# 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 SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court's process of orderly adjudication has broken down in this case. The Court disposes of challenges to only two of the District Court's many discrete remedial orders by declaring that the District Court erroneously provided an interdistrict remedy for an intradistrict violation. In doing so, it resolves a foundational issue going to one element of the District Court's decree that we did not accept for review in this case, that we need not reach in order to answer the questions that we did accept for review, and that we specifically refused to consider when it was presented in a prior petition for certiorari. Since, under these circumstances, the respondent school district and pupils naturally came to this Court without expecting that a fundamental premise of a portion of the District Court's remedial order would become the focus of the case, the essence of the Court's misjudgment in reviewing and repudiating that central premise lies in its failure to have warned the respondents of what was really at stake. This failure lulled the respondents into addressing the case without sufficient attention to the foundational issue, and their lack of attention has now infected the Court's decision.

No one on the Court has had the benefit of briefing and argument informed by an appreciation of the potential breadth of the ruling. The deficiencies from which we suffer have led the Court effectively to

overrule a unanimous constitutional precedent of 20 years standing, which was not even addressed in argument, was mentioned merely in passing by one of the parties, and discussed by another of them only in a misleading way.

The Court's departures from the practices that produce informed adjudication would call for dissent even in a simple case. But in this one, with a trial history of more than 10 years of litigation, the Court's failure to provide adequate notice of the issue to be decided (or to limit the decision to issues on which certiorari was clearly granted) rules out any confidence that today's result is sound, either in fact or in law.

In 1984, 30 years after our decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the District Court found that the State of Missouri and the Kansas City, Missouri School District (KCMSD) had failed to reform the segregated scheme of public school education in the KCMSD, previously mandated by the State, which had required black and white children to be taught separately according to race. *Jenkins* v. *Missouri*, 593 F. Supp. 1485, 1490–1494, 1503–1505 (WD Mo. 1984).[1] After *Brown*, neither the State nor the KCMSD moved to dismantle this system of separate education "root and branch," *id*., at 1505, despite their affirmative obligation to do that under

[1]In related litigation about the schools of St. Louis, the Eighth Circuit has noted that "[b]efore the Civil War, Missouri prohibited the creation of schools to teach reading and writing to blacks. Act of Feb. 16, 1847, §1, 1847 Mo. Laws 103. State-mandated segregation was first imposed in the 1865 Constitution, Article IX §2. It was reincorporated in the Missouri Constitution of 1945: Article IX specifically provided that separate schools were to be maintained for `white and colored children.' In 1952, the Missouri Supreme Court upheld the constitutionality of Article IX under the United States Constitution. Article IX was not repealed until 1976." *Liddell* v. *Missouri*, 731 F. 2d 1294, 1305–1306 (CA8 1984) (case citations and footnote omitted).

the Constitution. *Green* v. *School Bd. of New Kent County,* 391 U. S. 430, 437–438 (1968). "Instead, the [KCMSD] chose to operate some completely segregated schools and some integrated ones," *Jenkins*, 593 F. Supp., at 1492, using devices like optional attendance zones and liberal transfer policies to "allo[w] attendance patterns to continue on a segregated basis." *Id.*, at 1494. Consequently, on the 20th anniversary of *Brown* in 1974, 39 of the 77 schools in the KCMSD had student bodies that were more than 90 percent black, and 80 percent of all black schoolchildren in the KCMSD attended those schools. *Id.*, at 1492–1493. Ten years later, in the 1983–1984 school year, 24 schools remained racially isolated with more than 90 percent black enrollment. *Id.*, at 1493. Because the State and the KCMSD intentionally created this segregated system of education, and subsequently failed to correct it, the District Court concluded that the State and the district had "defaulted in their obligation to uphold the Constitution." *Id.*, at 1505.

Neither the State nor the KCMSD appealed this finding of liability, after which the District Court entered a series of remedial orders aimed at eliminating the vestiges of segregation. Since the District Court found that segregation had caused, among other things, "a system wide *reduction* in student achievement in the schools of the KCMSD," *Jenkins* v. *Missouri*, 639 F. Supp. 19, 24 (WD Mo. 1985) (emphasis in original), it ordered the adoption, starting in 1985, of a series of remedial programs to raise educational performance. As the Court recognizes, the District Court acted well within the bounds of its equitable discretion in doing so, *ante*, at 19, 30; in *Milliken* v. *Bradley*, 433 U. S. 267 (1977) *(Milliken II),* we held that a district court is authorized to remedy all conditions flowing directly from the constitutional violations committed by state or local officials, including the educational deficits that result

from a segregated school system (programs aimed to correct those deficits are therefore frequently referred to as *Milliken II* programs). *Id.*, at 281–283. Nor was there any objection to the District Court's orders from the State and the KCMSD, who agreed that it was "`appropriate to include a number of properly targeted educational programs in [the] desegregation plan,'" *Jenkins*, 639 F. Supp., at 24 (quoting from the State's desegregation proposal). They endorsed many of the initiatives directed at improving student achievement that the District Court ultimately incorporated into its decree, including those calling for the attainment of AAA status for the KCMSD (a designation, conferred by the State Department of Elementary and Secondary Education upon consideration of a limited number of criteria, indicating "that a school system quantitatively and qualitatively has the resources necessary to provide minimum basic education to its students," *id*., at 26), full day kindergarten, summer school, tutoring before and after school, early childhood development, and reduction in class sizes. *Id.*, at 24–26.

Between 1985 and 1987 the District Court also ordered the implementation of a magnet school concept, 1 App. 131–133 (Order of Nov. 12, 1986), and extensive capital improvements to the schools of the KCMSD. *Jenkins* v. *Missouri*, 672 F. Supp. 400, 405–408 (WD Mo. 1987); 1 App. 133–134 (Order of Nov. 12, 1986); *Jenkins*, 639 F. Supp., at 39–41. The District Court found that magnet schools would not only serve to remedy the deficiencies in student achievement in the KCMSD, but would also assist in desegregating the district by attracting white students back into the school system. See, *e.g.*, 1 App. 118 (Order of June 16, 1986) ("[C]ommitment, when coupled with quality planning and sufficient resources can result in the establishment of magnet schools which can attract non-minority enrollment as

well as be an integral part of district-wide improved student achievement"); see also *Jenkins* v. *Missouri*, 855 F. 2d 1295, 1301 (CA8 1988) ("The foundation of the plans adopted was the idea that improving the KCMSD as a system would at the same time compensate the blacks for the education they had been denied and attract whites from within and without the KCMSD to formerly black schools").

The District Court, finding that the physical facilities in the KCMSD had "literally rotted," *Jenkins*, 672 F. Supp., at 411, similarly grounded its orders of capital improvements in the related remedial objects of improving student achievement and desegregating the KCMSD. *Jenkins*, 639 F. Supp., at 40 ("The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan"); see also *Jenkins*, 855 F. 2d, at 1305 ("[T]he capital improvements [are] required both to improve the education available to the victims of segregation as well as to attract whites to the schools").

