time and resources. Nevertheless, such information is central to the very definition of a desegregation plan, and a necessary factor for a judge to consider. If educational planners can assemble and process the data as much as possible before presenting it to the judge, then judicial administrative costs can be kept reasonably contained.

Courts and judges can facilitate the planning process by laying out more specific criteria than the Supreme Court has done in \textit{Green}, \textit{Swann}, \textit{Keyes}, \textit{Milliken}, or \textit{Jenkins}. Forbes Bottomly, a former superintendent of schools and an educational planner in a Seattle desegregation case,\footnote{Citizens Against Mandatory Busing v Palmason, 80 Wash 2d 121, 492 P2d 536 (1971).} suggests that judges clarify the following for planners:

\footnote{Id at 635.}
\footnote{Id at 630-31.}
\footnote{Citizens Against Mandatory Busing v Palmason, 80 Wash 2d 121, 492 P2d 536 (1971).}
(1) The tenable limits within which students may be assigned to schools to achieve constitutionally acceptable desegregation.
(2) The degree to which optional attendance zones, neutral sites, magnet schools, and alternative programs fit the law.
(3) The variance, if any, from the tenable limits which will be allowable for special education of the handicapped, for the gifted, for kindergarten children, for athletic and other extracurricular programs.
(4) The definition of desegregation within a school system, such as prohibition against tracking, ability grouping, and other segregative assignments.
(5) A definition, within tenable limits, of a desegregated staff, including teachers, administrators, and nonteaching employees.
(6) A guide for equitable distribution of resources among the schools.
(7) A meaning of “burden”—that is, the measure to which desegregation may be achieved through disproportionately burdening minority students and minority communities with school closures, one-way assignments, busing distances and other inconveniences.
(8) A definition of “reasonable” transportation times and distances.
(9) The extent to which metropolitization may be considered in a remedial plan.
(10) Other instructions such as a timetable for submission of the plan or plans; target date, at least for implementation; a description for an appeal procedure for hardship cases; and a process for monitoring the plan, once implemented.\footnote{Bottomly, The Professional Educator, in Kalodner & Fishman, eds, Limits of Justice at 633-34 (cited in note 66).}

The specificity of Bottomly’s concerns illustrates how vague the Supreme Court’s guidelines have been concerning the constitutionally permissible scope of desegregation plans. On the one hand, broad, unspecified equitable powers are desirable to deal with the individual complexities of plans for various school districts. On the other hand, a lack of specificity can cause those plans to stagnate and die in the making.
Given this lack of guidance from the Supreme Court and the need for specific, tenable plans, how can judges craft an effective desegregation remedy? What options are available? Peter Roos discusses some of the concrete methods by which greater equality may be achieved. He suggests reallocating experienced teachers, repairing or replacing outdated or inadequate facilities, encouraging parental involvement, "reverse" busing (sending white students to black schools), building smaller schools, and revising curricula to eliminate discriminatory tracking. In addition, providing monetary incentives to teachers, as well as class ratio reduction and mentoring programs, would help reduce problems of inexperienced teachers and overcrowding. Roos also suggests creating magnet schools, although the effectiveness of magnet schools without interdistrict involvement might not be satisfactory.

One problem with too much expert community and educational planning advice, however, is that in many desegregation cases the parties will collude and present staggering plans to the court to implement. An example of this is the Kansas City plan, which Justice Kennedy identified as the most elaborate one ever created. Because the court must make the final decision to approve a desegregation plan, and because information provided by local officials may be suspect, the absence of clearer desegregation plan standards from the Supreme Court permits plans like the one in Jenkins to be approved without any checks on elaborateness whatsoever. The Supreme Court needs to establish national desegregation remedy guidelines that incorporate local needs.

III. TYPES OF REMEDIES AND WHERE THEY WORK

Many studies have been done on types of desegregation remedies and much data collected on the desegregation patterns in different cities. Examining the relationship between the type of plan and where it has been most effective provides valuable information for judges and educational planners to use in crafting a desegregation remedy for a particular district.

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73 Peter Roos, Separate and Unequal: The Common Element in Common Schools (unpublished manuscript on file with the Legal Forum).

74 Some researchers argue, however, that reverse busing aggravates the problem of white flight and should be avoided. See Rossell, 12 J Legal Stud at 87 (cited in note 55).

75 Id at 69.
A. Desegregation Techniques

The United States Commission for Civil Rights identified six major techniques used in desegregation. These techniques could be used singly or in combination in a remedy. The first three of them are voluntary techniques, the latter three are involuntary.

1. Freedom of choice / Open enrollment.

This voluntary technique allows students to transfer to the school of their choice. The transfer need not improve the level of integration, however. This type of plan was common in the late 1960s, but was then disapproved by the Supreme Court in Green because it did not address the substantive issues of desegregation. Examples of plans with this feature included the 1967 plans in Polk County and Orange County, Florida.


