SUPREME COURT OF THE UNITED STATES

No. 93–1823

MISSOURI, ET AL., PETITIONERS *v.* KALIMA JENKINS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 12, 1995]

JUSTICE O'CONNOR, concurring.

Because "[t]he mere fact that one question must be answered before another does not insulate the former from Rule 14.1(a)," *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. ___, ___ (1995) (O'CONNOR, J., dissenting) (slip op. at 6), I reject the State's contention that the propriety of the District Court's remedy is fairly included in the question whether student achievement is a valid measure of partial unitary status as to the quality education program, Brief for Petitioners 18.

The State, however, also challenges the District Court's order setting salaries for all but 3 of the 5,000 persons employed by the Kansas City, Missouri, School District (KCMSD). In that order, the court stated: "the basis for this Court's ruling is grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD. In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators and staff." App. to Pet. for Cert. A-90. The question presented in the petition for certiorari asks whether the order comports with our cases requiring that remedies "address and relate to the constitutional violation and be tailored to cure the condition that offends the Constitution," Pet. for Cert. i. Thus, the State asks not only whether salary increases are an appropriate means to achieve the District Court's goal of desegregative attractiveness, but also whether that

goal itself legitimately relates to the predicate constitutional violation. The propriety of desegregative attractiveness as a remedial purpose, therefore, is not simply an issue "prior to the clearly presented question," *Lebron*, *supra*, at ___ (slip op., at 7); it is an issue presented in the question itself and, as such, is one that we appropriately and necessarily consider in answering that question.

Beyond the plain words of the question presented, the State's opening brief placed respondents on notice of its argument; fully 25 of the State's 30 pages of discussion were devoted to desegregative attractiveness and suburban comparability. See Brief for Petitioners 19–45. Such focus should not come as a surprise. At every stage of this litigation, as the Court notes, *ante*, at 14, the State has questioned whether the salary increase order exceeded the nature and scope of the constitutional violation. In disposing of the argument, the lower courts explicitly relied on the need for desegregative attractiveness and suburban comparability. See, *e. g.*, 13 F. 3d, 1170, 1172 (CA8 1993) ("The significant finding of the court with respect to the earlier funding order was that the salary increases were essential to comply with the court's desegregation order, and that high quality teachers, administrators, and staff must be hired to improve the desegregative attractiveness of KCMSD"); 11 F. 3d 755, 767 (CA8 1993) ("In addition to compensating the victims, the remedy in this case was also designed to reverse white flight by offering superior educational opportunities").

Given the State's persistence and the specificity of the lower court decisions, respondents would have ignored the State's arguments on white flight and desegregative attractiveness at their own peril. But they did not do so, and instead engaged those arguments on the merits. See Brief for Respondent KCMSD et al. 44–49; Brief for Respondent Jenkins et al. 41–49. Perhaps the response was not made as artfully and completely as the dissenting Justices would like, but it was made nevertheless; whatever the cause of respondents' supposed failure to appreciate "what was really at stake," *post,* at 1 (SOUTER, J., dissenting), it is certainly not lack of fair notice.

Given such notice, there is no unfairness to the Court resolving the issue. Unlike *Bray* v. *Alexandria*

Women's Health Clinic, 506 U. S. ___ (1993), for example, where in order to decide a particular question, one would have had to "find in the complaint claims that the respondents themselves have admitted are not there; . . . resolve a question not presented to or ruled on by any lower court; . . . revise the rule that it is the Petition for Certiorari (not the Brief in Opposition and later briefs) that determines the questions presented; and . . . penalize the parties for not addressing an issue on which the Court specifically denied supplemental briefing," *id*., at ___ (slip op., at 16), in this case one need only read the opinions below to see that the question of desegregative attractiveness was presented to and passed upon by the lower courts; the petition for certiorari to see that it was properly presented; and the briefs to see that it was fully argued on the merits. If it could be thought that deciding the question in *Bray* presented no "unfairness" because it "was briefed, albeit sparingly, by the parties prior to the first oral argument," *id.*, at ___ (SOUTER, J., concurring in judgment in part and dissenting in part) (slip op., at 3–4), there should hardly be cause to cry foul here. The Court today transgresses no bounds of orderly adjudication in resolving a genuine dispute that is properly presented for its decision.