As a final element of its remedy, in 1987 the District Court ordered funding for increases in teachers' salaries as a step towards raising the level of student achievement. "[I]t is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty." *Jenkins*, 672 F. Supp., at 410. Neither the State nor the KCMSD objected to increases in teachers' salaries as an element of the comprehensive remedy, or to this cost as an item in the desegregation budget.

In 1988, however, the State went to the Eighth Circuit with a broad challenge to the District Court's remedial concept of magnet schools and to its orders of capital improvements (though it did not appeal the salary order), arguing that the District Court had run afoul of *Milliken* v. *Bradley*, 418 U. S. 717 (1974) *(Milliken I),* by ordering an interdistrict remedy for an intradistrict violation. The Eighth Circuit rejected the State's position, *Jenkins*, 855 F. 2d 1295, and in 1989 the State petitioned for certiorari.

The State's petition presented two questions for review, one challenging the District Court's authority to order a property tax increase to fund its remedial program, the other going to the legitimacy of the magnet school concept at the very foundation of the Court's desegregation plan:

> "For a purely intradistrict violation, the courts below have ordered remedies—costing hundreds of millions of dollars—with the stated goals of attracting more non-minority students to the school district and making programs and facilities comparable to those in neighboring districts . . . .
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> "The questio[n] presented [is] . . . .
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> ". . . Whether a federal court, remedying an intradistrict violation under *Brown* v. *Board of Education*, 347 U. S. 483 (1954), may
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> "a) impose a duty to attract additional non-minority students to a school district, and
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> "b) require improvements to make the district schools comparable to those in surrounding districts." Pet. for Cert. in *Missouri* v. *Jenkins*, O. T. 1988, No. 88–1150, p. i.

We accepted the taxation question, and decided that while the District Court could not impose the tax measure itself, it could require the district to tax property at a rate adequate to fund its share of the costs of the desegregation remedy. *Jenkins* v. *Missouri*, 495 U. S. 33, 50–58 (1990). If we had accepted the State's broader, foundational question

going to the magnet school concept, we could also have made an informed decision on whether that element of the District Court's remedial scheme was within the limits of the Court's equitable discretion in response to the constitutional violation found. Each party would have briefed the question fully and would have identified in some detail those items in the record bearing on it. But none of these things happened. Instead of accepting the foundational question in 1989, we denied certiorari on it. *Missouri* v. *Jenkins*, 490 U. S. 1034.

The State did not raise that question again when it returned to this Court with its 1994 petition for certiorari, which led to today's decision. Instead, the State presented, and we agreed to review, these two questions:

> "1. Whether a remedial educational desegregation program providing greater educational opportunities to victims of past de jure segregation than provided anywhere else in the country nonetheless fails to satisfy the Fourteenth Amendment (thus precluding a finding of partial unitary status) solely because student achievement in the District, as measured by results on standardized test scores, has not risen to some unspecified level?
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> "2. Whether a federal court order granting salary increases to virtually every employee of a school district—including non-instructional personnel—as a part of a school desegregation remedy conflicts with applicable decisions of this court which require that remedial components must directly address and relate to the constitutional violation and be tailored to cure the condition that offends the Constitution?" Pet. for Cert. i.

These questions focus on two discrete issues: the extent to which a district court may look at students' test scores in determining whether a school district has attained partial unitary status as to its *Milliken II*

educational programs, and whether the particular salary increases ordered by the District Court constitute a permissible component of its remedy.

The State did not go beyond these discrete issues, and it framed no broader, foundational question about the validity of the District Court's magnet concept. The Court decides, however, that it can reach that question of its own initiative, and it sees no bar to this course in the provision of this Court's Rule 14.1 that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered . . . ." *Ante*, at 12–13. The broader issue, the Court claims, is "fairly included" in the State's salary question. But that claim does not survive scrutiny.

The standard under Rule 14.1 is quite simple: as the Court recognizes, we have held that an issue is fairly comprehended in a question presented when the issue must be resolved in order to answer the question. See *ante*, at 12–13, citing *Procunier* v. *Navarette*, 434 U. S. 555, 560, n. 6 (1978); *United States* v. *Mendenhall*, 446 U. S. 544, 551–552, n. 5 (1980). That should be the end of the matter here, since the State itself concedes that we can answer its salary and test-score questions without addressing the soundness of the magnet element of the District Court's underlying remedial scheme, see Brief for Petitioners 18 ("each question [presented] can be dealt with on its own terms . . ."). While the Court ignores that concession, it is patently correct. There is no reason why we cannot take the questions as they come to us; assuming the validity of the District Court's basic remedial concept, we can determine the significance of test scores and assess the salary orders in relation to that concept.

Of course, as we understand necessity in prudential matters like this, it comes in degrees, and I would not deny that sometimes differing judgments are possible about the need to go beyond a question as originally

accepted. But this is not even arguably such a case. It is instead a case that presents powerful reasons to confine discussion to the questions taken.[2]

Quite naturally, the respondents here chose not to devote any significant attention to a question not raised, and they presumably had no reason to designate for printing those portions of the record bearing on an issue not apparently before us. And while respondents seemingly gave some thought to the bare possibility that the Court would choose to deal with the discrete questions by going beyond them to a more comprehensive underlying issue, they were entitled to reject that possibility as a serious

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[2]JUSTICE O'CONNOR suggests that I am saying something inconsistent with the position I took in *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. ___ (1993), see *ante*, at 3, but her claim rests on a misunderstanding of my position in that case. I did not think that in *Bray* we could reach the question whether respondents' claims fell within the "prevention clause" of 42 U. S. C. §1985(3) simply because the question "`was briefed, albeit sparingly, by the parties prior to the first oral argument.'" *Ante*, at 3. Rather, I said that "[t]he applicability of the prevention clause is fairly included within the questions presented, especially as restated by respondents . . . ." *Bray, supra,* at ___ (SOUTER, J., concurring in judgment in part and dissenting in part) (slip op., at 3). Thus the question was literally before us (as JUSTICE O'CONNOR believes the foundational question is before us under the second of the State's questions). What is not debatable is that *Bray* was not preceded by prior litigation indicating we would not consider the "prevention clause" issue, whereas this case was preceded by a refusal to take the very foundational issue that JUSTICE O'CONNOR argues is within the literal terms of the second question focusing on salaries. See *infra*. I obviously thought the Court was wrong to reject supplemental briefing on the prevention clause, but that rejection was a far cry from refusing to take the issue.

one for the very reason that the Court had already, in 1989, expressly refused to consider that foundational issue when the State expressly attempted to raise it. Our deliberate refusal to entertain so important an issue is and ought to be a reasonable basis to infer that we will not subsequently allow it to be raised on our own motion without saying so in advance and giving notice to a party whose interests might be adversely affected.