An increasingly popular voluntary technique, magnet schools draw students from all over a district into special programs. Magnets can provide educational programs that are the focus of an entire school (dedicated magnets), or as part of a standard curriculum (mini-magnets or part-schools). Magnets can operate at an elementary level, with an emphasis on special learning environments, or at a secondary level, with emphasis on particular vocational skills, math and science, languages, or performing arts. A magnet may be “citywide” if enrollment is available to every student in the district, or may be a “neighborhood preference” magnet, which gives enrollment priority to a particular racial group. An extensive magnet program was the basis of the plan in Jenkins. Other magnet programs exist in Chicago, Milwaukee, and Seattle.

3. Other voluntary transfers.

Majority-to-minority ("m-to-m") transfers permit any student to transfer from a school where he or she is in the racial majority to one where he or she would be in the racial minority. Some m-to-m plans, for example in Richmond and Buffalo, allow students in the majority to transfer if the transfer would improve the overall level of integration in the district. For example, a white student in an 80 percent white district could transfer from a 90 percent white school to a 70 percent white school.

Welch & Light, New Evidence at 24-28 (cited in note 18).

The following six plan descriptions are taken from Welch & Light, Id at 24-28.

Id at 24.
One-way transfers, a related technique, allow minority students in primarily minority schools to transfer to designated receiver schools. The transfer may occur within the district, or to suburban districts as well.

This mandatory technique assigns students to schools in their neighborhoods. The technique was used primarily in the South to end the dual practice of sending black children to distant schools because nearer ones were designated for whites. The effectiveness of this method depends on the original racial composition of the neighborhood.

5. Pairing and clustering.
This mandatory technique involves reassigning students between a pair or group of schools, usually through grade restructuring. For example, a predominately white school and a predominately black school, both offering grades K through 6, were reorganized into a lower elementary school with grades 1 through 3 and a higher elementary school with grades 4 through 6. Kindergarten remained unchanged. This technique was used in Little Rock, Arkansas. Pairing and clustering can result in single grade schools, such as the three freshmen schools created in Fresno, California, or grade rotation, as in Jefferson County, Kentucky. There, students were grouped randomly, then rotated to different schools for different quarters or different grades on a predetermined basis.

6. Re-zoning.
Re-zoning includes any change in attendance zones besides pairing and clustering. Re-zoning can occur with the closing of a school, the opening of a new school, the creation of magnet schools, or simply to promote integration.

Contiguous re-zoning alters attendance boundaries between adjacent schools, while noncontiguous re-zoning assigns minority students to schools with an inadequate racial balance. These "satellite receiver" schools then receive minority students through busing. Noncontiguous re-zoning is more costly because of the added transportation costs. The first re-zoning plan with busing was ap-

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78 See Clark v Board of Educ., 705 F2d 265 (8th Cir 1982).
proved in *Swann*, and has formed the basis for many later desegregation plans.

**B. Types of Cities**

Desegregation plans cannot be considered in a vacuum. Different remedies are effective in different kinds of cities. For example, southern, rural towns are more spread out and depend on a local school for a sense of community. The neighborhoods tend to be more racially balanced, and cities tend to be smaller, making southern school districts good candidates for pairing and clustering, or intradistrict re-zoning. Southern cities also have had a history of de jure segregation, which has led to carefully constructed plans that have been carefully enforced to comply with court mandates.

In contrast, interdistrict, or city-wide desegregation plans tend to be more effective in the urban, industrialized North because they force the generally affluent, mostly white suburbs to integrate with the generally poor, minority-inhabited inner city. Goedert argues that when the federal district court in *Jenkins* refused to consider an interdistrict remedy, Kansas City could never enjoy the benefits of full integration no matter what the plan included or how much was spent. Interdistrict remedies that include the suburbs are harder to achieve after the *Milliken* decision, however.

The size of northern urban school districts adds to the already complex list of factors to consider in implementing a desegregation plan. Northern cities are generally larger, and are divided into an urban school district in the city proper surrounded by independent suburban school districts. A study conducted by the U.S. Commission on Civil Rights found that a more useful unit of sampling to show desegregation patterns was the "metropolitan area." The largest metropolitan districts contained the largest administrative school units with the most problems. For example, 42 states have smaller total enrollments than metropolitan New York, metropoli-

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* Defined in note 24.
* Id at 1912.
* See text accompanying notes 27-28.
tan Los Angeles, or metropolitan Chicago. Large urban districts tend to have inefficient, centrally-controlled bureaucracies, that add another level of administrative confusion to designing remedies. The inner districts of large urban cities tend to be economically depressed and inhabited by poor families, further eroding the tax base from which to support the costs of a desegregation plan. The central city district is generally older than the surrounding suburban districts, with older school buildings and out-of-date, run-down facilities requiring high maintenance costs. Many urban districts contain mostly minority students—the Detroit City School District, for example, is 90.8 percent black.

Thus, for any meaningful desegregation to take place, most researchers, as well as the overruled district court in Milliken, agree that a large, urban district must engage in interdistrict desegregation with the suburbs. After the Milliken decision, however, interdistrict, metropolitan remedies are very difficult to obtain. Justice Douglas, dissenting in Milliken, wrote, "[w]hen we rule against the metropolitan area remedy, we take a step that will likely put the problems of the blacks and our society back to the period that antedated the 'separate but equal' regime of Plessy v. Ferguson." The strict test espoused in Milliken raised the plaintiff's burden of proving that suburban districts had intentionally maintained practices causing segregative effects before they could be included in a desegregation plan.