On the merits, the Court's resolution of the dispute comports with *Hills* v. *Gautreaux*, 425 U. S. 284 (1976). There, we held 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," *id.*, at 298. This holding follows from our judgment in *Milliken* v. *Bradley*, 418 U. S. 717 (1974) *(Milliken I)* that an interdistrict remedy is permissible, but only upon a showing "that there has been a constitutional violation within one district that produces a significant segregative effect in another district," *id.*,

at 745. The *per se* rule that the petitioner urged upon the Court in *Gautreaux* would have erected an "arbitrary and mechanical" shield at the city limits, 425 U. S., at 300, and contradicted the holding in *Milliken I* that remedies may go beyond the boundaries of the constitutional violator. *Gautreaux*, however, does not eliminate the requirement of *Milliken I* that such territorial transgression is permissible only upon a showing that the intradistrict constitutional violation produced significant interdistrict segregative effects; if anything, our opinion repeatedly affirmed that principle, see *Gautreaux*, *supra*, at 292–294; *id.*, at 296, n. 12. More important for our purposes here, *Gautreaux* in no way contravenes the underlying principle that the scope of desegregation remedies, even those that are solely intradistrict, is "determined by the nature and extent of the constitutional violation." *Milliken I*, *supra*, at 744 (citing *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 402 U. S. 1, 16 (1971)). *Gautreaux* simply does not give federal courts a blank check to impose unlimited remedies upon a constitutional violator.

As an initial matter, *Gautreaux* itself may not even have concerned a case of interdistrict relief, at least not in the sense that *Milliken I* and other school desegregation cases have understood it. Our opinion made clear that the authority of the Department of Housing and Urban Development (HUD) extends beyond the Chicago city limits, see *Gautreaux*, *supra*, at 298–299, n. 14, and that HUD's own administrative practice treated the Chicago metropolitan area as an undifferentiated whole, *id.*, at 299. Thus, "[t]he relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits." *Ibid*. Because the relevant district is the greater metropolitan area, drawing the remedial line at the city limits would be "arbitrary and mechanical." *Id.*, at 300.

JUSTICE SOUTER, *post*, at 34, makes much of how HUD

phrased the question presented: whether it is appropriate to grant "`inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation.'" *Gautreaux*, *supra*, at 292. HUD obviously had an interest in phrasing the question thus, since doing so emphasizes the alleged deviation from *Milliken I*. But the Court was free to reject HUD's characterization of the relevant district, which it did:

> "The housing market area `usually extends beyond the city limits' and in the larger markets `may extend into several adjoining counties.' . . . An order against HUD and CHA regulating their conduct in the greater metropolitan area will do no more than take into account HUD's expert determination of the area relevant to the respondents' housing opportunities and will thus be wholly commensurate with `the nature and extent of the constitutional violation.'" *Id.*, at 299–300 (quoting *Milliken I*, *supra*, at 744).

In light of this explicit holding, any suggestion that *Gautreaux* dispensed with the predicates of *Milliken I* for interdistrict relief rings hollow.

This distinction notwithstanding, the dissent emphasizes a footnote in *Gautreaux*, in which we reversed the finding by the Court of Appeals that "either an interdistrict violation or an interdistrict segregative effect may have been present," 425 U. S., at 294, n. 11, and argues that implicit in that holding is a suggestion that district lines may be ignored even absent a showing of interdistrict segregative effects, *post*, at 38. But no footnote is an island, entire of itself, and our statement in footnote 11 must be read in context. As explained above, we rejected the petitioner's categorical suggestion that "court-ordered metropolitan area relief in this case would be impermissible as a matter of law," 425 U. S., at 305. But the Court of Appeals had gone too far the other way, suggesting that the District Court

had to consider metropolitan area relief because the conditions of *Milliken I*—*i. e.*, interdistrict violation or significant interdistrict segregative effects—had been established as a factual matter. We reversed these ill-advised findings by the appellate court in order to preserve to the District Court its proper role, acknowledged by the dissent, *post*, at 39, n. 10, of finding the necessary facts and exercising its discretion accordingly. Indeed, in footnote 11 itself, we repeated the requirement of a "significant segregative effect in another district," *Milliken I*, *supra*, at 745, and held that the Court of Appeals' "unsupported speculation falls far short of the demonstration" required. *Gautreaux*, *supra*, at 295, n. 11. There would have been little need to overrule the Court of Appeals expressly on these factual matters if they were indeed irrelevant.