Thus the Court misses the point when it argues that the foundational issue is in a sense antecedent to the specific ones raised, and that those can be answered by finding error in some element of the underlying remedial scheme. Even if the Court were correct that the foundational issue could be reached under Rule 14.1, the critical question surely is whether that issue may fairly be decided without clear warning, at the culmination of a course of litigation in which this Court has specifically refused to consider the issue and given no indication of any subsequent change of mind. The answer is obviously no. And the Court's claim of necessity rings particularly hollow when one considers that if it really were essential to decide the foundational issue to address the two questions that are presented, the Court could give notice to the parties of its intention to reach the broader issue, and allow for adequate briefing and argument on it. And yet the Court does none of that, but simply decides the issue without any warning to respondents.

If there is any doubt about the lack of fairness and prudence displayed by the Court, it should disappear upon seeing two things: first, how readily the questions presented can be answered on their own terms, without giving any countenance to the State's now successful attempt to "`smuggl[e] additional questions into a case after we grant[ed] certiorari,'" *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Phillips Corp.*, 510 U. S. ___, ___ (1993) (slip op., at 7), quoting *Irvine* v. *California*, 347 U. S. 128, 129 (1954)

(plurality opinion of Jackson, J.); and, second, how the Court's decision to go beyond those questions to address an issue not adequately briefed or argued by one set of parties leads it to render an opinion anchored in neither the findings and evidence contained in the record, nor in controlling precedent, which is squarely at odds with the Court's holding today.

The test score question as it comes to us is one of word play, not substance. While the Court insists that the District Court's Order of June 17, 1992 (the only order relevant to the test score question on review here), "requir[ed] the State to continue to fund the quality education programs because student achievement levels [in the KCMSD] were still `at or below national norms at many grade levels . . . ,'" *ante*, at 29; see also *ante*, at 1, that order contains no discussion at all of student achievement levels in the KCMSD in comparison to national norms, and in fact does not explicitly address the subject of partial unitary status. App. to Pet. for Cert. A–69 to A–75. The reference to test scores "at or below national norms" comes from an entirely different and subsequent order of the District Court (dated Apr. 16, 1993) which is not under review. Its language presumably would not have been quoted to us, if the Court of Appeals's opinion affirming the District Court's June 17, 1992 order had not canvassed subsequent orders and mentioned the District Court's finding of fact that the "KCMSD is still at or below national norms at many grade levels," 11 F. 3d 755, 762 (CA8 1994), citing Order of Apr. 16, 1993, App. to Pet. for Cert. A–130. In any event, what is important here is that none of the District Court's or Court of Appeals's opinions or orders requires a certain level

of test scores before unitary status can be found, or indicates that test scores are the only thing standing between the State and a finding of unitary status as to the KCMSD's *Milliken II* programs. Indeed, the opinion concurring in the denial of rehearing en banc below (not mentioned by the Court, although it is certainly more probative of the governing law in the Eighth Circuit than the dissenting opinion on which the Court does rely) expressly disavows any dispositive role for test scores:

> "The dissent accepts, at least in part, the State's argument that the district court adopted a student achievement goal, measured by test scores, as the only basis for determining whether past discrimination has been remedied. . . . When we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered. Test scores, however, must be only one factor in the equation. Nothing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs should be ended by a declaration they are unitary." 19 F. 3d 393, 395 (1994) (Gibson, J., concurring in denial of rehearing en banc).

If, then, test scores do not explain why there was no finding of unitary status as to the *Milliken II* programs, one may ask what does explain it. The answer is quite straightforward. The Court of Appeals refused to order the District Court to enter a finding of partial unitary status as to the KCMSD's *Milliken II* programs (and apparently, the District Court did not speak to the issue itself) simply because the State did not attempt to make the showing required for that relief. As the Court recognizes, *ante*, at 17–18, we have established a clear set of procedures to be

followed by governmental entities seeking the partial termination of a desegregation decree. In *Freeman* v. *Pitts*, 503 U. S. 467 (1992), we held that "[t]he duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." *Id.*, at 485. Accordingly, before a district court may grant a school district (or other governmental entity) partial release from a desegregation decree, it must first consider "whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn . . . ." *Id.*, at 491. Full and satisfactory compliance, we emphasized in *Freeman*, is to be measured by "`whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.'" *Id.*, at 492, quoting *Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 249–250 (1991). The district court must then consider "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 [or other governmental entity] 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 judicial intervention in the first instance." 503 U. S., at 491. The burden of showing that these conditions to finding partial unitary status have been met rests (as one would expect) squarely on the constitutional violator who seeks relief from the existing remedial order. *Id.*, at 494.

While the Court recognizes the three-part showing that the State must make under *Freeman* in order to get a finding of partial unitary status, *ante*, at 17–18, it fails to acknowledge that the State did not even try to make a *Freeman* showing in the litigation leading

up to the District Court's Order of June 17, 1992. The District Court's order was triggered not by a motion for partial unitary status filed by the State, but by a motion filed by the KCMSD for approval of its desegregation plan for the 1992–1993 school year. See App. to Pet. for Cert. A–69. While the State's response to that motion suggested that the District Court should enter a finding of partial unitary status as to the district's *Milliken II* component of its decree, State's Response to KCMSD Motion for Approval of Desegregation Plan for 1992–1993, pp. 1–20 (hereinafter State's Response), the State failed even to allege its compliance with two of the three prongs of the *Freeman* test.

The State did not claim that implementation of the *Milliken II* component of the decree had remedied the reduction in student achievement in the KCMSD to the extent practicable; it simply argued that various *Milliken II* programs had been implemented. State's Response 9–17. Accordingly, in the hearings held by the District Court on the KCMSD's motion, the State's expert witness testified only that the various *Milliken II* programs had been implemented and had increased educational opportunity in the district. 2 App. 439–483. With the exception of the "effective schools" program, he said nothing about the effects of those programs on student achievement, and in fact admitted on cross-examination that he did not have an opinion as to whether the programs had remedied to the extent practicable the reduction in student achievement caused by the segregation in the KCMSD.

> "Q: Dr. Stewart, do you, testifying on behalf of the State . . . have an opinion as to whether or not the educational deficits that you acknowledged were vestiges of the prior segregation have been eliminated to the extent practicable in the Kansas City School District?
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> "A: No, that's not the purpose of my testimony,

Mr. Benson." *Id.,* at 483.

Nor did the State focus on its own good faith in complying with the District Court's decree; it emphasized instead the district's commitment to the decree and to the constitutional provisions on which the decree rested. State's Response 8. The State, indeed, said nothing to contradict the very findings made elsewhere by the District Court that have called the State's own commitment to the success of the decree into question. See, *e.g.*, 1 App. 136 (Order of Nov. 12, 1986) ("[D]uring the course of this lawsuit the Court has not been informed of one affirmative act voluntarily taken by the Executive Department of the State of Missouri or the Missouri General Assembly to aid a school district that is involved in a desegregation program"); see also App. to Pet. for Cert. A–123 (Order of Apr. 16, 1993) ("The State, also a constitutional violator, has historically opposed the implementation of any program offered to desegregate the KCMSD. The Court recognizes that the State has had to bear the brunt of the costs of desegregation due to the joint and several liability finding previously made by the Court. However, the State has *never* offered the Court a viable, even tenable, alternative and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD") (emphasis in original).