Opponents of interdistrict remedies claim that interdistrict plans cause white flight. However, white flight from the inner city has been a long-term trend since World War II, long before interdistrict desegregation plans existed. Continued white suburbanization, differential birthrates, and population age structures can explain many of the statistics pointed to by opponents of interdistrict remedies. Thus, the problem of white flight experienced by large urban districts can be explained in part by demographic trends.

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88 Id.
89 Welch & Light, New Evidence at 78.
90 Orfield, School Desegregation Patterns, in Miller, ed, Brown Plus Thirty at 34.
93 Id.
White flight following implementation of a desegregation remedy is a documented phenomenon, however. One study has found that white flight increases most in the year of plan implementation, then declines.\footnote{Rossell, 12 J Legal Stud at 85 (cited in note 55).} Also, white flight is greater when whites are reassigned to minority school districts through busing, as opposed to the usual technique of reassigning minorities to white school districts.\footnote{Id at 87.} The same study also found that white flight increases if the desegregation plan is "phased in" in stages, rather than implemented all at once, the implication being that whites have more time to plan a relocation and find another school district.\footnote{Id at 89.} Interestingly, since information costs are too high for parents to evaluate data about the quality of the physical plant, average scholastic reading scores, median socioeconomic status, or the suspension rate of the current or considered school district, white parents generally make their decision to move based on the size of the school and whether it is newly constructed, because this information is easily obtainable.\footnote{Id at 91.}

Countywide, interdistrict, or metropolitan plans show less white flight than city-only plans because (1) the suburbs are included, (2) residential relocation costs are greater, and (3) the suburban amenities are still present.\footnote{Rossell, 12 J Legal Stud at 89.} Busing distance affects white flight only in the implementation year.\footnote{Id at 92 (cited in note 55).} Another interesting finding in the study showed that racist attitudes are only weakly correlated with white flight. Most residents surveyed supported integration, but both blacks and whites underestimated their neighbors' support for integration by about 30 percent.\footnote{Id at 97-98.} The consensus seems to be that countywide plans are more effective than city-only plans.\footnote{Welch & Light, New Evidence at 43 (cited in note 18); Goedert, 76 Georgetown L J at 1867 (cited in note 83).}

\section*{Conclusion}

If interdistrict plans tend to be the most effective kind of remedy for urban districts, the plan in \textit{Jenkins} was arguably doomed from the start.\footnote{Goedert, 76 Georgetown L J at 1867.} Creating six new magnet schools in the Kansas
City School District, where those six schools constitute the whole system, does not seem to create much of a magnet. A voluntary influx of suburban children into inner city schools seems optimistic in a city with a long history of de jure segregation.\textsuperscript{103} Without the cooperation of other municipal branches to attack residential segregation or discrimination, such a huge investment of resources into education alone seems shortsighted.\textsuperscript{104}

The Supreme Court's decision in Jenkins "draws attention to the disarray in the legal standards applied across the circuits to decide metropolitan desegregation remedies,"\textsuperscript{105} but fails to provide either a more clear standard or a more cogent solution to the problems of implementing desegregation plans. Without better guidance from the Supreme Court, judges must separate constitutionally-mandated remedies from optimal educational programs on their own.

When the Court refused to grant certiorari on the scope of the remedy involved in Jenkins, it divided two issues that are so intertwined as to be inseparable. The Court granted a powerful new tool of judicial taxation to district courts for use in implementing remedies,\textsuperscript{106} while refusing to examine the practical elements of the plan itself, which indicates that the plan will not produce effective desegregation. That is not to say that courts should examine all details and historical facts and attempt to solve decades of discrimination and racial injustice in one fell swoop. However, if a high level of judicial intervention is warranted, as it seems to be, and desegregation is a constitutionally mandated goal, then courts should examine the many complex factors involved in designing a remedy and order one that will be effective and be implemented successfully.

The two issues of implementation and scope cannot be examined separately in a meaningful way. The Supreme Court, if it is going to endorse strong judicial intervention through judicial taxation, should also endorse the completion of the ends of which

\textsuperscript{103} Id.
\textsuperscript{105} Goedert, 76 Georgetown L J at 1912.
\textsuperscript{106} Whether judicial taxation is a constitutionally sound principle is debatable. See Note, 89 Colum L Rev 332 (cited in note 30), which argues for joint and several liability to solve problems of financing. Note, however, that the district court in Jenkins refused to let the state bear the whole burden of funding by itself, regardless of the factual liability, thus necessitating an alternative means of funding through a tax levy. Thus, joint and several liability does not necessarily solve the problem posed in cases in which judicial taxation is at issue.
taxation is only the means. *Jenkins* contained the most elaborate desegregation remedy designed to date. Courts need to determine whether elaborate schemes with elaborate funding can accomplish the dictates of *Brown* without including an interdistrict solution. Discrimination is a pervasive, ongoing problem in the schools that requires more analysis and balancing to solve than the Court in *Jenkins* appeared to recognize.