It is this reading of *Hills* v. *Gautreaux*—as an affirmation of, not a deviation from, *Milliken I*—that the Court of Appeals itself adopted in an earlier phase of this litigation: "*Milliken* and *Hills* make clear that we may grant interdistrict relief only to remedy a constitutional violation by the SSD [suburban school district], or to remedy an interdistrict effect in the SSD caused by a constitutional violation in KCMSD." *Jenkins* v. *Missouri*, 807 F. 2d 657, 672 (CA8 1986) (en banc). Perhaps *Gautreaux* was "mentioned only briefly" by the respondents, *post*, at 39, because the case may actually lend support to the State's argument.

Absent *Gautreaux*, the dissent hangs on the semantic distinction that "the District Court did not mean by an `intradistrict violation' what the Court apparently means by it today. The District Court meant that the violation within the KCMSD had not led to segregation outside of it, and that no other school districts had played a part in the violation. It did not mean that the violation had not produced effects of any sort beyond the district." *Post*, at 22–

23. The relevant inquiry under *Milliken I* and *Gautreaux*, however, is not whether the intradistrict violation "produced effects of any sort beyond the district," but rather whether such violation caused "significant segregative effects" across district boundaries, *Milliken I*, *supra*, at 745. When the Court of Appeals affirmed the District Court's initial remedial order, it specifically stated that the District Court "dealt not only with the issue of whether the SSDs [suburban school districts] were constitutional violators but also whether there were significant interdistrict segregative effects. . . . When it did so, it made specific findings that negate current significant interdistrict effects, and concluded that the requirements of *Milliken* had not been met." *Jenkins* v. *Missouri*, 807 F. 2d, at 672. This holding is unambiguous. Neither the legal responsibility for nor the causal effects of KCMSD's racial segregation transgressed its boundaries, and absent such interdistrict violation or segregative effects, *Milliken* and *Gautreaux* do not permit a regional remedial plan.

JUSTICE SOUTER, however, would introduce a different level of ambiguity, arguing that the District Court took a limited view of what effects are segregative: "while white flight would have produced significant effects in other school districts, in the form of greatly increased numbers of white students, those effects would not have been segregative beyond the KCMSD, as the departing students were absorbed into wholly unitary systems." *Post*, at 28. Even if accurate, this characterization of the District Court's findings would be of little significance as to its authority to order interdistrict relief. Such remedy is appropriate only "to eliminate the interdistrict segregation directly caused by the constitutional violation," *Milliken I*, *supra*, at 745. Whatever effects KCMSD's constitutional violation may be ventured to have had on the surrounding districts, those effects would

justify interdistrict relief only if they were "segregative beyond the KCMSD."

School desegregation remedies are intended, "as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken I*, 418 U. S., at 746. In the paradigmatic case of an interdistrict violation, where district boundaries are drawn on the basis of race, a regional remedy is appropriate to ensure integration across district lines. So too where surrounding districts contribute to the constitutional violation by affirmative acts intended to segregate the races—*e. g.*, where those districts "arrang[e] for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties," *id.*, at 746–747. *Milliken I* of course permits interdistrict remedies in these instances of interdistrict violations. Beyond that, interdistrict remedies are also proper where "there has been a constitutional violation within one district that produces a significant segregative effect in another district." *Id.*, at 745. Such segregative effect may be present where a predominantly black district accepts black children from adjacent districts, see *id.*, at 750, or perhaps even where the fact of intradistrict segregation actually causes whites to flee the district, cf. *Gautreaux*, 425 U. S., at 295, n. 11, for example, to avoid discriminatorily underfunded schools—and such actions produce regional segregation along district lines. In those cases, where a purely intradistrict violation has caused a significant interdistrict segregative effect, certain interdistrict remedies may be appropriate. Where, however, the segregative effects of a district's constitutional violation are contained within that district's boundaries, there is no justification for a remedy that is interdistrict in nature and scope.

Here, where the District Court found that KCMSD students attended schools separated by their race

and that facilities have "literally rotted," *Jenkins* v. *Missouri*, 672 F. Supp. 400, 411 (WD Mo. 1987), the district court of course should order restorations and remedies that would place previously segregated black KCMSD students at par with their white KCMSD counterparts. The District Court went further, however, and ordered certain improvements to KCMSD as a whole, including schools that were not previously segregated; these district-wide remedies may also be justified (the State does not argue the point here) in light of the finding that segregation caused "a system wide *reduction* in student achievement in the schools of the KCMSD," *Jenkins* v. *Missouri*, 639 F. Supp. 19, 24 (WD Mo. 1985). Such remedies obviously may benefit some who did not suffer under—and, indeed, may have even profited from—past segregation. There is no categorical constitutional prohibition on non-victims enjoying the collateral, incidental benefits of a remedial plan designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken I*, *supra*, at 746. Thus, if restoring KCMSD to unitary status would attract whites into the school district, such a reversal of the white exodus would be of no legal consequence.