Thus, it was the State's failure to meet or even to recognize its burden under *Freeman* that led the Court of Appeals to reject the suggestion that it make a finding of partial unitary status as to the district's *Milliken II* education programs:

> "It is . . . significant that the testimony of [the State's expert] did no more than describe the successful establishment of the several educational programs, but gave no indication of whether these programs had succeeded in improving student achievement. . . .
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> "The only evidence before the district court

> with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made. The evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable. . . .
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> ". . . [Further, the] State did not try to prove that it has demonstrated a good faith commitment to the whole of the court's decree. . . .
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> . . . . .
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> ". . . [T]he district court did not abuse its discretion in continuing the quality education programs. 11 F. 3d, at 764–765 (citations omitted).

Examining only the first *Freeman* prong, there can be no doubt that the Court of Appeals was correct. *Freeman* and *Dowell* make it entirely clear that the central focus of this prong of the unitary status enquiry is on effects: to the extent reasonably possible, a constitutional violator must remedy the ills caused by its actions before it can be freed of the court-ordered obligations it has brought upon itself. Under the logic of the State's arguments to the District Court, the moment the *Milliken II* programs were put in place, the State was at liberty to walk away from them, no matter how great the remaining consequences of segregation for educational quality or how great the potential for curing them if State funding continued.

Looking ahead, if indeed the State believes itself entitled to a finding of partial unitary status on the subject of educational programs, there is an orderly procedural course for it to follow. It may frame a proper motion for partial unitary status, and prepare to make a record sufficient to allow the District Court and the Court of Appeals to address the continued need for and efficacy of the *Milliken II* programs.

In the development of a proper unitary status record, test scores will undoubtedly play a role. It is

true, as the Court recognizes, that all parties to this case agree that it would be error to require that the students in a school district attain the national average test score as a prerequisite to a finding of partial unitary status, if only because all sorts of causes independent of the vestiges of past school segregation might stand in the way of the goal. *Ante*, at 31. That said, test scores will clearly be relevant in determining whether the improvement programs have cured a deficiency in student achievement to the practicable extent. The District Court has noted (in the finding that the Court would read as a dispositive requirement for unitary status) that while students' scores have shown a trend of improvement, they remain at or below national norms. App. to Pet. for Cert. A–131 (Order of Apr. 16, 1993). The significance of this fact is subject to assessment. Depending, of course, on other facts developed in the course of unitary status proceedings, the improvement to less than the national average might reasonably be taken to show that education programs are having a good effect on student achievement, and that further improvement can be expected. On the other hand, if test score changes were shown to have flattened out, that might suggest the impracticability of any additional remedial progress. While the significance of scores is thus open to judgment, the judgment is not likely to be very sound unless it is informed by more of a record than we have in front of us, and the Court's admonition that the District Court should "sharply limit" its reliance on test scores, *ante*, at 31, should be viewed in this light.

The other question properly before us has to do with the propriety of the District Court's recent salary orders. While the Court suggests otherwise, *ante*, at 12–13, 29, the District Court did not ground its orders of salary increases solely on the goal of attracting

students back to the KCMSD. From the start, the District Court has consistently treated salary increases as an important element in remedying the systemwide reduction in student achievement resulting from segregation in the KCSMD. As noted above, the Court does not question this remedial goal, which we expressly approved in *Milliken II*. See *supra*, at 3–4. The only issue, then, is whether the salary increases ordered by the District Court have been reasonably related to achieving that goal, keeping in mind the broad discretion enjoyed by the District Court in exercising its equitable powers.

The District Court first ordered KCMSD salary increases, limited to teachers, in 1987, basing its decision on the need to raise the level of student achievement. "[I]t is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty." *Jenkins*, 672 F. Supp., at 410. The State raised no objection to the District Court's order, and said nothing about the issue of salary increases in its 1988 appeal to the Eighth Circuit.

When the District Court's 1987 order expired in 1990, all parties, including the State, agreed to a further order increasing salaries for both instructional and noninstructional personnel through the 1991–1992 school year. 1 App. 332–337 (Order of July 23, 1990). In 1992 the District Court merely ordered that salaries in the KCMSD be maintained at the same level for the following year, rejecting the State's argument that desegregation funding for salaries should be discontinued, App. to Pet. for Cert. A–76 to A–93 (Order of June 25, 1992), and in 1993 the District Court ordered small salary increases for both instructional and non-instructional personnel through the end of the 1995–1996 school year. App. to Pet. for Cert. A–94 to A–109 (Order of June 30, 1993).

It is the District Court's 1992 and 1993 orders that are before us, and it is difficult to see how the District

Court abused its discretion in either instance. The District Court had evidence in front of it that adopting the State's position and discontinuing desegregation funding for salary levels would result in their abrupt drop to 1986–1987 levels, with the resulting disparity between teacher pay in the district and the nationwide level increasing to as much as 40–45 percent, and a mass exodus of competent employees likely taking place. *Id.,* at A–76, A–78 to A–91. Faced with this evidence, the District Court found that continued desegregation funding of salaries, and small increases in those salaries over time, were essential to the successful implementation of its remedial scheme, including the elevation of student achievement:

> "[I]n the absence of desegregation funding for salaries, the District will not be able to implement its desegregation plan. . . .
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> . . . . .
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> "High quality personnel are necessary not only to implement specialized desegregation programs intended to `improve educational opportunities and reduce racial isolation,' but also to `ensure that there is no diminution in the quality of its regular academic program.' . . .
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> ". . . There is no question but that a salary roll back would have effects that would drastically impair implementation of the desegregation remedy.
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> . . . . .
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> ". . . A salary roll back would result in excessive employee turnover, a decline in the quality and commitment of work and an inability of the KCMSD to achieve the objectives of the desegregation plan." *Id.,* at A–86 to A–91 (Order of June 25, 1992), quoting *Jenkins*, 855 F. 2d, at 1301, and *Jenkins*, 672 F. Supp., at 410.

See also App. to Pet. for Cert. A–95 to A–97, A–101 to A–102 (Order of June 30, 1993). The Court of Appeals

affirmed the District Court's orders on the basis of these findings, again taking special note of the importance of adequate salaries to the remedial goal of improving student achievement:

> "[Q]uality education programs and magnet schools [are] a part of the remedy for the vestiges of segregation causing a system wide reduction in student achievement in the KCMSD schools. . . . The significant finding of the [district] court with respect to the earlier funding order was that the salary increases were essential to comply with the court's desegregation orders, and that high quality teachers, administrators, and staff must be hired to improve the desegregative attractiveness of KCMSD.
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> . . . . .
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> "It is evident that the district court had before it substantial evidence of a statistically significant reduction in the turnover rates for full-time employees, a dramatic increase in the percentage of certified employees selecting KCMSD because of the salary increases, and a significant decline in the number of employees lost to other districts. Further, the court heard testimony that the average performance evaluation for the professional employees increased positively and significantly." 13 F. 3d 1170, 1172–1174 (CA8 1993).

See also 11 F. 3d, at 766–769.

There is nothing exceptionable in the lower courts' findings about the relationship between salaries and the District Court's remedial objectives, and certainly nothing in the record suggests obvious error as to the amounts of the increases ordered.[3] If it is tempting to

[3]There is no claim of anything unreasonable in the salary increases merely because the District Court has ordered them, whereas they might otherwise have been set by collective bargaining. For that matter, the Court of

question the place of salary increases for administrative and maintenance personnel in a desegregation order, the Court of Appeals addressed the temptation in specifically affirming the District Court's finding that such personnel are critical to the success of the desegregation effort, 13 F. 3d, at 1174 (referring to order of June 30, 1993, App. to Pet. for Cert. A–104), and did so in the circumstances of a district whose schools have been plagued by leaking roofs, defective lighting, and reeking lavatories. See *Jenkins*, 855 F. 2d, at 1306; *Jenkins*, 672 F. Supp., at 403–404. As for teachers' increases, the District Court and the Court of Appeals were beyond reproach in finding and affirming that in order to remedy the educational deficits flowing from segregation in the KCMSD, "those persons charged with implementing the [remedial] plan [must] be the most qualified persons reasonably attainable," App. to Pet. for Cert. A–102.

Indeed, the Court does not question the District Court's salary orders insofar as they relate to the objective of raising the level of student achievement in the KCMSD, but rather overlooks that basis for the orders altogether. The Court suggests that the District Court rested its approval of salary increases only on the object of drawing students into the district's schools, *ante*, at 29, and rejects the increases for that reason. It seems clear, however, that the District Court and the Court of Appeals both viewed the salary orders as serving two

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Appeals observed that the District Court has not replaced collective bargaining in the KCMSD with a rubber-stamping of union requests, but rather has "juridically pruned applications of funding that have been presented to it," 13 F. 3d, at 1174, ordering salary increases that have been far smaller than those requested by the union. See, *e.g.*, App. to Pet. for Cert. A–102, A–104 to A–106 (Order of June 30, 1993).

complementary but distinct purposes, and to the extent that the District Court concludes on remand that its salary orders are justified by reference to the quality of education alone, nothing in the Court's opinion precludes those orders from remaining in effect.

The two discrete questions that we actually accepted for review are, then, answerable on their own terms without any need to consider whether the District Court's use of the magnet school concept in its remedial plan is itself constitutionally vulnerable. The capacity to deal thus with the questions raised, coupled with the unfairness of doing otherwise without warning, are enough to demand a dissent.

But there is more to fuel dissent. On its face, the Court's opinion projects an appealing pragmatism in seeming to cut through the details of many facts by applying a rule of law that can claim both precedential support and intuitive sense, that there is error in imposing an interdistrict remedy to cure a merely intradistrict violation. Since the District Court has consistently described the violation here as solely intradistrict, and since the object of the magnet schools under its plan includes attracting students into the district from other districts, the Court's result seems to follow with the necessity of logic, against which arguments about detail or calls for fair warning may not carry great weight.

The attractiveness of the Court's analysis disappears, however, as soon as we recognize two things. First, 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. Indeed, the record that we have indicates that the District Court understood that the violation here did produce effects spanning district borders and leading to greater segregation within the KCMSD, the reversal of which the District Court sought to accomplish by establishing magnet schools.[4] Insofar as the Court assumes that this was not so in fact, there is at least enough in the record to cast serious doubt on its assumption. Second, the Court violates existing case law even on its own apparent view of the facts, that the segregation violation within the KCMSD produced no proven effects, segregative or otherwise, outside it. Assuming this to be true, the Court's decision 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

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[4]This was not the only, or even the principal, purpose of the magnet schools. The District Court found that magnet schools would assist in remedying the deficiencies in student achievement in the KCMSD, see *supra*, at 4–5. Moreover, while the Court repeatedly describes the magnet school program as looking beyond the boundaries of the district, the program is primarily aimed not at drawing back white children whose parents have moved to another district, but rather at drawing back children who attend private schools while living within the geographical confines of the KCMSD, whose population remains majority white, *Jenkins*, 855 F. 2d, at 1302–1303. See 1 App. 132 (Order of Nov. 12, 1986) ("Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs"). As such, a substantial impetus for the District Court's remedy does not consider the world beyond district boundaries at all, and much of the Court's opinion is of little significance to the case before it.

district in which the violation occurred, is flatly contrary to established precedent.

The Court appears to assume that the effects of segregation were wholly contained within the KCMSD, and based on this assumption argues that any remedy looking beyond the district's boundaries is forbidden. The Court's position rests on the premise that the District Court and the Court of Appeals erred in finding that segregation had produced effects outside the district, and hence were in error when they treated the reversal of those effects as a proper subject of the equitable power to eliminate the remaining vestiges of the old segregation so far as practicable.

The Court has not shown the trial court and the Eighth Circuit to be wrong on the facts, however, and on the record before us this Court's factual assumption is at the very least a questionable basis for removing one major foundation of the desegregation decree. I do not, of course, claim to be in a position to say for sure that the Court is wrong, for I, like the Court, am a victim of an approach to the case uninformed by any warning that a foundational issue would be dispositive. My sole point is that the Court is not in any obvious sense correct, wherever the truth may ultimately lie.

To be sure, the District Court found, and the Court of Appeals affirmed, that the SSDs had taken no action contributing to segregation in the KCMSD. *Jenkins* v. *Missouri*, 807 F. 2d 657, 664, 668–670 (CA8 1986); 3 App. 723, 738 (Order of June 5, 1984). Those courts further concluded that the constitutional violations committed by the State and the KCMSD had not produced any significant segregative effects in the SSDs, all of which have operated as unitary districts since shortly after our decision in *Brown*. *Jenkins*, 807 F. 2d, at 672, 678; 3 App. 813, 816. It

was indeed on the basis of just these findings that the District Court concluded that it was dealing with an intradistrict violation, and, consistently with our decision in *Milliken I*, refused to consolidate the SSDs with the KCMSD. *Jenkins*, 807 F. 2d, at 660–661, 674; 3 App. 721–723, 725, 810–811.

There is no inconsistency between these findings and the possibility, however, that the actions of the State and the KCMSD produced significant non-segregative effects outside the KCMSD that led to greater segregation within it. To the contrary, the District Court and the Court of Appeals concurred in finding that "the preponderance of black students in the [KCMSD] was due to the State and KCMSD's constitutional violations, which caused white flight. . . . [T]he existence of segregated schools led to white flight from the KCMSD to suburban districts and to private schools." *Jenkins*, 855 F. 2d, at 1302, citing the District Court's Order of August 25, 1986, 1 App. 126 ("[S]egregated schools, a constitutional violation, ha[ve] led to white flight from the KCMSD to suburban districts [and] large numbers of students leaving the schools of Kansas City and attending private schools . . ."). While this exodus of white students would not have led to segregation within the SSDs, which have all been run in a unitary fashion since the time of *Brown*, it clearly represented an effect spanning district borders, and one which the District Court and the Court of Appeals expressly attributed to segregation in the KCMSD.