What the District Court did in this case, however, and how it transgressed the constitutional bounds of its remedial powers, is to make desegregative attractiveness the underlying goal of its remedy for the specific purpose of reversing the trend of white flight. However troubling that trend may be, remedying it is within the District Court's authority only if it is "directly caused by the constitutional violation." *Id.,* at 745. The Court and the dissent attempt to reconcile the different statements by the lower courts as to whether white flight was caused by segregation or desegregation. See *ante*, at 23–25; *post*, at 25–28. One fact, however, is uncontroverted.

When the District Court found that KCMSD was racially segregated, the constitutional violation from which all remedies flow in this case, it also found that there was neither an interdistrict violation nor significant interdistrict segregative effects. See *Jenkins* v. *Missouri*, 807 F. 2d, at 672; *ante*, at 25. Whether the white exodus that has resulted in a school district that is 68% black was caused by the District Court's remedial orders or by natural, if unfortunate, demographic forces, we have it directly from the District Court that the segregative effects of KCMSD's constitutional violation did not transcend its geographical boundaries. In light of that finding, the District Court cannot order remedies seeking to rectify regional demographic trends that go beyond the nature and scope of the constitutional violation.

This case, like other school desegregation litigation, is concerned with "the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds." *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 22 (1971). Those myriad factors are not readily corrected by judicial intervention, but are best addressed by the representative branches; time and again, we have recognized the ample authority legislatures possess to combat racial injustice, see, *e. g.*, *Wisconsin* v. *Mitchell*, 508 U. S. ___, ___ (1993) (slip op., at 7–9); *Jones* v. *Alfred H. Mayer Co*, 392 U. S. 409, 443–444 (1968); *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 326 (1966). It is true that where such legislative efforts classify persons on the basis of their race, we have mandated strict judicial scrutiny to ensure that the personal right to equal protection of the laws has not been infringed. *Richmond* v. *J. A. Croson Co*, 488 U. S. 469, 493–494 (1989) (plurality opinion). But it is not true that strict scrutiny is "strict in theory, but

fatal in fact," *Fullilove* v. *Klutznick*, 448 U. S. 448, 519 (1980) (Marshall, J., concurring in judgment); cf. *post*, at 8 (THOMAS, J., concurring). It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination.

Courts, however, are different. The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills. The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation. Thus, even though the Civil War Amendments altered the balance of authority between federal and state *legislatures*, see *Ex parte Virginia*, 100 U. S. 339, 345 (1880), JUSTICE THOMAS cogently observes that "what the federal courts cannot do at the federal level they cannot do against the States; in either case, Article III courts are constrained by the inherent constitutional limitations on their powers." *Post*, at 21. Unlike Congress, which enjoys "`discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,'" *Croson*, 488 U. S., at 490 (quoting *Katzenbach* v. *Morgan*, 384 U. S., at 651), federal courts have no comparable license and must always observe their limited judicial role. Indeed, in the school desegregation context, federal courts are specifically admonished to "take into account the interests of state and local authorities in managing their own affairs," *Milliken* v. *Bradley*, 433 U. S. 267, 281 (1977) *(Milliken II)*, in light of the intrusion into the area of education, "where States historically have been sovereign," *United States* v. *Lopez*, 514 U. S. ___, ___ (1995) (slip op. at 16), and "to which States lay claim by right of

history and expertise," *id.*, at ___ (KENNEDY, J., concurring) (slip op. at 16).

In this case, it may be the "myriad factors of human existence," *Swann*, *supra*, at 22, that have prompted the white exodus from KCMSD, and the District Court cannot justify its transgression of the above constitutional principles simply by invoking desegregative attractiveness. The Court today discusses desegregative attractiveness only insofar as it supports the salary increase order under review, see *ante*, at 12–13, 18, 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 serve the same goals of desegregative attractiveness and suburban comparability that we hold today to be impermissible, and, conversely, the District Court may be able to justify some remedies without reliance on these goals. But these are questions that the Court rightly leaves to be answered on remand. For now, it is enough to affirm the principle that "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken II*, *supra*, at 280.

For these reasons, I join the opinion of the Court.