The Court, however, rejects the findings of the District Court, endorsed by the Court of Appeals, that segregation led to white flight from the KCMSD, and does so at the expense of another accepted norm of our appellate procedure. We have long adhered to the view that "[a] court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of

a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949); see also *Branti* v. *Finkel*, 445 U. S. 507, 512, n. 6 (1980) (referring to "our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred . . ."). The Court fails to show any exceptional circumstance present here, however: it relies on a "contradiction" that is not an obvious contradiction at all, and on an arbitrary "supposition" that "`white flight' may result from desegregation, not *de jure* segregation," *ante*, at 24, a supposition said to be bolstered by the District Court's statement that there was "an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to integrate its schools." 672 F. Supp., at 412.[5]

The doubtful contradiction is said to exist between the District Court's findings, on the one hand, that segregation caused white flight to the SSDs, and the Court of Appeals's conclusion, on the other, that the District Court "`made specific findings that negate current significant interdistrict effects . . . .'" *Ante*, at 25, quoting *Jenkins*, 807 F. 2d, at 672. Any impression of contradiction quickly disappears, however, when the Court of Appeals's statement is read in context:

> "[T]he [district] court explicitly recognized that [to consolidate school districts] under *Milliken [I]* `there must be evidence of a constitutional violation in one district that produces a significant segregative effect in another district.' Order of June 5, 1984 at 14, 95. . . . The district court thus

[5]JUSTICE O'CONNOR also rests on supposition. See *ante*, at 12 ("In this case, it may be the `myriad factors of human existence,' that have prompted the white exodus from the KCMSD . . .") (citation omitted).

> dealt not only with the issue of whether the SSDs were constitutional violators but also whether there were significant interdistrict segregative effects. *See* V, *infra*. When it did so, it made specific findings that negate current significant interdistrict effects . . . ." *Ibid.*

It is clear that, in this passage, the Court of Appeals was summarizing the District Court's findings that the constitutional violations within the KCMSD had not produced any segregative effects in other districts. *Ibid.* While the Court of Appeals did not repeat the word "segregative" in its concluding sentence, there is nothing to indicate that it was referring to anything but segregative effects, and there is in fact nothing in the District Court's own statements going beyond its finding that the State and the KCMSD's actions did not lead to segregative effects in the SSDs.[6] There is,

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[6]The Court states that the Court of Appeals would not have decided the question whether the State and the KCMSD's violations produced segregative effects in the SSDs, as respondents lacked standing to raise the issue. *Ante*, at 25, n. 9. This statement eludes explanation. In *Milliken I,* 418 U. S. 717 (1974), we held that before a district court may order the mandatory interdistrict reassignment of students throughout a metropolitan area, it must first find either that multiple school districts participated in the unconstitutional segregation of students, or that the violation within a single school district "produce[d] . . . significant segregative effect[s]" in the others. *Id.,* at 744–745. See *ante*, at 22; *ante*, at 4, 7 (O'CONNOR, J., concurring); see also *infra*, at 32–33. In the earlier stages of this litigation, the Jenkins respondents sought the mandatory reassignment of students throughout the Kansas City metropolitan area, and the District Court, 3 App. 721–820 (Order of June 5, 1984), and the Court of Appeals, *Jenkins*, 807 F. 2d, at 665–666, 672, rejected such relief on the grounds that the requirements of *Milliken I* had not been satisfied. The

in turn, no contradiction between this finding and the District Court's findings about white flight: 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.

Without the contradiction, the Court has nothing to justify its rejection of the District Court's finding that segregation caused white flight but its supposition that flight results from integration, not segregation. The supposition, and the distinction on which it rests, are untenable. At the more obvious level, there is in fact no break in the chain of causation linking the effects of desegregation with those of segregation. There would be no desegregation orders and no remedial plans without prior unconstitutional segregation as the occasion for issuing and adopting them, and an adverse reaction to a desegregation order is traceable in fact to the segregation that is subject to the remedy. When the Court quotes the District Court's reference to abundant evidence that integration caused flight to the suburbs, then, it quotes nothing inconsistent with the District Court's other findings that segregation had caused the flight. The only difference between the statements lies in the point to which the District Court happened to trace the causal sequence.

The unreality of the Court's categorical distinction can be illustrated by some examples. There is no dispute that before the District Court's remedial plan was placed into effect the schools in the unreformed

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Court is now saying that respondents lacked standing to raise the issue of interdistrict segregative effects, and that the District Court and the Court of Appeals lacked the authority to reach the issue, even though that is precisely what was required of them under *Milliken I*.

segregated system were physically a shambles:

> "The KCMSD facilities still have numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments. The specific problems include: inadequate lighting; peeling paint and crumbling plaster on ceilings, walls and corridors; loose tiles, torn floor coverings; odors resulting from unventilated restrooms with rotted, corroded toilet fixtures; noisy classrooms due to lack of adequate acoustical treatment; lack of off street parking and bus loading for parents, teachers and students; lack of appropriate space for many cafeterias, libraries and classrooms; faulty and antiquated heating and electrical systems; damaged and inoperable lockers; and inadequate fire safety systems. The conditions at Paseo High School are such that even the principal stated that he would not send his own child to that facility." 672 F. Supp., at 403 (citations omitted).

See also *Jenkins*, 855 F. 2d, at 1300 (reciting District Court findings); *Jenkins*, 639 F. Supp., at 39–40. The cost of turning this shambles into habitable schools was enormous, as anyone would have seen long before the District Court ordered repairs. See *Missouri* v. *Jenkins*, 495 U. S., at 38–40 (discussing the costs of the remedial program and the resulting increases in tax rates within the KCMSD). Property tax-paying parents of white children, seeing the handwriting on the wall in 1985, could well have decided that the inevitable cost of clean-up would produce an intolerable tax rate and could have moved to escape it. The District Court's remedial orders had not yet been put in place. Was the white flight caused by segregation or desegregation? The distinction has no significance.

Another example makes the same point. After *Brown*, white parents likely came to understand that

the practice of spending more on white schools than on black ones would be stopped at some point. If they were unwilling to raise all expenditures to match the customary white school level, they must have expected the expenditures on white schools to drop to the level of those for the segregated black schools or to some level in between. See, *e.g.*, 639 F. Supp., at 39–40 (describing a decline in all 68 of the KCMSD's school buildings in the past "10 to 15 years"). If they thus believed that the white schools would deteriorate they might then have taken steps to establish private white schools, starting a practice of local private education that has endured. Again, what sense does it make to say of this example that the cause of white private education was desegregation (not yet underway), rather than the segregation that led to it?

I do not claim that either of these possible explanations would ultimately turn out to be correct, for any such claim would head me down the same road the Court is taking, of resolving factual issues independently of the trial court without warning the respondents that the full evidentiary record bearing on the issue should be identified for us. My point is only that the Court is on shaky grounds when it assumes that prior segregation and later desegregation are separable in fact as causes of "white flight," that the flight can plausibly be said to result from desegregation alone, and that therefore as a matter of fact the "intradistrict" segregation violation lacked the relevant consequences outside the district required to justify the District Court's magnet concept. With the arguable plausibility of each of these assumptions seriously in question, it is simply rash to reverse the concurrent factual findings of the District Court and the Court of Appeals. All the judges who spoke to the issue below concluded that segregated schooling in the KCMSD contributed to the exodus of white students from the district. Among

them were not only the judges most familiar with the record of this litigation, Judge Clark of the District Court and the three members of the Court of Appeals panel that has retained jurisdiction over the case, see *supra*, at 25, but also the five judges who dissented from the denial of rehearing en banc in the Court of Appeals (whose opinion the majority does not hesitate to rely on for other purposes):

> "[By 1985], `[w]hite flight' to private schools and to the suburbs was rampant.
>
> "The district court, correctly recognizing that at least part of this problem was the consequence of the de jure segregation previously practiced under Missouri constitutional and statutory law, fashioned a remedial plan for the desegregation of the KCMSD . . . ." 19 F. 3d, at 397 (Beam, J., dissenting from denial of rehearing en banc).

The reality is that the Court today overturns the concurrent factual findings of the District Court and the Court of Appeals without having identified any circumstance in the record sufficient to warrant such an extraordinary course of action.

To the substantial likelihood that the Court proceeds on erroneous assumptions of fact must be added corresponding errors of law. We have most recently summed up the obligation to correct the condition of *de jure* segregation by saying that "the duty of a former *de jure* district is to take `whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" *Freeman*, 503 U. S., at 486, quoting *Green*, 391 U. S., at 437–438. Although the fashioning of judicial remedies to this end has been left, in the first instance, to the equitable discretion of the district courts, in *Milliken I* we established an absolute limitation on this exercise of equitable authority. "[W]ithout an interdistrict violation and

interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Milliken I*, 418 U. S., at 745.

The Court proceeds as if there is no question but that this proscription applies to this case. But the proscription does not apply. We are not dealing here with an interdistrict remedy in the sense that *Milliken I* used the term. In the *Milliken I* litigation, the District Court had ordered 53 surrounding school districts to be consolidated with the Detroit school system, and mandatory busing to be started within the enlarged district, even though the court had not found that any of the suburban districts had acted in violation of the Constitution. "The metropolitan remedy would require, in effect, consolidation of 54 independent school districts historically administered as separate units into a vast new super school district." *Id.*, at 743. It was this imposition of remedial measures on more than the one wrongdoing school district that we termed an "interdistrict remedy":

> "We . . . turn to address, for the first time, the validity of a remedy mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district." *Id.,* at 744.

And it was just this subjection to court order of school districts not shown to have violated the Constitution that we deemed to be in error:

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. . . .
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> ". . . To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional

> violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court." *Id.,* at 744–745.

We did not hold, however, that any remedy that takes into account conditions outside of the district in which a constitutional violation has been committed is an "interdistrict remedy," and as such improper in the absence of an "interdistrict violation." To the contrary, by emphasizing that remedies in school desegregation cases are grounded in traditional equitable principles, *id.*, at 737–738, we left open the possibility that a district court might subject a proven constitutional wrongdoer to a remedy with intended effects going beyond the district of the wrongdoer's violation, when such a remedy is necessary to redress the harms flowing from the constitutional violation.

The Court, nonetheless, reads *Milliken I* quite differently. It reads the case as categorically forbidding imposition of a remedy on a guilty district with intended consequences in a neighboring innocent district, unless the constitutional violation yielded segregative effects in that innocent district. See, *e.g.*, *ante*, at 21 ("But this interdistrict goal [of attracting nonminority students from outside the KCMSD schools] is beyond the scope of the intradistrict violation identified by the District Court" (emphasis deleted).).

Today's decision therefore amounts to a redefinition of the terms of *Milliken I* and consequently to a substantial expansion of its limitation on the permissible remedies for prior segregation. But that is not the only prior law affected by today's decision. The Court has not only rewritten *Milliken I*; it has effectively overruled a subsequent case expressly refusing to constrain remedial equity powers to the extent the Court does today, and holding that courts ordering relief from unconstitutional segregation may, with an appropriate factual predicate, exercise just the authority that the Court today eliminates.

Two Terms after *Milliken*, we decided *Hills* v. *Gautreaux*, 425 U. S. 284 (1976), in a unanimous opinion by Justice Stewart. The District Court in *Gautreaux* had found that the United States Department of Housing and Urban Development (HUD) and the Chicago Housing Authority (CHA) had maintained a racially segregated system of public housing within the City of Chicago, in violation of various constitutional and statutory provisions. There was no indication that the violation had produced any effects outside the city itself. The issue before us was whether "the remedial order of the federal trial court [might] extend beyond Chicago's territorial boundaries." *Id.*, at 286. Thus, while JUSTICE O'CONNOR suggests that *Gautreaux* may not have addressed the propriety of a remedy with effects going beyond the district in which the constitutional violation had occurred, *ante*, at 4–5, her suggestion cannot be squared with our express understanding of the question we were deciding: "the permissibility in light of *Milliken* of `inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation.'" *Gautreaux*, *supra*, at 292.

HUD argued that the case should turn on the same principles governing school desegregation orders and that, under *Milliken I*, the District Court's order could not look beyond Chicago's city limits, because it was only within those limits that the constitutional violation had been committed. 425 U. S., at 296–297. We agreed with HUD that the principles of *Milliken* apply outside of the school desegregation context, 425 U. S., at 294, and n. 11, but squarely rejected its restricted interpretation of those principles and its view of limited equitable authority to remedy segregation. We held that a district court may indeed subject a governmental perpetrator of segregative practices to an order for relief with intended consequences beyond the perpetrator's own subdivision,

even in the absence of effects outside that subdivision, so long as the decree does not bind the authorities of other governmental units that are free of violations and segregative effects:

> "[*Milliken*'s] holding that there had to be an inter-district violation or effect before a federal court could order the crossing of district boundary lines reflected the substantive impact of a consolidation remedy on separate and independent school districts. The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation." *Id.,* at 296 (footnote omitted).

In the face of *Gautreaux*'s language, the Court claims that it was only because the "`relevant geographic area for the purposes of the [plaintiffs'] housing options [was] the Chicago housing market, not the Chicago city limits,'" *ante*, at 26, quoting *Gautreaux*, *supra*, at 299, that we held that "`a metropolitan area remedy [was] not impermissible as a matter of law,'" *ante,* at 26, quoting *Gautreaux*, *supra*, at 306. See also *ante*, at 5 (O'CONNOR, J., concurring). But that was only half the explanation. Requiring a remedy outside the city in the wider metropolitan area was permissible not only because that was the area of the housing market even for people who lived within the city (thus relating the scope of the remedy to the violation suffered by the victims) but also because the trial court could order a remedy in that market without binding a governmental unit innocent of the violation and free of its effects. In "reject[ing] the contention that, since HUD's constitutional and statutory violations were committed in Chicago, *Milliken* precludes an order

against HUD that will affect its conduct in the greater metropolitan area," we stated plainly that "[t]he critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution. That violation provided the necessary predicate for the entry of a remedial order against HUD and, indeed, imposed a duty on the District Court to grant appropriate relief." *Gautreaux,* 425 U. S., at 297. Having found HUD in violation of the Constitution, the District Court was obligated to make "every effort . . . to employ those methods [necessary] `to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation,'" *ibid.*, quoting *Davis* v. *Board of School Comm'rs of Mobile County*, 402 U. S. 33, 37 (1971), and the District Court's methods could include subjecting HUD to measures going beyond the geographical or political boundaries of its violation. "Nothing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred." 425 U. S., at 298.

On its face, the District Court's magnet school concept falls entirely within the scope of equitable authority recognized in *Gautreaux*. In *Gautreaux*, the fact that the CHA and HUD had the authority to operate outside the limits of the City of Chicago meant that an order to fund or build housing beyond those limits would "not necessarily entail coercion of uninvolved governmental units . . . ." *Id.*, at 298. Here, by the same token, the District Court has not sought to "consolidate or in any way restructure" the SSDs, *id.*, at 305–306, or, indeed, to subject them to any remedial obligation at all.[7] The District Court's

[7]Thus, the Court errs in suggesting that the District Court has sought to do here indirectly what we held the District

remedial measures go only to the operation and quality of schools within the KCMSD, and the burden of those measures accordingly falls only on the two proven constitutional wrongdoers in this case, the KCMSD and the State. And insofar as the District Court has ordered those violators to undertake measures to increase the KCMSD's attractiveness to students from other districts and thereby to reverse the flight attributable to their prior segregative acts, its orders do not represent an abuse of discretion, but instead appear "wholly commensurate with the `nature and extent of the constitutional violation.'" *Id.*, at 300, quoting *Milliken I*, 418 U. S., at 744.

The Court's failure to give *Gautreaux* its due points up the risks of its approach to this case. The major peril of addressing an important and complex question without adequate notice to the parties is the virtual certainty that briefing and argument will not go to the real point. If respondents had had reason to suspect that the validity of applying the District Court's remedial concept of magnet schools in this case would be the focus of consideration by this Court, they presumably would have devoted significant attention to *Gautreaux* in their briefing. As things stand, the only references to the case in the parties' briefs were two mere passing mentions by the Jenkins respondents and a footnote by the State implying that *Gautreaux* was of little relevance here. The State's footnote says that "in *Gautreaux*, there was evidence of suburban discrimination and of the `extra-city impact of [HUD's] intracity discrimination.'" Brief for Petitioners 28, n. 18. That statement, however, is flatly at odds with Justice Stewart's

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Court could not do directly in *Milliken I*. *Ante*, at 23. The District Court here has not attempted, directly or indirectly, to impose any remedial measures on school districts innocent of a constitutional violation or free from its segregative effects.

opinion for the Court: "the Court of Appeals surmised that either an interdistrict violation or an interdistrict segregative effect may have been present in this case. There is no support provided for either conclusion. . . . [I]t is apparent that the Court of Appeals was mistaken in supposing that the [record contains] evidence of suburban discrimination justifying metropolitan area relief. . . . [And the Court of Appeals's] unsupported speculation falls far short of the demonstration of a `significant segregative effect in another district' discussed in the *Milliken* opinion." *Gautreaux*, 425 U. S., at 294–295, n. 11.[8]

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[8]JUSTICE O'CONNOR thinks I place undue emphasis on the *Gautreaux* Court's footnote, turning it into an "island, entire of itself . . . ," *ante*, at 6, but it cannot be shrunk to the dimension necessary to support the majority's result. According to JUSTICE O'CONNOR, *Gautreaux* holds that "territorial transgression" of any kind "is permissible only upon a showing that [an] intradistrict constitutional violation [has] produced significant interdistrict segregative effects. . . ." *Ante*, at 4. She finds *Gautreaux* significant only in reversing the Court of Appeals's finding that such effects had been established on the record of that case, and she understands that the Court remanded the case to the District Court with the understanding that it would order relief going beyond the City of Chicago's boundaries only if it found significant interdistrict segregative effects to exist. *Ante*, at 6.

But this is an implausible reading. JUSTICE O'CONNOR is correct that in *Gautreaux* we reiterated the importance of *Milliken I*'*s* requirement of significant interdistrict segregative effects, but we did so only in connection with the type of relief at issue in *Milliken I*, that involving "direct federal judicial interference with local governmental entities" not shown to have violated the Constitution. *Gautreaux*, 425 U. S., at 294; see generally *id.*, at 292–298. As the language I have quoted above demonstrates, we made it very clear in *Gautreaux* that the District Court

After being misrepresented by the State and mentioned only briefly by the other parties, *Gautreaux*'s holding is now effectively overruled, for the Court's opinion can be viewed as correct only on that assumption. But there is no apparent reason to reverse that decision, which represented the judgment of a unanimous Court, seems to reflect equitable common sense, and has been in the reports for two decades. While I would reserve final judgment on *Gautreaux*'s future until a time when the subject has been given a full hearing, I realize that

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could order relief going beyond the boundaries of the City of Chicago without any finding of such effects, because that relief would impose no obligation on governmental units innocent of a constitutional violation and free of its effects. Indeed, when we summarized our holding at the conclusion of our opinion, we made the point yet again. "In sum, there is no basis for the petitioner's claim that court-ordered metropolitan area relief in this case would be impermissible as a matter of law under the *Milliken* decision. In contrast to the desegregation order in that case, a metropolitan area relief order directed to HUD would not consolidate or in any way restructure local governmental units." *Id.*, at 305–306. While JUSTICE O'CONNOR, *ante*, at 6, (and the Court, *ante*, at 26–27) seeks to make much of the fact that we did not order metropolitan relief ourselves in *Gautreaux*, but rather remanded the case to the District Court, we did so because we recognized that the question of what relief to order was a matter for the District Court in the first instance. "The nature and scope of the remedial decree to be entered on remand is a matter for the District Court in the exercise of its equitable discretion, after affording the parties an opportunity to present their views." *Id.*, at 306. Nowhere did we state that before the District Court could order metropolitan area relief, it would first have to make findings of significant segregative effects extending beyond the City of Chicago's borders.

after today's decision there may never be an occasion for any serious examination of *Gautreaux*. If things work out that way, there will doubtless be those who will quote from *Gautreaux* to describe today's opinion as "transform[ing] *Milliken*'s principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct." *Id.*, at 300.

I respectfully dissent.